RUPRO ACTION REQUEST FORM

RUPRO Meeting: November 5, 2014

RUPRO action requested:

Recommend JC approval (has circulated for comment)

Title: Subordinate Judicial Officers: Complaints and Notice Requirements	Rules: 10.603 and 10.703 Standards: Forms:
Committee or other entity submitting the proposal: Trial Court Presiding Judges Advisory Committee	Staff contact: Mark Jacobson, Senior Attorney 415-865-7898 mark.jacobson@jud.ca.gov

If requesting July 1 or out of cycle, explain:
This matter was on the agenda for the Judicial Council's October 2014 meeting but it was pulled from that agenda and placed on the December agenda.

Additional Information for RUPRO: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary, including any substantial argument in opposition and any expected individual or organization likely to support or oppose the proposal.)

This is the third time RUPRO has reviewed this matter. In September 2013, at the request of the California Court Commissioners Association (CCCA), RUPRO agreed to defer consideration of the proposed amendments pending a discussion between representatives of the TCPJAC and representatives of the CCCA. The two groups met twice by conference call and the presiding judges agreed to modify two aspects of the proposals objected to by the CCCA.

RUPRO reviewed it again in April 2014 and agreed to send it to the Judicial Council with a recommendation that it be placed on the discussion agenda in October 2014. In September 2014, Justice Miller received a letter from attorney Edith Matthai proposing revisions to three subdivisions of the rule. The Trial Court Presiding Judges Advisory Committee considered Ms. Matthai's letter and voted to adopt the CCCA's proposed revisions with some minor modifications.

The main objection by the CCCA concerned the provision in existing subdivision (j)(5) that a presiding judge must advise the subordinate judicial office (SJO) that he or she may request an opportunity to respond to the intended final action. The committee originally proposed eliminating this provision, but after meeting with the CCCA, the committee agreed to

recommend retaining the provision, but to add limiting language stating that the SJO's response must be based on correction of an error of fact or law or both. After reviewing Ms. Matthai's letter, the committee now recommends retaining the existing language in subdivision (j)(5), which will be renumbered as (i)(8). Because the committee has now agreed to retain that provision and to recommend CCCA's other proposed revisions, it is unknown whether the CCCA still opposes the proposed amendments.

The portions of the report highlighted in yellow are those that are different from the report reviewed by RUPRO in April 2014.

JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on December 12, 2014

Title
Subordinate Judicial Officers: Complaints and Notice Requirements

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 10.603 and 10.703

Recommended by
Trial Court Presiding Judges Advisory Committee
Hon. Marsha G. Slough, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2015

Date of Report
October 23, 2014

Contact
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Executive Summary

The Trial Court Presiding Judges Advisory Committee recommends amending rule 10.703 of the California Rules of Court to (1) simplify the procedures a presiding judge must follow while reviewing and investigating complaints against subordinate judicial officers (SJOs); (2) clarify a presiding judge's authority in conducting an investigation and determining the appropriate action to be taken; and (3) clarify the circumstances under which discipline against an SJO must be reported to the Commission on Judicial Performance (CJP). The proposed amendments were prompted in part by a suggestion from Victoria B. Henley, Director–Chief Counsel of the CJP, that the rule be amended to address ambiguity as to what types of disciplinary action a presiding judge can impose after an investigation and what types of action must be reported to the CJP.

Recommendations

The Trial Court Presiding Judges Advisory Committee recommends that the Judicial Council, effective January 1, 2015, amend rule 10.703 of the California Rules of Court to:

1. Replace the two-tier investigation process in subdivisions (i) and (j) with one investigation;

2. Delete from subdivision (j)(3) the list of possible actions available to the presiding judge and replace it with a provision (proposed subdivision (i)(4)) that a presiding judge must, in his or her discretion, close the complaint, impose discipline, or take other appropriate corrective action, including oral counseling;

3. Add new subdivision (f)(3) to provide that a presiding judge has discretion to investigate anonymous complaints;

4. Amend subdivision (h)(3) to provide that when a presiding judge closes a complaint after initial review under subdivision (h)(1) without having contacted the SJO, it is optional to advise the SJO in writing of the disposition;

5. Amend subdivision (j)(2) and add subdivision (i)(5) to clarify that when a presiding judge closes a complaint after investigation without having contacted the SJO, the presiding judge must give the SJO written notice of the final action taken on the complaint only if the presiding judge is aware that the SJO knows about the complaint;

6. Delete from subdivision (j)(2)(B) the phrase "sufficient to allow a meaningful response to the allegations" because at that stage of the process, the SJO is responding only to the proposed discipline, not to the allegations;

7. Add to subdivision (j)(4)(A) the phrase "to the intended final action" to clarify that, at that stage of the process, the SJO is responding to the intended final action, not to the allegations;

8. Amend subdivision (j)(5) to provide that if the SJO requests an opportunity to respond to the intended final action, the presiding judge "must" (rather than "should") allow the SJO an opportunity to respond, and amend subdivision (j)(7) to eliminate the reference to denying the SJO an opportunity to respond;

9. Amend subdivisions (g)(1), (2), and (3) to provide that a presiding judge, in his or her discretion, may request the CJP or the presiding judge of another court to investigate and adjudicate a complaint on behalf of the court, or to investigate a complaint and provide the results of the investigation to the court for adjudication;

10. Add a provision as new subdivision (a)(4) stating that the procedures in the rule do not entitle an SJO to receive progressive levels of discipline;

11. Add a definition of "written reprimand" as new subdivision (b)(4);

12. Amend subdivisions (f)(3) and (*l*)(1) to clarify that a presiding judge must give written notice to the complainant of receipt of the complaint and the final court action only if the complainant is known;

13. Add “hearing officer” to the definition of “subordinate judicial officer” in subdivision (b)(1);

14. Delete from subdivision (*l*)(1) the words “and the subordinate judicial officer” because the requirement that the presiding judge notify the SJO of the final court action is also stated in subdivisions (i)(5) and (j)(6).

If the Judicial Council adopts the proposed amendments to rule 10.703, the Trial Court Presiding Judges Advisory Committee also recommends that the council, effective January 1, 2015, amend rule 10.603(c)(4)(C)(ii) to conform to the amendments of rule 10.703. The cross-reference to rule 10.703(k) would be amended to reflect the renumbering of that subdivision to rule 10.703(j).

The text of the proposed amendments to rules 10.603 and 10.703 is attached at pages 13–18.

Previous Council Action

At its April 30, 2010 meeting, the Judicial Council amended rule 10.703 to clarify the circumstances under which a report to the CJP must be made by the presiding judge.

Rationale for Recommendation

The proposed amendments to rule 10.703 would simplify the procedures a presiding judge must follow while reviewing and investigating complaints against SJOs. They would also clarify (1) a presiding judge’s authority and options in investigating and resolving a complaint, and (2) the circumstances under which a report must be filed with the CJP. Finally, some of the proposed amendments would make the procedures consistent with those used by the CJP in processing complaints about judges.

Replacing two-tier investigation process with one investigation

The current rule requires a presiding judge to review each complaint to determine whether it should be closed or investigated further. The rule provides that if initial review by the presiding judge shows that a basis for further investigation exists, the presiding judge must conduct a preliminary investigation. (Rule 10.703(i).) If the presiding judge, after conducting the preliminary investigation, “finds a basis for proceeding with the investigation,” he or she must then conduct a formal investigation. (Rule 10.703(j).)

Under the proposed amendments, there would be just one investigation if the presiding judge determines after initial review that there is a basis for an investigation. As with subdivision (i)(3), the presiding judge would be required to give the SJO an opportunity to respond to the allegations before the presiding judge takes any disciplinary action. After reviewing the response and completing the investigation, the presiding judge would close the matter, impose discipline, or take any other appropriate action. The actual investigation procedure would not change except that there would be one investigation instead of two.

Clarifying the presiding judge's authority and options in resolving complaints

In addition to being unnecessarily complicated, the rule as it is currently written does not afford a presiding judge enough discretion in processing and resolving a complaint. The rule provides that after a preliminary investigation, the presiding judge may close the matter, proceed to a formal investigation, or take "appropriate informal action, which may include a reprimand or warning . . . ." (Rule 10.703(i)(4).) After a formal investigation, if the presiding judge decides to take action, the rule lists various types of final action a presiding judge may take, including no action, an oral or written warning, a private or public reprimand, suspension, termination, or any other action the court deems appropriate. (Rule 10.703(j)(3).)

To simplify the rule and clarify the presiding judge's authority in determining the appropriate action, the amendments would eliminate the list of possible actions available to the presiding judge. Instead, the rule would simply provide that after an investigation, the presiding judge "must, in his or her discretion: [¶] (A) Close action on the complaint if the presiding judge finds the complaint lacks merit; [¶] (B) Impose discipline; or [¶] (C) Take other appropriate corrective action, which may include, but is not limited to, oral counseling of the subordinate judicial officer." (Rule 10.703(i)(4).) This change would diminish the perception that a presiding judge is limited by the list of possible actions or that the SJO is entitled to progressive discipline.

Investigating anonymous complaints

The amendments would also add a provision specifying that a presiding judge has discretion to investigate complaints that are anonymous. (Rule 10.703(f)(3).) This new provision would not alter a presiding judge's obligation to investigate allegations of serious misconduct brought to his or her attention. Rather, it would clarify the notion that a presiding judge is not required to investigate an anonymous complaint that provides insufficient facts to launch an investigation or that does not allege conduct that violates any ethical principles. This amendment is consistent with the CJP policy regarding anonymous complaints.

Advising SJO of the disposition of the complaint

When a presiding judge closes a complaint after initial review under subdivision (h)(1) without having contacted the SJO, subdivision (h)(3) provides that the presiding judge "must advise the subordinate judicial officer in writing of the disposition." Under the current rule, a presiding judge is required to notify an SJO that a complaint has been filed only if the presiding judge intends to take some type of "informal action" or to impose discipline. (Rule 10.703(i)(3) and (j)(1)(B).) Therefore, an SJO may not even know a complaint has been filed until the presiding judge advises the SJO that the matter has been closed. If, for example, the essence of a complaint is that the SJO ruled against the complainant and the presiding judge closes the matter without contacting the SJO, the committee's view is the presiding judge should not be required to advise the SJO of the disposition of the complaint. Similarly, a presiding judge could investigate a complaint and close the matter without asking the SJO to respond to the allegations. For example, the presiding judge could listen to a recording of a hearing and determine, without contacting the SJO, that an allegation of poor demeanor was unmeritorious.

This proposed revision would eliminate the requirement in subdivision (h)(3) that a presiding judge *must* advise the SJO in writing of the disposition and instead give the presiding judge discretion to notify the SJO. The committee also recommends amending subdivision (j)(2) (proposed subdivision (i)(6)) and adding a new subdivision (i)(5) to require a presiding judge to give to the SJO written notice of the final action taken only if the presiding judge is aware that the SJO knows about the complaint. These amendments are consistent with the CJP policies regarding notifying judges of complaints filed against them. If a complaint to the CJP does not result in an investigation, or if the investigation reveals facts that warrant dismissal of the complaint without contacting the judge, the CJP does not inform judges about those complaints.

Allowing opportunity to respond to intended final action

The rule provides that within 10 days or as soon as reasonably possible after completion of the investigation, the presiding judge must give the SJO notice of the intended final action on the complaint and must advise the SJO that he or she may request an opportunity to respond to the intended final action. (Rule 10.703(j)(2), (4), and (5).) Subdivision (j)(5) currently states that if the SJO requests an opportunity to respond to the intended final action, the presiding judge "should" allow it. The committee recommends changing the "should" to "must" to make subdivision (j)(7) consistent with subdivision (j)(5). Otherwise, a presiding judge could deny an opportunity to respond after advising the SJO that he or she may request such an opportunity. This amendment would also necessitate removal of the phrase "or has not been given" in subdivision (j)(7). That subdivision directs a presiding judge to give written notice of the final action to the complainant if the SJO "does not request or has not been given an opportunity to respond."

Asking CJP to investigate and adjudicate complaints

Current subdivision (g)(2) provides that a presiding judge "may request that the commission investigate and adjudicate the complaint if a local conflict of interest or disqualification prevents the court from acting on the complaint." Current subdivision (g)(3) states: "In exceptional circumstances a presiding judge may request the commission to investigate a complaint on behalf of the court and provide the results of the investigation to the court for action."

The amendments would (1) allow a presiding judge to ask a presiding judge of another court to investigate or to investigate and adjudicate a complaint, and (2) expand the circumstances under which a presiding judge may request that the CJP or another court investigate and adjudicate a complaint by deleting subdivision (g)(2) and changing (g)(3) to state: "In his or her discretion, a presiding judge may request the commission or the presiding judge of another court to investigate and adjudicate a complaint on behalf of the court, or to investigate a complaint on behalf of the court and provide the results of the investigation to the court for adjudication." If subdivision (g)(3) is expanded so that a presiding judge can, "[i]n his or her discretion," request the CJP's or another court's assistance, (g)(2) becomes superfluous. This amendment would permit a presiding judge to ask for the CJP's or another court's help if, for example, the court lacks the resources to conduct an investigation. Allowing a presiding judge to ask another court,

rather than the CJP, to handle the investigation and adjudication avoids unnecessary involvement by the CJP.

Other amendments

The proposed amendments would add several other provisions to the rule. First, subdivision (a)(4) would state specifically that the procedure for addressing complaints does not entitle the SJO to progressive levels of discipline.

Second, the proposed amendments would add a definition of "written reprimand" to the rule. (Proposed rule 10.703(b)(4).) That term is used currently in subdivision (k)(1), which requires a presiding judge to report an SJO to the commission when the presiding judge disciplines the SJO by written reprimand, suspension, or removal.

Third, current subdivision (*l*), which states what the presiding judge must tell the complainant and the SJO after the matter is resolved, would be amended to state that if the complainant is unknown, either because the matter did not come to the attention of the presiding judge as a result of a complaint or because the complainant is anonymous, the presiding judge need not notify the complainant. A similar revision would be added to proposed subdivision (f)(4), which requires written notice to a complainant of receipt of a complaint. The revision would add the words "if known" to clarify that notice is required only if the complainant is known.

Fourth, subdivision (b)(1) defines "subordinate judicial officer" as an attorney employed by a court to serve as a commissioner or referee. The amendments would add "hearing officer" to that definition. (See Cal. Rules of Court, rule 10.701(a).)

Fifth, subdivision (j)(2)(B) provides that a presiding judge who has completed an investigation and has decided to take disciplinary action must give the SJO, in writing, "[t]he facts and other information forming the basis for the proposed action and the source of the facts and information, sufficient to allow a meaningful response to the allegations." The committee recommends deleting the phrase "sufficient to allow a meaningful response to the allegations" because at this stage of the process, the SJO is being given an opportunity to respond to the proposed discipline; the SJO has already had an opportunity to respond to the allegations of misconduct. For the same reason, the committee proposes clarifying in subdivision (j)(4)(A) that this is an opportunity to respond "to the intended final action."

Sixth, subdivision (i)(3) provides that a presiding judge may give the SJO a copy of a complaint or a summary of its allegations and allow the SJO to respond, but the presiding judge *must* do so before taking any disciplinary action. The committee recommends adding the phrase "decides to" before "take any disciplinary action" to clarify that a presiding judge must give the SJO an opportunity to provide his or her explanation of what occurred before the presiding judge decides to take any disciplinary action.

Finally, in subdivision (*l*)(1), the amendments would delete the phrase "and the subordinate judicial officer" so that the presiding judge would be required to notify only the complainant, not the SJO, of the final court action. This notification to the SJO in this provision is duplicative because subdivisions (j)(6) (proposed subdivision (i)(9)) and new subdivision (i)(5) already require such notification to the SJO.

Rule 10.603(c)(4)(C)(ii)

Rule 10.603 of the California Rules of Court—Authority and duties of presiding judge—contains two cross-references to rule 10.703. In subdivision (c)(4)(C)(ii) requires a presiding judge to notify the CJP if an SJO "is disciplined or resigns, consistent with rule 10.703(k)." If the Judicial Council adopts the proposed amendments to rule 10.703, subdivision (k) would be renumbered as subdivision (j). Therefore, the Trial Court Presiding Judges Advisory Committee recommends that the council amend rule 10.603(c)(4)(C)(ii) to conform to the amendments of rule 10.703. The cross-reference to rule 10.703(k) would be amended to reflect the renumbering of that subdivision to rule 10.703(j).

Comments, Alternatives Considered, and Policy Implications

This proposal was circulated for comment as part of the spring 2013 invitation-to-comment cycle. Twenty-five individuals or organizations submitted comments.[1] Eighteen of those commentators are court commissioners who object to the proposed revisions. (One commissioner, Rebecca Wightman, commented twice.) Several of those commissioners merely indicated support for the positions taken in the comment from the California Court Commissioners Association (CCCA). Others reiterated comments set forth in the CCCA response (discussed below). In addition to the comments from the CCCA, attorney Edith Matthai was asked by the CCCA to review and comment on the proposed revisions. She submitted a comment on September 25, 2014, after the comment period closed. Ms. Matthai's remarks are included in the comment chart. In response to her letter, the committee agreed to rescind one proposed amendment and revert to the original language. That proposal is discussed below as an alternative considered by the committee. The committee also agreed to recommend adoption of other language proposed by Ms. Matthai.

One presiding judge—Presiding Judge Colette M. Humphrey, from the Superior Court of Kern County—also disagreed with the proposed amendments. She reiterated comments in the CCCA response (discussed below).

Three superior courts (Los Angeles, San Diego, and Tulare) submitted comments indicating support for the proposed amendments.

Finally, two members of the public submitted comments that did not address proposed amendments to rule 10.703. The committee did not consider those comments.

[1] A chart providing the full text of the comments and the committee responses is attached at pages 19–52.

The CCCA addressed several aspects of the proposed amendments. All of the concerns raised by the other commentators are addressed in the CCCA response to some extent. Therefore, this section discusses the objections of the CCCA with additional reference to specific comments from other commentators. The CCCA also drafted its own version of the rule that reflects its concerns. The CCCA version of the rule is attached to the comment chart.

General comments

First, the CCCA expressed disappointment that it was not asked to participate in the discussions leading to the proposed amendments to rule 10.703. In response to this comment, RUPRO deferred action on the proposal at its September 9, 2013 meeting pending a discussion between a subcommittee of the Trial Court Presiding Judges Advisory Committee and representatives of the CCCA. Representatives of the two groups met twice by conference call to discuss the CCCA's concerns.

Second, the CCCA asserts, and many individual commentators agree, that the current procedure for handling complaints about SJOs works well, so there is no need to amend the rule. (Several commentators used the maxim, "If it ain't broke, don't fix it.") They suggest that there is no evidence that the rule is confusing or complicated for presiding judges, so the proposed revisions are unnecessary. The committee's response is that just because a rule may be working does not mean it cannot be improved.

Third, the CCCA and some other commentators contend that the proposed revisions go beyond both the scope of the original request for a rule amendment by the CJP[2] and the intent of the proposal as stated in the invitation to comment, i.e., to "(1) simplify the procedures a presiding judge must follow while reviewing and investigating complaints against [SJOs]; (2) clarify a presiding judge's authority in conducting an investigation and determining the appropriate action to be taken; and (3) clarify the circumstances under which discipline against an SJO must be reported to the [CJP]." The committee's response is that its review of rule 10.703 is not limited to the scope of the issues raised by the CJP. In addition, the committee believes the amendments advance the goals of simplifying the procedures and clarifying a presiding judge's authority and options in handling complaints about SJOs.

Notifying SJO of closed complaints

One proposed amendment that generated substantial opposition is the proposed deletion of the requirements in subdivisions (h)(3) and (i)(5) that when a presiding judge closes a complaint after initial review (subdivision (h)(3)) or a preliminary investigation (subdivision (i)(5)(B)) without having contacted the SJO, the presiding judge "must advise the subordinate judicial officer in writing of the disposition." Because the current rule does not require the presiding

[2] In March 2010, Victoria B. Henley, Director–Chief Counsel of the CJP, sent a letter to then–Administrative Director of the Courts William C. Vickrey suggesting that rule 10.703 be amended to address an ambiguity in the rule as to what types of disciplinary action a presiding judge can impose after a preliminary and a formal investigation and what types of action must be reported to the CJP.

judge to notify an SJO of a complaint unless the presiding judge intends to take some type of disciplinary action, the proposed amendments would give the presiding judge discretion to advise the SJO of the decision to close the matter rather than requiring it.

The CCCA, joined by several commissioners, objected to the elimination of this requirement because a complainant is entitled to ask the CJP to review the court's disposition of the complaint, and if the SJO is unaware of the complaint, the SJO "would lose the opportunity to make notes or otherwise preserve relevant testimony or documents should the SJO be required to respond to a CJP inquiry." Presiding Judge Colette Humphrey adds:

> [I]f there really is a basis for some action, the SJO should have the opportunity to correct the conduct as needed. For example, when an SJO receives a complaint that a judgment was pending signature for far too long, the complaint may be justified, and the SJO has an opportunity to alter procedures to avoid a recurrence.

Commissioner Vince Lechowick agrees with the CCCA and specifies the types of evidence that may be lost if the presiding judge does not inform the SJO about the closed complaint: exhibits returned to the parties or lost or destroyed, deleted tape or video recordings, erased hard drives, employees who no longer work for the court, and loss of memories by the SJOs, clerks, and bailiffs.

As noted in Commissioner Wightman's comments, of the complaints reviewed by the CJP after disposition by the presiding judge, more than 95 percent are closed without further action because it is determined that the presiding judge's action was adequate. Coupled with the fact that a complainant must seek review by the CJP within 30 days of the presiding judge's resolution of the complaint, the committee concluded that it would be rare that the CJP would open an investigation in which the SJO would have destroyed or returned evidence needed to refute the allegations. In addition, the committee noted that it is burdensome, particularly in large courts that receive many complaints, to notify an SJO in writing every time a complaint is closed. The committee also noted that the proposed amendment would give the presiding judge discretion to notify the SJO of the closed complaint. Finally, this change would be consistent with the CJP's practice of not informing judges about complaints that are closed without contacting the judge who is the subject of the complaint.

Elimination of two-tiered investigation

Another concern is the proposed elimination of the two-tiered investigation model. The CCCA contends that the proposed revisions would require a formal investigation once the decision is made to investigate. In agreement, Commissioner Diana Baker stated that "[m]any complaints may be resolved by an informal preliminary investigation saving everyone a lot of time. The option of conducting an informal preliminary investigation should be left to the sound discretion of the Presiding Judge." She contends that the proposed change to a single investigation "results in one less option for the Presiding Judge. We should preserve the Presiding Judge's flexibility in dealing with a complaint by preliminary investigation if that is his or her choice." Commissioner

Ronald Creighton also objects, stating that the proposed amendment "takes away discretion and flexibility from the presiding judge by requiring a formal investigation once a decision to investigate is made." And Commissioner Wightman asserts that "by collapsing the existing, orderly process (initial review, preliminary investigation if needed, or formal investigation as needed), the proposed rule will actually limit presiding judges' discretion and authority to treat and resolve the complaint at the level it deserves."

The proposed revisions do not limit a presiding judge's options. Rather, the presiding judge will be able to conduct any type of investigation he or she deems appropriate to resolve the complaint. The revised rule would not require the presiding judge to conduct a "formal investigation."

Asking CJP to investigate and adjudicate complaints

The CCCA objects to the proposed amendments of subdivisions (g)(2) and (3)—allowing a presiding judge to ask the CJP to investigate and adjudicate a complaint—as unnecessary and "beyond the scope of the proposal (which is to clarify the type of disciplinary action a presiding judge may impose and what types of action must be reported to the CJP) . . . ." Commissioner Wightman adds that the proposed amendment "actually *takes away* the PJ's authority to adjudicate if they turn it over entirely to the CJP (and may very well lead to disparate results if some counties routinely turn over to the CJP to adjudicate while others keep their investigation and dispositions in house)." (Emphasis in original.)

Although the proposed amendments are not *necessary*, they would expand the circumstances under which a presiding judge may request assistance from the CJP, and they make it clear that the presiding judge has discretion to either (1) ask the CJP to investigate a complaint only, leaving the adjudication of the matter to the presiding judge; or (2) ask the CJP to both investigate and adjudicate the complaint. In response to the CCCA's concerns about these proposed amendments, the committee recommends amending subdivisions (g)(1)(C) and (g)(2) to allow a presiding judge to ask a presiding judge of another court to investigate and adjudicate a complaint or to investigate and turn the results over to the referring court for disposition.

Elimination of progressive discipline

The CCCA commented that the proposed addition to subdivision (a) of a statement that the procedures in rule 10.703 do not entitle an SJO to receive progressive levels of discipline is unnecessary, and the association "strenuously object[s] to the abandonment of the concept of progressive discipline when considering prospective discipline of a SJO." The comment states: "[O]ne must question why there is any need to completely eliminate the concept of progressive discipline as it currently exists in this rule."

In fact, SJOs are not entitled to progressive discipline. Although courts often employ progressive discipline with SJOs, it is not required. It is expected that, to the extent courts currently use progressive discipline, that practice will not change because of this proposed amendment.

Mission creep

Finally, the CCCA expresses concern that the amendments would lead to "mission creep, which would unnecessarily expand the nature and number of proceedings which fall within the jurisdiction of the CJP." The association adds:

> The SJOs who comprise the CCCA share all the same concerns which judges have recently expressed through recent written correspondence by the CJA and ACJ [Alliance of California Judges] regarding CJP positions on issues such as the expansion of defined misconduct (including legal error) and procedural fairness issues such as discovery.

It is unclear how the proposed amendments to rule 10.703 would fuel any concern the CCCA has about perceived overreaching by the CJP.

Alternatives Considered

The committee considered eliminating entirely the provisions in subdivisions (j)(2), (4), and (5) providing that within 10 days after the completion of the investigation, the presiding judge must give the SJO notice of the intended final action on the complaint and must advise the SJO that he or she may request an opportunity to respond to the proposed discipline. The committee originally recommended eliminating this opportunity to respond because, as at-will employees, SJOs have no right to respond to proposed discipline. (Gov. Code, § 71650(d)(1).) In addition, removing this provision would streamline the complaint review process.

The CCCA and many other commentators, including several commissioners and the presiding judge from Kern County, argued that the elimination of this important due process provision is unwarranted. One commentator, Commissioner Rebecca Wightman, stated:

> With PJs rotating in counties every two years, there may very well be instances in which a discussion or an opportunity to respond to an intended final action (whether the action to be taken is informal or formal) can assist the PJ in reaching a better solution, or in making sure that similar cases in the past (when the person was not PJ) are dealt with similarly, for example.

After discussion of this issue with representatives of the CCCA, the committee agreed to recommend retention of the provision, but to limit the SJO's response to seeking correction of an error of fact or law or both. The commissioners expressed opposition to this limiting language, contending that it eviscerates the provision allowing SJOs an opportunity to respond. After receiving a letter from attorney Edith Matthai explaining the commissioners' position, the committee agreed to rescind its proposal and to retain the existing language.

The committee also considered and rejected a suggestion by CJP Director–Chief Counsel Henley that the rule be amended to specifically permit courts to commence an investigation based on oral complaints. The committee noted that if an oral complaint alleges conduct that constitutes a

violation of the California Code of Judicial Ethics, a presiding judge would be obligated under canon 3D(1) of the code to investigate the complaint and take appropriate corrective action if the presiding judge has reliable information that the SJO violated any provision of the code. Therefore, an amendment "permitting" a presiding judge to consider an oral complaint is unnecessary.

Implementation Requirements, Costs, and Operational Impacts

The proposed amendments would result in no costs. Replacing the current two-tiered investigation with a single investigation would reduce the burden on presiding judges.

Attachments

1. Cal. Rules of Court, rule 10.703, at pages 13–18
2. Comment chart, at pages 19–52

Rule 10.703 of the California Rules of Court is amended, effective January 1, 2015, to read:

Rule 10.703. Subordinate judicial officers: complaints and notice requirements

(a) Intent

The procedures in this rule for processing complaints against subordinate judicial officers do not:

(1) Create a contract of employment;

(2) Change the existing employee-employer relationship between the subordinate judicial officer and the court; ~~or~~

(3) Change the status of a subordinate judicial officer from an employee terminable at will to an employee terminable only for cause~~.~~; or

(4) Entitle a subordinate judicial officer to receive progressive levels of discipline.

(b) Definitions

Unless the context requires otherwise, the following definitions apply to this rule:

(1) "Subordinate judicial officer" means an attorney employed by a court to serve as a commissioner, ~~or~~ referee, or hearing officer, whether the attorney is acting as a commissioner, referee, hearing officer, or temporary judge. The term does not include any other attorney acting as a temporary judge.

(2)–(3) * * *

(4) "Written reprimand" means written disciplinary action that is warranted either because of the seriousness of the misconduct or because previous corrective action has been ineffective.

(c) Application

(1) * * *

(2) If a complaint against a subordinate judicial officer as described in (f) does not allege conduct that would be within the jurisdiction of the commission, the ~~court must process the complaint following~~ local procedures adopted under rule 10.603(c)(4)(C) apply. The local process may include any procedures from this rule for the court's adjudication of the complaint other than the provisions for referring the matter to the commission under (g) or giving notice of commission review under ~~(l)~~(k)(2)(B).

(3) * * *

**(d)–(e) * * *

(f) Written complaints to presiding judge

(1) A complaint about the conduct of a subordinate judicial officer must be in writing and must be submitted to the presiding judge.

(2) * * *

(3) The presiding judge has discretion to investigate complaints that are anonymous.

(4) The presiding judge must give written notice of receipt of the complaint to the complainant, if known.

(g) Initial review of the complaint

(1) The presiding judge must review each complaint and determine if the complaint:

(A) May be closed after initial review;

(B) ~~Needs preliminary investigation~~ Requires investigation by the presiding judge; or

(C) ~~Requires formal investigation~~ Should be referred to the commission or to the presiding judge of another court for investigation or for investigation and adjudication.

(2) ~~A presiding judge may request that the commission investigate and adjudicate the complaint if a local conflict of interest or disqualification prevents the court from acting on the complaint.~~

~~(3)~~ In ~~exceptional circumstances~~ his or her discretion, a presiding judge may request the commission or the presiding judge of another court to investigate and adjudicate a complaint on behalf of the court, or to investigate a complaint on behalf of the court and provide the results of the investigation to the court for ~~action~~ adjudication.

~~(4)~~(3) The court must maintain a file on every complaint received, containing the following:

(A)–(D) * * *

(h) Closing a complaint after initial review

(1) After an ~~preliminary~~ initial review the presiding judge may close without further action any complaint that:

(A)–(B) * * *

(2) If the presiding judge decides to close the complaint under (h)(1), t~~T~~he presiding judge must notify the complainant in writing of the decision to close ~~the investigation on~~ the complaint. The notice must include the information required under ~~(*l*)~~(k).

(3) The presiding judge ~~must~~ may, in his or her discretion, advise the subordinate judicial officer in writing of the ~~disposition~~ decision to close the complaint.

(i) Complaints requiring ~~preliminary~~ investigation

(1) If after an initial review of the complaint the presiding judge finds a basis for further inquiry, the presiding judge must conduct an ~~preliminary~~ investigation appropriate to the nature of the complaint.

(2) * * *

(3) The presiding judge may give the subordinate judicial officer a copy of the complaint or a summary of its allegations and allow him or her an opportunity to respond to the allegations. The presiding judge must give the subordinate judicial officer a copy of the complaint or a summary of its allegations and allow the subordinate judicial officer an opportunity to respond to the allegations before the presiding judge decides to take~~s~~ ~~appropriate informal~~ any disciplinary action ~~as described in (i)(4)(B)~~ against the subordinate judicial officer.

(4) After completing the ~~preliminary~~ investigation, the presiding judge must, in his or her discretion:

(A) ~~Terminate the investigation and c~~Close action on the complaint if the presiding judge finds the complaint lacks merit; ~~or~~

(B) ~~Terminate the investigation and close action on the complaint by taking appropriate informal action, which may include a reprimand or warning to the subordinate judicial officer, if the presiding judge finds a basis for taking informal action; or~~ Impose discipline; or

(C) ~~Proceed with a formal investigation under (j) if the presiding judge finds a basis for proceeding further.~~ Take other appropriate corrective action, which may include, but is not limited to, oral counseling of the subordinate judicial officer.

~~(5) If the presiding judge terminates the investigation and closes action on the complaint, the presiding judge must:~~

~~(A) Notify the complainant in writing of the decision to close the investigation on the complaint. The notice must include the information required under (*l*); and~~

~~(B) Advise the subordinate judicial officer in writing of the disposition.~~

~~(j) Complaints requiring formal investigation~~

~~(1) If after a preliminary investigation the presiding judge finds a basis for proceeding with the investigation, the presiding judge must conduct a formal investigation appropriate to the nature of the complaint.~~

~~(A) The investigation may include interviews of witnesses and a review of court records.~~

~~(B) As soon as practicable, the presiding judge must give the subordinate judicial officer a copy of the complaint or a summary of its allegations and allow the subordinate judicial officer an opportunity to respond.~~

(5) If the presiding judge closes action on the complaint under (i)(4)(A) and the presiding judge is aware that the subordinate judicial officer knows of the complaint, the presiding judge must give the subordinate judicial officer written notice of the final action taken on the complaint.

~~(2)~~(6) If the presiding judge decides to impose discipline or take other appropriate corrective action under (i)(4)(B) or (C), ~~W~~within 10 days after the completion of the investigation or as soon thereafter as is reasonably possible, the presiding judge must give the subordinate judicial officer the following in writing:

(A) Notice of the intended final action on the complaint; and

(B) The facts and other information forming the basis for the proposed action and the source of the facts and information~~, sufficient to allow a meaningful response to the allegations~~.

~~(3) Final action on the complaint may include:~~

~~(A) A finding that no further action need be taken on the complaint;~~

~~(B) An oral or written warning to the subordinate judicial officer;~~

~~(C) A private written reprimand to the subordinate judicial officer;~~

~~(D) A public written reprimand to the subordinate judicial officer;~~

~~(E) Suspension of the subordinate judicial officer;~~

~~(F) Termination of the subordinate judicial officer; and~~

~~(G) Any other action the court may deem appropriate.~~

~~(4)~~(7) The notice of the intended final action on the complaint in ~~(j)(2)~~(i)(5)(A) must include the following advice:

(A) The subordinate judicial officer may request an opportunity to respond to the intended final action within 10 days after service of the notice; and

(B) If the subordinate judicial officer does not request an opportunity to respond within 10 days after service of the notice, the proposed action will become final.

~~(5)~~(8) If the subordinate judicial officer requests an opportunity to respond, the presiding judge ~~should~~ must allow the subordinate judicial officer an opportunity to respond to the notice of the intended final action, either orally or in writing as specified by the presiding judge, in accordance with local rules.

~~(6)~~(9) Within 10 days after the subordinate judicial officer has responded, the presiding judge must give the subordinate judicial officer ~~and the complainant~~ written notice of the final action taken on the complaint. ~~The notice to the complainant must include the information required under (*l*).~~

~~(7)~~(10) If the subordinate judicial officer does not request ~~or has not been given~~ an opportunity to respond, the presiding judge must promptly give written notice of the final action to the complainant. The notice must include the information required under ~~(*l*)~~(k).

~~(k)~~(j) Notice to the Commission on Judicial Performance

(1) If a court disciplines a subordinate judicial officer by written reprimand ~~under (i)(4)(B) or (j)(3)(C) or (D)~~ , suspension, or ~~removal~~ termination for conduct that, if

alleged against a judge, would be within the jurisdiction of the commission under article VI, section 18 of the California Constitution, the presiding judge must promptly forward to the commission a copy of the portions of the court file that reasonably reflect the basis of the action taken by the court, including the complaint or allegations of misconduct and the subordinate judicial officer's response. This provision is applicable even when the disciplinary action does not result from a written complaint.

(2) If a subordinate judicial officer resigns (A) while an ~~preliminary or formal~~ investigation under (i) ~~or (j)~~ is pending concerning conduct that, if alleged against a judge, would be within the jurisdiction of the commission under article VI, section 18 of the California Constitution, or (B) under circumstances that would lead a reasonable person to conclude that the resignation was due, at least in part, to a complaint or allegation of misconduct that, if alleged against a judge, would be within the jurisdiction of the commission under article VI, section 18 of the California Constitution, the presiding judge must, within 15 days of the resignation or as soon thereafter as is reasonably possible, forward to the commission the entire court file on any pending complaint about or allegation of misconduct committed by the subordinate judicial officer.

(3) * * *

~~(l)~~(k) Notice of final court action

(1) When the court has completed its action on a complaint, the presiding judge must promptly notify the complainant, if known, ~~and the subordinate judicial officer~~ of the final court action.

(2) * * *

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All comments are verbatim unless indicated by an asterisk (*).

List of All Commentators, Overall Positions on the Proposal, and General Comments				
	Commentator	**Position**	**Comment**	**Committee Response**
1.	Abby Abinanti Former Commissioner San Francisco, CA	N	No further comment.	No response necessary.
2.	Trilla Bahrke Commissioner Tahoe City, CA	N	I would like to add my endorsement to the letter written by Commissioner St. George on behalf of our organization. It appears that this proposed modified rule of court is attempting to fix a system that is not broken but is actually working extremely efficiently. I would object to the proposed changes. They are unfair to subordinate judicial officers and, frankly, unnecessary.	See response to comments by the California Court Commissioners Association.
3.	Diana C. Baker Commissioner Marina, CA	N	I have been a Superior Court Commissioner since 1998. I am writing to oppose the proposed change to the court's initial review of a complaint about an SJO. Many complaints may be resolved by an informal preliminary investigation saving everyone a lot of time. The option of conducting an informal preliminary investigation should be left to the sound discretion of the Presiding Judge. Since 2008 (not including 2010), the CJP approved the Presiding Judge's handling of SJO complaints 96.42% of the time. There is no reason to change the current procedure – especially since it results in one less option for the Presiding Judge. We should preserve the Presiding Judge's flexibility in dealing with a complaint by preliminary investigation if that is	The amended rule would allow a presiding judge to conduct any type of investigation he or she deems appropriate to resolve the complaint. But it would not require two different investigations "[i]f after a preliminary investigation the presiding judge finds a basis for proceeding with the investigation."

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			his or her choice. I urge you not to adopt this unnecessary change.	
4.	California Court Commissioners Association by Matthew St. George President Santa Monica, CA	N	On behalf of the Board of the California Court Commissioners Association (CCCA), I am providing the following comments on the proposed amendments to CRC 10.703. This public comment letter was reviewed and endorsed unanimously at our June 12, 2013 Board meeting. As a preliminary matter, I must relay the concern and disappointment expressed by my membership that the CCCA was not requested to participate earlier in the process as the proposed amendments would substantially alter the procedural and substantive rights of every subordinate judicial officer in the State. As requested in the invitation to comment circulated by your committee, the CCCA has focused its comments on the question of "Does the proposal reasonably achieve the stated purpose?" For the reasons set forth below, we believe that in several significant respects it does not. OVERREACH As stated in your committee's invitation to comment, the genesis of the proposed amendments was a letter from Victoria Henley of the CJP to William Vickery of the AOC	Consideration of the rule proposal was deferred pending a meeting between the Trial Court Presiding Judges Advisory Committee and representatives of the CCCA. The two groups then met twice by telephone conference call. The committee, in its review of rule 10.703, is not limited by the scope of the issues addressed by the Commission on Judicial Performance. The committee believes the proposed amendments

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			suggesting that Rule 10.703 be amended "*to address an ambiguity in the rule as to what types of disciplinary action a presiding judge can impose after a preliminary hearing and a formal investigation and what types of action must be reported to the CJP*" (emphasis added). As also stated in your committee's invitation to comment, the Trial Court Presiding Judges Advisory Committee concluded that it could address this issue "*by eliminating the current two-tiered preliminary/formal investigation process and replacing it with one investigation*" (emphasis added). Despite the limited scope of the conceptual amendments summarized above, and the limited scope of the proposed revisions as summarized in the invitation to comment, the CCCA and its membership are surprised and greatly concerned by the actual language proposed. The proposal as stated in the invitation to comment is to "simplify the procedures a presiding judge must follow while reviewing and investigating complaints against SJO's" and to "clarify a presiding judge's authority and options in investigating and resolving a complaint" and to "clarify under what circumstances a report must be filed with the CJP." However, several of the proposed amendments are far outside the scope of the proposal or are simply unnecessary given the present language of the rule. The two key points we wish to stress are 1) SJO discipline under the current rule is working as	advance the goals of simplifying the procedures and clarifying a presiding judge's authority and options in handling complaints about SJOs. The committee believes that although the rule may be working, there is room for improvement

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			shown by the CJP's own statistics (If it ain't broke, don't fix it!), and 2) the proposed amendments will deprive presiding judges of discretion and flexibility in the imposition of discipline by requiring a formal investigation once the decision is made to investigate. NOTICE TO SJO OF COMPLAINT Specifically, the CCCA strongly objects to the proposed deletion of the current requirement that the presiding judge must give the SJO notice of the intended final action on the complaint and an opportunity to respond (Rule 10.703(j)(2), (4) and (5)). While it is true the SJO would still have the opportunity under subdivision (i)(3) to respond to the alleged misconduct, this addresses a completely different issue: whether the punishment fits the conduct as opposed to whether there was misconduct. The proposal to move from a two-tier investigation to a single investigation simply does not require and should not include the loss or removal of this right. AUTHORITY OF PRESIDING JUDGE The CCCA also believes that the deletion of subdivision (g)(2) and the amendment of (g)(3) are both unnecessary and beyond the scope of the proposal. These subdivisions currently grant the authority to a presiding judge to request the CJP investigate and adjudicate a complaint against an SJO in the event of conflict of interest, disqualification, or other exceptional	through amending the rule. The proposed amendments do not require a formal investigation once a decision is made to investigate. The amended rule would allow a presiding judge to conduct any type of investigation he or she deems appropriate to resolve the complaint. But it would not require two different investigations "[i]f after a preliminary investigation the presiding judge finds a basis for proceeding with the investigation." The committee agreed that the provision requiring a presiding judge to advise the SJO that he or she may request an opportunity to respond to the intended final action should be retained. This is a minor change. However, to address the CCCA's concern, the committee added a provision to the proposal authorizing a presiding judge to ask the presiding judge of another court to investigate and adjudicate a complaint, or to investigate a complaint on behalf of the court and provide the results of the investigation to the court for adjudication.

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			circumstances. The sole example of circumstances put forth in the invitation to comment which might lead a presiding judge to exercise the discretion to refer the matter to the CJP under the proposed amendment to the rule is if a court lacks the resources to conduct an investigation. Obviously, the entire judicial branch is currently under tremendous financial pressure. However, that is exactly the sort of "exceptional circumstance" under which a presiding judge could refer a matter to the CJP under the present rule. The proposed amendment is both beyond the scope of the proposal (which is to clarify the type of disciplinary action a presiding judge may impose and what types of action must be reported to the CJP) and, as clarified above, unnecessary. NOTICE OF CLOSED INVESTIGATION The CCCA also objects to the proposed amendment to subdivision (h)(3) removing the requirement that a presiding judge advise an SJO in writing of the decision to close an investigation, instead granting discretion to the presiding judge as to whether to do so. The CCCA's concern with this proposed amendment is that any complainant who is dissatisfied with the action by the presiding judge has the right to then demand redress from the CJP, and subdivision (l) requires the presiding judge to so advise the complainant. Absent notification by the presiding judge, the SJO would not be aware	The CJP opens investigations on very few complaints about SJOs and the time frame for a complainant to seek review by the CJP is very limited. Therefore, the risk of evidence being lost is minimal.

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			of the complaint, and would lose the opportunity to make notes or otherwise preserve relevant testimony or documents should the SJO be required to respond to a CJP inquiry. ELIMINATION OF PROGRESSIVE DISCIPLINE Another unnecessary proposed change to Rule 10.703 is to place within subdivision (a), which delineates the intent of the rule, an additional line stating that nothing in this rule would "[e]ntitle a subordinate judicial officer to receive progressive levels of discipline". Other proposed changes within the current rule would eliminate any language stating the types of discipline which could be progressively imposed should disciplinary action be taken. Nowhere was this substantive change mentioned previously. At no time was its proposed implementation discussed with those individuals whom would be impacted by the change. All SJOs are painfully aware that our employment is at will, as recent events have demonstrated. However, one must question why there is any need to completely eliminate the concept of progressive discipline as it currently exists in this rule. As our numbers diminish due to budget constraints, there is all the more reason to retain the experience and expertise of those who remain. Consider the many hours spent with judicial colleagues at New Judges Orientation, Judges College, and subsequent CLE and substantive law courses as the major	The amended rule would not prohibit a presiding judge from using progressive discipline. In any event, SJOs are not, in fact, entitled to progressive discipline, so it is appropriate to so state in the rule.

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			investment they represent in developing a SJO into a capable and competent member of the judiciary. As an institution, our rules of conduct should encourage presiding judges to cultivate and mentor SJOs in our mission to provide equal justice without prejudice to the citizens of our State. The concept of progressive discipline, long established in procedure and practice, is designed to accomplish just that. Nothing in the current rule prohibits imposition of a level of discipline equal to the misconduct committed by a SJO which requires it. The CCCA would not object to additional language in the appropriate section of the rule which would make this clear. However, we strenuously object to the abandonment of the concept of progressive discipline when considering prospective discipline of a SJO. ROLE OF THE CJP Last but not least, much of the CCCA membership also belongs to the CJA, the ACJ or both. The CCCA (like the CJA and the ACJ) is concerned with "mission creep," which would unnecessarily expand the nature and number of proceedings which fall within the jurisdiction of the CJP. The SJOs who comprise the CCCA share all the same concerns which judges have recently expressed through recent written correspondence by the CJA and ACJ regarding CJP positions on issues such as the expansion of defined misconduct (including legal error) and procedural fairness issues such as discovery.	It is not clear how the proposed amendments to rule 10.703 would fuel any concern the CCCA has about perceived overreaching by the CJP.

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			In summary, the CCCA questions the scope and necessity of many of the proposed amendments. Rather than approve and forward the proposed amendments to the Judicial Council for implementation on January 1, 2014, the CCCA implores the Trial Court Presiding Judges Advisory Committee to reject the above–referenced proposed amendments or, alternatively, send them back to committee for further review and discussion. In furtherance of this goal, an alternative version of an amended rule 10.703, which incorporates some revisions, but which leaves the rule as currently stated largely intact, is attached. The CCCA would be pleased to participate in such a discussion, and would happily have done so had its input been requested earlier. [Proposed revisions by the CCCA are attached to this comment chart]	
5.	Benjamin R. Campos Commissioner Los Angeles, CA	N	I join in the position outlined by Commissioner St. George, president of CCCA. Thank you for your consideration.	See response to comments by the California Court Commissioners Association.
6.	Ronald Creighton Commissioner Walnut Creek, CA	N	The proposed rule change takes away discretion and flexibility from the presiding judge by requiring a formal investigation once a decision to investigate is made. More importantly, the Rule as currently written is working fine. The CJP's own statistics show an overwhelming approval of how the presiding judges have	The proposed amendments do not require a formal investigation once a decision is made to investigate. The amended rule would allow a presiding judge to conduct any type of investigation he or she deems appropriate to resolve the complaint. But it would not require two different investigations "[i]f after a

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			conducted their investigations and impose discipline by simply closing each SJO disciplinary action reported to them with rare exception.	preliminary investigation the presiding judge finds a basis for proceeding with the investigation." See response to comments by the California Court Commissioners Association.
7.	J. F. DeMelo Commissioner Visalia, CA	N	The current SJO discipline method works well. The proposed changes are unnecessary.	See response to comments by the California Court Commissioners Association.
8.	William D. Dodson Commissioner Los Angeles, CA	N	As I understand it, the current rule gives an SJO the right to notice and an opportunity to respond to a court's intended final action. As far as I can tell, the new rule would eliminate this guarantee, which would eliminate the officer's right to be heard on a very critical issue. Such a change does not seem prudent. In reference to the proposed changes, it seems to me that there has not been a sufficient showing that any changes in the existing procedures are really desirable. When described as a change to simplify or clarify the procedures, the proposal sounds good in the abstract, but I do not see any real confusion or unnecessary complexity that would make the change desirable in practice. Thank you for the opportunity to comment.	The committee agreed that the provision requiring a presiding judge to advise the SJO that he or she may request an opportunity to respond to the intended final action should be retained. See response to comments by the California Court Commissioners Association.
9.	Carol J. Hallowitz	N	I tend to believe in the old adage "If it ain't	See response to comments by the California

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	Commissioner Los Angeles, CA		broke, don't fix it." The system we now have in place appears to be working just fine. If there are to be changes, I endorse the proposals submitted by the California Court Commissioners Association.	Court Commissioners Association.
10.	Jeffrey M. Harkavy Commissioner Chatsworth, CA	N	After having reviewed the proposed changes, I concur in the concerns and recommendations made by Commissioner Matthew St. George on behalf of the CCCA.	See response to comments by the California Court Commissioners Association.
11.	Colette M. Humphrey Presiding Judge Superior Court of Kern County Bakersfield, CA	N	I would like to express my opposition to the proposed revision to Rule 10.703. While it seems intended to "streamline" the complaint process, it also creates a situation that may deprive SJOs of the opportunity to respond to complaints. Under the current rule, the SJO has a right to notice and an opportunity to respond to a court's intended final action. The revision requires only that the SJO be notified AFTER the action is taken. The proposed revision also removes the requirement that the SJO be advised of the disposition when a complaint is closed. This is not helpful for at least two reasons. First, if there really is a basis for some action, the SJO should have the opportunity to correct the conduct as needed. For example, when an SJO receives a complaint that a judgment was pending signature for far too long, the complaint may be justified, and the SJO has an opportunity to alter procedures to avoid a recurrence. Secondly, since a large	The committee agreed that the provision requiring a presiding judge to advise the SJO that he or she may request an opportunity to respond to the intended final action should be retained. See response to comments by the California Court Commissioners Association.

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			portion of the complaints are not justified and since SJOs tend to have a lot of "repeat customers," if the SJO is unaware of a disposition, they won't know to keep records that might serve to refute future claims by the same litigant. The procedure that has been in place to address complaints regarding SJOs has remained virtually unchanged for 10 years, and it seems to have worked adequately for the benefit of the court, the public and the SJOs. The proposed revision does not seem designed to help SJOs do the right thing, but rather makes it harder for them to modify their conduct if needed. Thank you for your consideration of my thoughts.	
12.	Patricia M. Ito Commissioner Lancaster, CA	N	I concur with the position taken by the California Court Commissioners Association.	See response to comments by the California Court Commissioners Association.
13.	Vince Lechowick Commissioner Lakeport, CA	N	Further points on the loss of due process from lack of timely notice of a pending complaint (beyond even the simple preservation of judicial notes) include: Exhibits returned to the parties (or otherwise made unavailable, lost or destroyed); Erasures or deletions of tape recordings, videos or hard drives (routine, accidental or otherwise); Retiring and exiting employees from court staffs (who may have favorable observations to add); Loss of memories of the specifics of the case by the Commissioners, clerks, bailiffs and others	See response to comments by the California Court Commissioners Association.

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			involved as they move on to many other days of high volume pro per calendars, etc. "Streamlined" sounds more like "taking the easy way out" rather than doing justice or providing defense of SJOs' work. Remember, discipline can now extend to simple "errors" ("should have known or so decided"), and adequate defense of decisions can require basically a "retrial."	
14.	Chris Martin Commissioner Salinas, CA	N	The appropriate changes, if any, that should be made are listed in Matt St. George's posted comment, which reflects the well-thought out and well-reasoned position of the CCCA. An alternate Amended Rule 10.703 is also attached to Mr. St. George's comment. I speak on my behalf only and not on behalf of the Superior Court.	See response to comments by the California Court Commissioners Association.
15.	Edith R. Matthai Robie & Matthai Los Angeles, CA	N	I have been asked by the California Court Commissioner's Association to review and comment on the proposed changes to Rule 10.703. It is my opinion that further limited revisions need to be made to the currently proposed version of the rule. The changes will clarify the process both for the protection of the presiding judges charged with the obligation to administer the rule, and the subordinate judicial officers who may face investigations under the rule.	

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			I greatly appreciate the tremendous amount of work that has been done, to date, by the Presiding Judges and others who have crafted the proposed new rule and certainly do not intend my comments to be critical of those efforts. It simply appears that in the laudatory effort to streamline and simplify the process, there were a few areas in which the resulting proposal is either unclear or resulted in an unintended consequence. The California Commissioner's Association now agrees that streamlining the process by eliminating the two levels of a preliminary and a formal investigation is appropriate if adopted in combination with the recommended changes in this letter. [T]he following changes would resolve areas in which the new rule as written is unclear. I have underlined the proposed additional language below. • (i) **Complaints requiring further investigation** (3) The presiding judge may give the subordinate judicial officer a copy of the complaint or a summary of its allegations and allow him or her an opportunity to respond to the allegations <u>at the beginning of the investigation</u>. The presiding judge must give the subordinate judicial officer a copy of the complaint or a summary of its allegations and allow the subordinate judicial officer an	The committee disagreed with the proposed addition of the phrase “at the beginning of the investigation” but agreed with the proposed addition of the phrase “decides to.”

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			opportunity to respond to the allegations before the presiding judge decides to takes any disciplinary action against the subordinate judicial officer. This change in language would clarify that no judge should decide to take disciplinary action until the subordinate judicial officer has had an opportunity to provide his or her explanation of what occurred. The section would still allow the presiding judge to begin an investigation, decide that discipline was not warranted and close the matter without notifying the subordinate judicial officer of the investigation. • (i) **Complaints requiring further investigation** (4) After completing the investigation, the presiding judge must, in his or her discretion: (C) Take other appropriate corrective action, which may include, but is not limited to, an oral reprimand or counseling of the subordinate judicial officer. This language makes it clear that a presiding judge may in appropriate circumstances, decline to impose written discipline and instead counsel or verbally reprimand the subordinate judicial officer. Of additional concern is that the limitation in	The committee agreed with the proposed revision except for the reference to an oral reprimand.

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			Section (i)(8) of the SJO's response to a Notice of Intended Final Action to matters "based on correction of an error of fact or law or both" eliminates the ability of an SJO to address the appropriate level of discipline that should be imposed. It is presumed that the language "based on correction of an error of fact or law or both" was intended to mirror the language of Rule 111.5 of the Rules of the Commission on Judicial Performance. However that Rule applies only to advisory letters, the lowest level of discipline issued by the commission. When an advisory letter has been issued, the level of discipline has been set at the lowest level available if discipline is to be imposed. The limitation of the SJO's response in proposed Rule 10.703(i)(8) applies no matter what level of discipline the presiding judge has imposed, which eliminates the ability of the SJO to address the appropriate level of discipline. Although the SJO is able to give an initial response under (i)(3), that response would address the facts and circumstances surrounding the allegations. It is anticipated that in most circumstances the SJO will ask that discipline not be imposed for the reasons set forth in that response and would not address the level of discipline to be imposed.	

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	Commentator	**Position**	**Comment**	**Committee Response**
			The change requested below should not be viewed as a desire to reargue or reiterate the response previously provided under (i)(3). I would suggest that the language be changed to read: "but the response to the intended final action must be based on new matter, which the SJO could have not known at the time a response was submitted pursuant to (i)(3) or to a statement objecting to the level of discipline or to a correction of an error of fact or law or both. Finally, in what I understood to be the currently proposed version of the role, Section (i)(l 0) states: "The notice must include the information required under (1)." "(1)" should be changed to "(k)" since there is no longer a section (1) in the rule. Both the California Commissioner's Association and I appreciate your attention to these requested changes. If you have any changes or would like to discuss this matter further, please do not hesitate to contact me.	The committee agreed to recommend retaining this provision, but rejected the proposed language. Instead the committee recommends reverting to the existing language in subdivision (i)(5), which will be renumbered (j)(8).
16.	Elizabeth Munisoglu Commissioner Los Angeles, CA	N	I agree wholeheartedly with the comment and suggestions proposed and posted by the CCCA in behalf of all subordinate judicial officers. The proposed changes, both facially and substantively, seem to presume that SJOs are	See response to comments by the California Court Commissioners Association.

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All comments are verbatim unless indicated by an asterisk (*).

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			inherently less deserving of the same procedural due process as are judges. There is NO evidence that the current system is flawed, nor is there any evidence that any County's Presiding Judge has been, or in the future would be, unable to effectively implement the existing disciplinary processes. I strongly urge that, if any changes are made, they be limited to the sensible suggestions offered by the CCCA.	
17.	Ronald Pierce Squaw Valley, CA	AM		Comment does not address proposed amendments to rule 10.703.
18.	Scott Retired Investigator San Luis Obispo, CA	N/A		Comment does not address proposed amendments to rule 10.703.
19.	Phyllis Shibata Commissioner Pomona, CA	N	There is no need for these changes.	See response to comments by the California Court Commissioners Association.
20.	Superior Court of Los Angeles County Los Angeles, CA [Comment on behalf of the court]	A	Rule 10.703 requires revision. In broad terms, it seeks to create a process by which courts respond to external complaints about its subordinate judicial officers (SJOs). However, the existing process is duplicative and imposes unnecessary work on presiding judges. To the extent the proposed changes streamline the process of investigating external complaints against SJOs, they are useful.	No response necessary.

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21.	Superior Court of San Diego County by Mike Roddy Executive Officer San Diego, CA [Comment on behalf of the court]	A	No further comment.	No response necessary.
22.	Superior Court of Tulare County by Sherry Pacillas Court Operations Manager Visalia, CA [Comment on behalf of the court]	A	In agreement with the proposed updated policies and Judicial Council forms.	No response necessary.
23.	Rebecca Wightman Commissioner San Francisco, CA	N	I am submitting this comment as an individual who, by virtue of my position, is subject to discipline under existing CRC Rule 10.703. I also agree with the comments previously submitted by the CCCA, as well as the CCCA's alternative suggested rule revision to address any and all concerns previously identified by the CJP letter referenced in the write up to the original proposed rule change. **Does the proposal reasonably achieve the stated purpose?** Answer: **NO**, for all of the reasons and comments stated below, including, but not limited to the fact that there appears to be **no credible data that PJs are confused or feel constrained, or that there is a need to "simplify"** the existing process that has been in place for years, and **there appears to be no credible reason for eliminating a perfectly**	See response to comments by the California Court Commissioners Association.

List of All Commentators, Overall Positions on the Proposal, and General Comments				
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			good model (which is successfully used by CJP), including elimination of due process provisions regarding notification to SJOs. Comments The background to the proposed rule change – the letter from the CJP (Victoria Henley) – identified two very specific, limited, concerns: one regarding consideration of oral complaints, the other regarding clarifying that the informal actions that can be taken after a preliminary investigation regarding "a reprimand or warning" are *oral* warnings and *oral* reprimands. The proposed rule revision goes WAY BEYOND addressing such concerns, claiming – without actual evidence or clear justification – that the existing rule is "unnecessarily complicated" and/or somehow limits the discretion of presiding judges. A review of public data regarding complaints against SJOs from CJP's own annual reports reveals that presiding judges do not seem to be having any problems in utilizing the existing procedures in Rule 10.703, and further, that they are adequately addressing complaints against the SJOs in their respective counties. The CJP's annual reports that I examined revealed the following astonishing information: o **2009** – 153 new complaints; CJP reviewed **154** (incl. from prior year): a whopping **149** were closed after initial	

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			review [that's 96.7%] – to use the CJP's own words in its annual report: **"…because it determined that the superior court's handling and disposition of the complaints were adequate and that no further proceedings were warranted."** And, of the remaining five, three were closed without discipline following CJP's investigation, one concluded with an advisory letter, and one concluded with a public censure (this latter one was for an SJO who failed to complete submitted matters in a timely fashion). o **2010 (I didn't have the report handy)** o **2011 –** 163 new complaints; CJP reviewed **162:** a whopping **157** were closed after initial review [that's 96.9%] – to use the CJP's own words in its annual report: **"…because it determined that the superior court's handling and disposition of the complaints were adequate and that no further proceedings were warranted."** And, of the remaining five, four of them were closed without discipline following CJP's investigation; one closed when the SJO resigned with an agreement not to serve in a judicial capacity. o **2012** – 160 new complaints; CJP	

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			reviewed **161** (incl. one from prior year): and a whopping **152** were closed after initial review [that's 95% or 94.4% if you incl. case from prior year] – to use the CJP's own words in its annual report: **"…because it determined that the superior court's handling and disposition of the complaints were adequate and that no further proceedings were warranted."** And, of the remaining nine, three were closed without discipline following CJP's investigation; one was closed where SJO resigned and agreed not to serve in a judicial capacity; one led to a public admonishment, and four led to issuance of advisory letters. o I even found a CJP annual report from **2005**: 155 new complaints; CJP reviewed **154:** a whopping **153** were closed after initial review!! **This data appears to contradict any unsubstantiated statement that the current CRC Rule 10.703 is unnecessarily complicated and/or needs to be simplified. Indeed, PJs appear to be quite successfully following the procedures in the current rule.** This raises the age-old question: "If it ain't broke, why "fix" it?" SUGGESTION: If, indeed, there is any concern	

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			regarding either the need to clarify that the phrase in subdivision (i) pertaining to "a reprimand or warning", then by all means, let's clarify it by inserting the word "oral" in front of both "reprimand" and "warning." The proposed rule also simply makes the unsubstantiated statement that the existing rule somehow restricts presiding judges' discretion. This is simply an incorrect *opinion*. Indeed, it is my opinion that by collapsing the existing, orderly process (initial review, preliminary investigation if needed, or formal investigation as needed), the proposed rule will actually limit presiding judges' discretion and authority to treat and resolve the complaint at the level it deserves. SUGGESTION: To the extent there is any conception or belief that the existing rule somehow limits a presiding judges' discretion, then a simple added provision to explicitly state that the rule does no such thing would be sufficient to address any such concern. This would include removing any barriers to the discretion of a PJ to refer the matter to the CJP for investigation and report back to the PJ. Finally, there are indeed impacts from the proposed rule – proposed eliminations of certain provisions – that are not justified or adequately explained. The most glaring one has to do with the elimination of due process provisions in the	

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			existing rule regarding notifications to SJOs. The elimination – without any good reason – appears to be "overkill" under the guise of trying to "simplify" the rule. Why is elimination of such an important provision necessary????? It isn't, and should be restored. In sum, the alternative suggested revisions that were submitted by the CCCA are ones that I believe would adequately address any real concerns with the existing rule. Please take the time to reconsider the need for such a drastic revision to a rule that PJs have been quite successfully navigating for years. Minor changes, if any, will more than adequately address any true concerns.	
21-A	Rebecca Wightman Commissioner San Francisco, CA	N	I previously submitted some comments, along with indicating my support for the alternative proposed revision of CRC 10.703; however, I realized that perhaps some of my comments were not specific enough – i.e., I alluded to the problematic due process issues, but did not mention specific provisions. Please consider the following additional comments as an augmentation to my prior comments. **There is at least one very critical due process provision that was completely removed in the "streamlining" attempt for absolutely no stated good reason**:	The committee agreed that the provision requiring a presiding judge to advise the SJO that he or she may request an opportunity to respond to the intended final action should be retained, but added language in subdivision (j)(5) that the

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			• In the current rule, an SJO has the right to notice and an opportunity to respond to a court's intended final action – see (j)(2), with specific advice required in the notice – see (j)(4). o The "streamlined" proposed rule COMPLETELY ELIMINATES this due process procedure, and merely states that if the PJ is aware that the SJO knows of the complaint (and who knows how someone will keep track of that), then the PJ must give the SJO written notice of the final action taken—i.e., after it is a done deal. o If adopted, SJOs will no longer have an opportunity to address concerns regarding any proposed intended final action. With PJs rotating in counties every two years, there may very well be instances in which a discussion or an opportunity to respond to an intended final action (whether the action to be taken is informal or formal) can assist the PJ in reaching a better solution, or in making sure that similar cases in the past (when the person was not PJ) are dealt with similarly, for example. o Why was this provision taken out?? If there is no good reason, then it	response must be based on correction of an error of fact or law or both.

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			should at the very least be added back in to any revised rule. There are other changes that put an SJO at a disadvantage (particularly with regard to difficult pro pers who file multiple complaints), and may wind up causing problems and inconsistencies in treatment for SJOs down the road, including causing problems for CJP if the case is refiled with the CJP down the road: • The "streamlined" rule removes the mandate currently in (h)(3) [and also currently in (i)(5)(B)] that the PJ advise the SJO of the disposition when closing a complaint. This provision currently puts an SJO on notice that there may be a need to keep notes (or jot some down) should the litigant refile with the CJP and/or raise the same or similar complaints (as we all know that can happen) with the court down the road. o By removing the mandate, and making it "discretionary," the SJO may never know about a complaint, and may not therefore save any notes, etc., related to a litigant where the PJ decided not to advise. This change is not a "matter of semantics." o If SJOs are not consistently (mandatorily) given notice of the	

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			closure of a complaint, irrespective of at what stage of investigation it closes, not only may notes not get preserved, but recordings may get erased, and other evidence may not be preserved (including other witnesses, court staff that may move on) – which evidence and information may be very helpful to both SJOs and the CJP should a litigant decide to pursue the matter further by filing a complaint with the CJP. o By making it "discretionary" there will be a disparate effect throughout the state, with some SJOs and the CJP having a better record to work with, depending upon which county/PJs decide to give notice upon closing a complaint. • **The "streamlined" rule radically changes the nature of who initially not only investigates, but also who *adjudicates* <u>local</u> complaints against SJOs:** o In the current rule, subdivision (g)(2), trial courts/PJs can seek the assistance of the CJP if there is a conflict, or if, in exceptional circumstances, the PJ wants CJP to investigate and provide the results	

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			back to the trial court. o HOWEVER, by "collapsing" (g)(2) and (g)(3) into a new (g)(3), and adding the words "<u>and adjudicate</u>" – this changes the nature of the existing process tremendously – and actually *takes away* the PJs authority to adjudicate if they turn it over entirely to the CJP (and may very well lead to disparate results if some counties routinely turn over to the CJP to adjudicate while others keep their investigations and dispositions in house). ▪ The suggested alternative put forth by the CCCA was to simply remove the "exception circumstance" phrase, so that PJs can freely refer to CJP for investigation, **but there is absolutely no reason to allow CJP to adjudicate local complaints that would never arise to the level of CJP reporting.** In some respects, the proposed provision – without clarification or if not eliminated – may very well interfere with existing employer/employee processes in existence in the various counties. Bottom line: <u>Courts – and their respective HR</u>	

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			divisions – have for years operated under the existing process and procedures without any problems. (I previously sent in some statistics on this aspect of complaint resolution). The proposed "overhaul" is simply unnecessary and not just a matter of semantics. Please consider the alternative proposed revisions submitted by CCCA, or *at a minimum* put back the various due process notice provisions (both regarding final intended action, and closures), and take out the "adjudicate" provision of the new proposed rule. I do not support the rule as proposed for the reasons above. Thank you for considering these comments, which are my own, and not on behalf of any organization.	
25.	Cynthia A. Zuzga Commissioner Los Angeles, CA	N	Please maintain the current investigative model to afford all parties involved a complete and fair process. I urge the advisory committee to adopt the recommendations of the California Commissioners Court Association.	See response to comments by the California Court Commissioners Association.

PROPOSED RULE CHANGES BY CCCA

Rule 10.703. Subordinate judicial officers: complaints and notice requirements

(a) Intent

The procedures in this rule for processing complaints against subordinate judicial officers do not:

(1) Create a contract of employment;

(2) Change the existing employee-employer relationship between the subordinate judicial officer and the court; or

(3) Change the status of a subordinate judicial officer from an employee terminable at will to an employee terminable only for cause~~.~~; or

(4) Restrict the discretion of the presiding judge in taking appropriate informal or formal action.

(b) Definitions

Unless the context requires otherwise, the following definitions apply to this rule:

(1) "Subordinate judicial officer" means an attorney employed by a court to serve as a commissioner, ~~or~~ referee, or hearing officer, whether the attorney is acting as a commissioner, referee, hearing officer, or temporary judge. The term does not include any other attorney acting as a temporary judge.

(2)–(3) ***

(c) Application

(1) ***

(2) If a complaint against a subordinate judicial officer as described in (f) does not allege conduct that would be within the jurisdiction of the commission, the ~~court must process the complaint following~~ local procedures adopted under rule 10.603(c)(4)(C) apply. The local process may include any procedures from this rule for the court's adjudication of the complaint other than the provisions for referring the matter to the commission under (g) or giving notice of commission review under (*l*)(2)(B).

(3) ***

(d)–(e) *

(f) Written complaints to presiding judge

(1) A complaint about the conduct of a subordinate judicial officer must be in writing and must be submitted to the presiding judge.

(2) ***

(3) The presiding judge has discretion to investigate complaints that are anonymous.

(4) The presiding judge must give written notice of receipt of the complaint to the complainant, if known.

(g) Initial review of the complaint

(1) The presiding judge must review each complaint and determine if the complaint:

(A) May be closed after initial review;

(B) Needs preliminary investigation; or

(C) Requires formal investigation.

(2) A presiding judge may request that the commission investigate and adjudicate the complaint if a local conflict of interest or disqualification prevents the court from acting on the complaint.

(3) In ~~exceptional circumstances~~ his or her discretion, a presiding judge may request the commission to investigate a complaint on behalf of the court and provide the results of the investigation to the court for action.

(4) The court must maintain a file on every complaint received, containing the following:

(A)–(D) ***

(h) Closing a complaint after initial review

(1) After a preliminary review the presiding judge may close without further action any complaint that:

(A)–(B) ***

(2) If the presiding judge decides to close the complaint after initial review, t~~T~~he presiding judge must notify the complainant, if known, in writing of the decision to close the complaint. The notice must include the information required under (*l*).

(3) The presiding judge must advise the subordinate judicial officer in writing of the ~~disposition~~ decision to close the complaint.

(i) Complaints requiring preliminary investigation

(1)–(2) ***

(3) The presiding judge may give the subordinate judicial officer a copy of the complaint or a summary of its allegations and allow him or her an opportunity to respond to the allegations. The presiding judge must give the subordinate judicial officer a copy of the complaint or a summary of its allegations and allow the subordinate judicial officer an opportunity to respond to the allegations before the presiding judge takes appropriate informal action as described in (i)(4)(B).

(4) After completing the preliminary investigation, the presiding judge must, in his or her discretion:

(A) Terminate the investigation and close action on the complaint if the presiding judge finds the complaint lacks merit; or

(B) Terminate the investigation and close action on the complaint by taking appropriate informal action, which may include an oral reprimand or oral warning to the subordinate judicial officer, if the presiding judge finds a basis for taking informal action; or

(C) Proceed with a formal investigation under (j) if the presiding judge finds a basis for proceeding further.

(5) If the presiding judge terminates the investigation and closes action on the complaint, the presiding judge must:

(A) Notify the complainant, if known, in writing of the decision to close the investigation on the complaint. The notice must include the information required under (*l*); and

(B) Advise the subordinate judicial officer in writing of the disposition.

(j) Complaints requiring formal investigation

(1) If after a preliminary investigation the presiding judge finds a basis for proceeding with the investigation, the presiding judge must conduct a formal investigation appropriate to the nature of the complaint.

(A) The investigation may include interviews of witnesses and a review of court records.

(B) As soon as practicable, the presiding judge must give the subordinate judicial officer a copy of the complaint or a summary of its allegations and allow the subordinate judicial officer an opportunity to respond to the allegations.

(2) Within 10 days after the completion of the investigation or as soon thereafter as is reasonably possible, the presiding judge must give the subordinate judicial officer the following in writing:

(A) Notice of the intended final action on the complaint; and

(B) The facts and other information forming the basis for the proposed action and the source of the facts and information, sufficient to allow a meaningful response to the allegations.

(3) Final action on the complaint may include, but is not limited to:

(A)–(G) ***

(4) The notice of the intended final action on the complaint in (j)(2)(A) must include the following advice:

(A) The subordinate judicial officer may request an opportunity to respond within 10 days after service of the notice; and

(B) If the subordinate judicial officer does not request an opportunity to respond within 10 days after service of the notice, the proposed action will become final.

(5) If the subordinate judicial officer requests an opportunity to respond, the presiding judge should allow the subordinate judicial officer an opportunity to respond to the notice of the intended final action, either orally or in writing as specified by the presiding judge, in accordance with local rules.

(6) Within 10 days after the subordinate judicial officer has responded, the presiding judge must give the subordinate judicial officer and the complainant, if known, written notice of the final action taken on the complaint. The notice to the complainant must include the information required under (*l*).

(7) If the subordinate judicial officer does not request or has not been given an opportunity to respond, the presiding judge must promptly give written notice of the final action to the complainant, if known. The notice must include the information required under (*l*).

(k) Notice to the Commission on Judicial Performance

(1) If a court disciplines a subordinate judicial officer by written reprimand under (i)(4)(B) or (j)(3)(C) or (D) , suspension, or ~~removal~~ termination for conduct that, if alleged against a judge, would be within the jurisdiction of the commission under article VI, section 18 of the California Constitution, the presiding judge must promptly forward to the commission a copy of the portions of the court file that reasonably reflect the basis of the action taken by the court, including the complaint or allegations of misconduct and the subordinate judicial officer's response. This provision is applicable even when the disciplinary action does not result from a written complaint.

(2) If a subordinate judicial officer resigns either (A) while a preliminary or formal investigation under (i) or (j) is pending concerning conduct that, if alleged against a judge, would be within the jurisdiction of the commission under article VI, section 18 of the California Constitution, or (B) under circumstances that would lead a reasonable person to conclude that the resignation was due, at least in part, to a complaint or allegation of misconduct that, if alleged against a judge, would be within the jurisdiction of the commission under article VI, section 18 of the California Constitution, then the presiding judge must, within 15 days of the resignation or as soon thereafter as is reasonably possible, forward to the commission

the entire court file on any pending complaint about or allegation of misconduct committed by the subordinate judicial officer.

(3) ***

(*l*) Notice of final court action

(1) When the court has completed its action on a complaint, the presiding judge must promptly notify the complainant, if known, and the subordinate judicial officer of the final court action.

(2) ***

RUPRO ACTION REQUEST FORM

RUPRO Meeting: November 5, 2014

RUPRO action requested:

Recommend JC approval (has circulated for comment)

Title: Criminal Justice Realignment: Imposition of Mandatory Supervision	Rules: 4.411, 4.411.5, and 4.415 Standards: Forms:
Committee or other entity submitting the proposal: Criminal Law Advisory Committee	Staff contact: Arturo Castro

If requesting July 1 or out of cycle, explain:

Additional Information for RUPRO: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary, including any substantial argument in opposition and any expected individual or organization likely to support or oppose the proposal.)

The final report will be modified to include a response to the comment from the JRWG that was sought and received after the public comment period concluded.

JUDICIAL COUNCIL OF CALIFORNIA

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

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: December 12, 2014

Title
Criminal Justice Realignment: Imposition of Mandatory Supervision

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 4.411 and 4.411.5; adopt rule 4.415

Recommended by
Criminal Law Advisory Committee
Hon. Tricia A. Bigelow, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2015

Date of Report
October 28, 2014

Contact
Arturo Castro, Supervising Attorney, 415-865-7702, arturo.castro@jud.ca.gov

Executive Summary

The Criminal Law Advisory Committee recommends amendments to rules 4.411 and 4.411.5 of the California Rules of Court and adoption of a new rule to govern the imposition of mandatory supervision under Penal Code section 1170(h)(5), including criteria for court consideration and the contents and requirements for related probation reports, as required by recent legislation that mandates adoption of these rules by January 1, 2015.

Recommendation

The Criminal Law Advisory Committee recommends that the Judicial Council, effective January 1, 2015:

1. Adopt rule 4.415 of the California Rules of Court to govern the imposition of mandatory supervision under Penal Code section 1170(h)(5), including criteria for court consideration when determining the length and conditions of supervision and whether to deny supervision in the interests of justice;

2. Amend rule 4.411 of the California Rules of Court to apply existing requirements for presentence probation reports to cases in which the defendant is eligible for a term of imprisonment in county jail under Penal Code section 1170(h); and

3. Amend rule 4.411.5 of the California Rules of Court to require presentence probation reports to include recommendations regarding the appropriate term of imprisonment in county jail under Penal Code section 1170(h), the denial of mandatory supervision in the interests of justice, and the length and conditions of mandatory supervision.

The text of the new and amended rules is attached at pages 7–12.

Previous Council Action

Rule 4.411 was originally adopted as rule 418, effective July 1, 1977, and rule 4.411.5 was originally adopted as rule 419, effective July 1, 1981. Both rules were most recently amended effective January 1, 2007. This is the first time they are being amended to reflect the advent of criminal justice realignment.

Rationale for Recommendation

Criminal justice realignment implemented broad changes to felony sentencing laws, including replacing prison sentences with county jail sentences for certain felonies and authorizing courts to impose a period of mandatory supervision upon release from county jail. Recent realignment-related legislation[1] amended several statutory provisions that govern the imposition of mandatory supervision and require the Judicial Council to adopt rules of court.

New rule 4.415

Penal Code section 1170(h)(5)(A) was amended, effective January 1, 2015, to require courts to impose mandatory supervision for all felony terms of imprisonment in county jail unless the court finds, in the interests of justice, that mandatory supervision is not appropriate in a particular case. Penal Code section 1170.3(a) was also amended to require the Judicial Council, effective January 1, 2015, to adopt rules of court to prescribe criteria for the court to consider when deciding whether to deny a period of mandatory supervision "in the interests of justice" under Penal Code section 1170(h)(5)(A) and when determining the appropriate period and conditions of mandatory supervision.

In response, the committee recommends adoption of rule 4.415. The new rule is designed to emphasize the new statutory presumption in favor of the imposition of mandatory supervision, prescribe the requisite criteria for court consideration, and require courts to state reasons for a denial of a period of mandatory supervision in the interests of justice. An advisory committee comment is included to explain the statutory bases for specific provisions.

[1] Assem. Bill 1468 (Comm. on Budget); Stats. 2014, ch. 26.

Content of presentence probation reports

Two existing rules govern the use and contents of presentence probation reports. Rule 4.411 prescribes the purpose and requirements for use and rule 4.411.5 establishes the requisite content and sequential presentation of the information contained in the reports. Penal Code section 1170.3(b) was amended to require the Judicial Council to adopt rules of court to standardize the content and sequential presentation of information regarding the imposition of mandatory supervision in presentence probation reports submitted to the court.

In response, the committee recommends several amendments to rule 4.411 that are designed to apply existing report requirements to cases in which the defendant is eligible for a term of imprisonment under Penal Code section 1170(h). The committee also recommends amendments to rule 4.411.5 to ensure that the reports include recommendations regarding the appropriate term of imprisonment, denials of mandatory supervision in the interests of justice, and the length and conditions of mandatory supervision. To enhance the information and recommendations contained in the reports, the amendments also require reports to include information from any available risk/needs assessments[2] conducted by the probation department.

Comments, Alternatives Considered, and Policy Implications

This proposal circulated for public comment on an expedited basis from August 22, 2014, to September 19, 2014, yielding a total of 14 comments. Of those, 2 agreed with the proposal, including the Superior Court of Los Angeles County; 11 agreed with the proposal if modified, including the American Civil Liberties Union, the California District Attorneys Association, California Public Defenders Association, Chief Probation Officers of California, California Department of Justice (DOJ), and the Superior Courts of Orange and San Diego Counties; and 1 disagreed with the proposal.

A chart with all comments received and committee responses is attached at pages 13–58. Attachments to specific comments made by DOJ are also provided after the comment chart.

Notable changes in response to comments

The committee revised the proposal in response to the following notable comments:

- ***Order of considerations.*** As originally circulated, the proposal listed factors related to the length and conditions of supervision before the factors related to denials of supervision in the interests of justice. To more accurately reflect the typical order of considerations during sentencing, the committee switched the order of subdivisions (a)(9)(C) and (a)(9)(D) of rule 4.411.5 (related to the content of probation reports) and subdivisions (b) and (c) of rule 4.415 (related to the factors for courts to consider during sentencing) so that the factors related to the denial of supervision appear *before* those related to the length and conditions of supervision.

[2] The Criminal Law Advisory Committee is separately developing rules of court and standards of judicial administration to provide guidance regarding the use of risk/needs assessments by courts at sentencing.

- ***Factors for denying supervision were overly broad.*** As originally circulated, the factors related to decisions to deny a period of mandatory supervision in the interests of justice included several broad considerations, including any factor "reasonably related to the court's determination." To address concerns that the factors were overly broad and would frustrate the intent of the statutory presumption *against* denials of supervision, the committee amended rule 4.415 to:

    - Emphasize the limited scope of the statutory authority to deny supervision by adding the following sentence to subdivision (a): "Because section 1170(h)(5)(A) establishes a statutory presumption in favor of the imposition of a period of mandatory supervision in all applicable cases, courts should limit the exercise of discretion to deny a period of mandatory supervision";

    - Narrow the list of criteria in subdivision (b) for denying supervision in the interests of justice by deleting the following two factors: "The likelihood that the defendant will be a danger to others if not imprisoned" and "Any other factor reasonably related to the court's determination that mandatory supervision is not appropriate in the interests of justice"; and

    - Replace factors related to the nature of the case and the defendant's suitability for supervision with the following factor under subdivision (b)(4): "Whether the nature, seriousness, or circumstances of the case or the defendant's past performance on supervision substantially outweigh the benefits of supervision in promoting public safety and the defendant's successful reentry into the community upon release from custody." The new factor is designed to underscore the importance of supervision in the successful reintegration of defendants into the community upon release from custody by encouraging courts to limit denials of supervision only to circumstances that substantially outweigh the benefits of supervision.

- ***Waivers of reports.*** In response to concerns about the costs and burdens of requiring presentence probation reports in all cases eligible for terms of imprisonment in county jail under section 1170(h), the committee amended rule 4.411(a) to clarify that courts remain authorized to waive preparation of reports under appropriate circumstances.

- ***Additional factors.*** In recognition that some defendants may *lack* the need for supervision upon release from custody, the committee added the following factor under rule 4.415(b)(3) for courts to consider when deciding whether to deny supervision: "Specific factors related to the defendant that indicate a lack of need for treatment or supervision upon release from custody." To encourage courts to consider the full impacts of incarceration when deciding the length and conditions of supervision, the committee

also added the following factor to rule 4.415(c)(9): "The likely effect of extended imprisonment on the defendant and any dependents."

The committee also made several nonsubstantive changes, including amendments to more accurately track the statutory language of Penal Code section 1170(h)(5), add cross-references to other rule provisions, and clarify the purpose of factors related to restitution and custody credits.

Notable alternative declined

Although rule 4.412 generally exempts courts from stating reasons for sentencing decisions when the parties have negotiated a plea agreement,[3] rule 4.415(d) would require courts to state reasons for denying mandatory supervision "[n]otwithstanding rule 4.412(a)." A few commentators raised concerns that the requirement to state reasons even though the parties have negotiated a plea agreement may result in improper judicial plea bargaining and inadvertently frustrate the plea bargaining process.

The committee considered but declined to delete the requirement. Plea agreements do not divest courts of inherent sentencing discretion. Courts must ensure that all sentences are lawful and all plea agreements are subject to court approval before imposition. Under Penal Code section 1170(h)(5)(A), denials of mandatory supervision are prohibited unless "the court finds that, in the interests of justice, it is not appropriate *in a particular case*." (Emphasis added.) Accordingly, lawful denials of mandatory supervision require the exercise of judicial discretion on a case-by-case basis, even when the parties have agreed to the sentence. A statement of reasons is necessary to demonstrate the lawfulness of the sentence, memorialize the basis for the exercise of judicial discretion, and aid appellate review.

Implementation Requirements, Costs, and Operational Impacts

No significant costs or operational impacts are expected. As noted above, courts will retain authority to waive presentence probation reports when appropriate. The proposal is designed to enable courts to fold the new requirements into existing report practices, including waiver protocols. Implementation requirements are expected to be limited to judicial and court staff training.

Attachments

1. Cal. Rules of Court, rules 4.411, 4.411.5, and 4.415, at pages 7–12
2. Comment chart, at pages 13–58
3. Attachment A: *Attachment A to Comments on SP14-08*, attached as an exhibit to the comments from DOJ

[3] Rule 4.412(a) states: "It is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting has not expressed an objection to it. The agreement and lack of objection must be recited on the record. This section does not authorize a sentence that is not otherwise authorized by law."

4. Attachment B: *Attachment B to Comments on SP14-08*, attached as an exhibit to the comments from DOJ

Rules 4.411 and 4.411.5 of the California Rules of Court are amended, and rule 4.415 is adopted, effective January 1, 2015, to read:

Rule 4.411. Presentence investigations and reports

(a) Eligible defendant

If the defendant is eligible for probation or a term of imprisonment in county jail under section 1170(h), the court must refer the matter to the probation officer for a presentence investigation and report. ~~Waivers of~~ Although courts may waive the presentence report, waivers should not be accepted except in unusual circumstances.

(b) Ineligible defendant

Even if the defendant is not eligible for probation or a term of imprisonment in county jail under section 1170(h), the court should refer the matter to the probation officer for a presentence investigation and report.

(c) Supplemental reports

The court must order a supplemental probation officer's report in preparation for sentencing proceedings that occur a significant period of time after the original report was prepared.

(d) Purpose of presentence investigation report

Probation officers' reports are used by judges in determining the appropriate term of imprisonment in ~~length of a~~ prison or county jail ~~sentence~~ under section 1170(h) and by the Department of Corrections and Rehabilitation, Division of Adult Operations in deciding on the type of facility and program in which to place a defendant. ~~,~~ The reports ~~and~~ are also used by courts in deciding whether probation is appropriate, whether a period of mandatory supervision should be denied in the interests of justice under section 1170(h)(5)(A), and the appropriate length and conditions of probation and mandatory supervision. Section 1203c requires a probation officer's report on every person sentenced to prison; ordering the report before sentencing in probation-ineligible cases will help ensure a well-prepared report.

Advisory Committee Comment

Section 1203 requires a presentence report in every felony case in which the defendant is eligible for probation. Subdivision (a) requires a presentence report in every felony case in which the defendant is eligible for a term of imprisonment in county jail under section 1170(h). Because such a probation investigation and report are valuable to the judge and to the jail and prison authorities, waivers of the report and requests for immediate sentencing are discouraged, even when the defendant and counsel have agreed to a prison sentence or a term of imprisonment in county jail under section 1170(h).

Notwithstanding a defendant's statutory ineligibility for probation or term of imprisonment in county jail under section 1170(h), a presentence investigation and report should be ordered to assist the court in deciding the appropriate sentence and to facilitate compliance with section 1203c.

This rule does not prohibit pre-conviction, pre-plea reports as authorized by section 1203.7.

Subdivision (c) is based on case law that generally requires a supplemental report if the defendant is to be resentenced a significant time after the original sentencing, as, for example, after a remand by an appellate court, or after the apprehension of a defendant who failed to appear at sentencing. The rule is not intended to expand on the requirements of those cases.

The rule does not require a new investigation and report if a recent report is available and can be incorporated by reference and there is no indication of changed circumstances. This is particularly true if a report is needed only for the Department of Corrections and Rehabilitation because the defendant has waived a report and agreed to a prison sentence. If a full report was prepared in another case in the same or another jurisdiction within the ~~preceeding~~ preceding six months, during which time the defendant was in custody, and that report is available to the Department of Corrections and Rehabilitation, it is unlikely that a new investigation is needed.

Rule 4.411.5. Probation officer's presentence investigation report

(a) Contents

A probation officer's presentence investigation report in a felony case must include at least the following:

(1)–(7) * * *

(8) Any available, reliable risk/needs assessment information.

~~(8)~~(9) An evaluation of factors relating to disposition. This section must include:

(A) A reasoned discussion of the defendant's suitability and eligibility for probation, and, if probation is recommended, a proposed plan including recommendations for the conditions of probation and any special need for supervision;

(B) If a prison sentence or term of imprisonment in county jail under section 1170(h) is recommended or is likely to be imposed, a reasoned discussion of aggravating and mitigating factors affecting the sentence length; ~~and~~

(C) If denial of a period of mandatory supervision in the interests of justice is recommended, a reasoned discussion of the factors prescribed by rule 4.415(b);

(D) If a term of imprisonment in county jail under section 1170(h) is recommended, a reasoned discussion of the defendant's suitability for specific terms and length of period of mandatory supervision, including the factors prescribed by rule 4.415(c); and

~~(C)~~(E) A reasoned discussion of the defendant's ability to make restitution, pay any fine or penalty that may be recommended, or satisfy any special conditions of probation that are proposed.

Discussions of factors (A) through (D) ~~affecting suitability for probation and affecting the sentence length~~ must refer to any sentencing rule directly relevant to the facts of the case, but no rule may be cited without a reasoned discussion of its relevance and relative importance.

~~(9)~~(10) The probation officer's recommendation. When requested by the sentencing judge or by standing instructions to the probation department, the report must include recommendations concerning the length of any prison or county jail term under section 1170(h) that may be imposed, including the base term, the imposition of concurrent or consecutive sentences, and the imposition or striking of the additional terms for enhancements charged and found.

~~(10)~~(11) Detailed information on presentence time spent by the defendant in custody, including the beginning and ending dates of the period or periods of custody; the existence of any other sentences imposed on the defendant during the period of custody; the amount of good behavior, work, or participation credit to which the defendant is entitled; and whether the sheriff or other officer holding custody, the prosecution, or the defense wishes that a

hearing be held for the purposes of denying good behavior, work, or participation credit.

~~(11)~~(12) A statement of mandatory and recommended restitution, restitution fines, other fines, and costs to be assessed against the defendant, including chargeable probation services and attorney fees under section 987.8 when appropriate, findings concerning the defendant's ability to pay, and a recommendation whether any restitution order should become a judgment under section 1203(j) if unpaid.

(b)–(c) *** * ***

Rule 4.415. Criteria affecting the imposition of mandatory supervision

(a) Presumption

When imposing a term of imprisonment in county jail under section 1170(h), the court must suspend execution of a concluding portion of the term to be served as a period of mandatory supervision unless the court finds, in the interests of justice, that mandatory supervision is not appropriate in a particular case. Because section 1170(h)(5)(A) establishes a statutory presumption in favor of the imposition of a period of mandatory supervision in all applicable cases, courts should limit the exercise of discretion to deny a period of mandatory supervision.

(b) Criteria for denying mandatory supervision in the interests of justice

In determining that mandatory supervision is not appropriate in the interests of justice under section 1170(h)(5)(A), the court's determination must be based on factors that are specific to a particular case or defendant. Factors the court may consider include:

(1) Consideration of the balance of custody exposure available after imposition of presentence custody credits;

(2) The defendant's present status on probation, mandatory supervision, postrelease community supervision, or parole;

(3) Specific factors related to the defendant that indicate a lack of need for treatment or supervision upon release from custody; and

(4) Whether the nature, seriousness, or circumstances of the case or the defendant's past performance on supervision substantially outweigh the

benefits of supervision in promoting public safety and the defendant's successful reentry into the community upon release from custody.

(c) Criteria affecting conditions and length of mandatory supervision

In exercising discretion to select the appropriate period and conditions of mandatory supervision, factors the court may consider include:

(1) Availability of appropriate community corrections programs;

(2) Victim restitution, including any conditions or period of supervision necessary to promote the collection of any court-ordered restitution;

(3) Consideration of length and conditions of supervision to promote the successful reintegration of the defendant into the community upon release from custody;

(4) Public safety, including protection of any victims and witnesses;

(5) Past performance and present status on probation, mandatory supervision, postrelease community supervision, and parole;

(6) The balance of custody exposure after imposition of presentence custody credits;

(7) Consideration of the statutory accrual of post-sentence custody credits for mandatory supervision under section 1170(h)(5)(B) and sentences served in county jail under section 4019(a)(6);

(8) The defendant's specific needs and risk factors identified by a validated risk/needs assessment, if available; and

(9) The likely effect of extended imprisonment on the defendant and any dependents.

(d) Statement of reasons for denial of mandatory supervision

Notwithstanding rule 4.412(a), when a court denies a period of mandatory supervision in the interests of justice, the court must state the reasons for the denial on the record.

Advisory Committee Comment

Penal Code section 1170.3 requires the Judicial Council to adopt rules of court that prescribe criteria for the consideration of the court at the time of sentencing regarding the court's decision to "[d]eny a period of mandatory supervision in the interests of justice under paragraph (5) of subdivision (h) of Section 1170 or determine the appropriate period of and conditions of mandatory supervision."

Subdivision (a). Penal Code section 1170(h)(5)(A): "Unless the court finds, in the interests of justice, that it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2) of this subdivision, shall suspend execution of a concluding portion of the term for a period selected at the court's discretion."

Subdivisions (b)(3), (b)(4), and (c)(3). The Legislature has declared that "[s]trategies supporting reentering offenders through practices and programs, such as standardized risk and needs assessments, transitional community housing, treatment, medical and mental health services, and employment, have been demonstrated to significantly reduce recidivism among offenders in other states." (Pen. Code, § 17.7(a).)

Subdivision (c)(7). Under Penal Code section 1170(h)(5)(B), defendants serving a period of mandatory supervision are entitled to day-for-day credits: "During the period when the defendant is under such supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court." In contrast, defendants serving terms of imprisonment in county jails under Penal Code section 1170(h) are entitled to conduct credits under Penal Code section 4019(a)(6).

SP14–08

Criminal Justice Realignment: Imposition of Mandatory Supervision *(amend Cal. Rules of Court, rules 4.411, 4.411.5; adopt rule 4.415)*

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	American Civil Liberties Union by Micaela Davis, Criminal Justice and Drug Policy Attorney	AM	The ACLU of California submits the below comments on the proposed rules of court to govern the imposition of mandatory supervision under Penal Code section 1170(h)(5). In particular, we offer comment that the proposed criteria for denying and granting mandatory supervision are overly broad in contravention of the legislative intent that a split sentence is presumed in all but the narrowest of circumstances. We urge the Judicial Council to narrow the criteria a court may consider when making split sentencing determinations so that a grant of mandatory supervision is truly the rule rather than the exception. **Background** Realignment legislation added the option of "split sentencing" for non-violent, non-serious felony offenders sentenced at the county level. Under Penal Code section 1170(h)(5), the court may order that a concluding portion of an eligible offender's sentence be served under the supervision of the probation department in a period of "mandatory supervision," instead of serving the entire sentence in jail. Despite split sentencing's dual benefits of reducing lengthy jail stays and creating a more structured reentry into society following incarceration, during the first few years of Realignment the use of split sentencing has varied widely around the state and remained at a statewide low of 28% as of the end of 2013.	

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

	Commentator	Position	Comment	Committee Response
			Counties such as Contra Costa and Riverside have been using split sentencing at rates of 90% and 75% respectively, while counties such as Los Angeles have remained at a low of about 6%. Recognizing that split sentencing was being underutilized to the detriment of public safety and recidivism reduction, the legislature added a provision to the Penal Code through the 2014-15 Budget providing that "[u]nless the court finds that, in the interests of justice, it is not appropriate in a particular case, the court, when imposing a sentence pursuant to paragraph (1) or (2) of [Penal Code 1170(h)], shall suspend execution of a concluding portion of the term for a period selected at the court's discretion." Penal Code § 1170(h)(5)(A). A summary of the legislation explained that "[i]ncreased split sentences will result in additional offenders placed under probation supervision upon release from jail, which helps to improve successful reintegration into the community through access to rehabilitative programming and supportive services." (Summary of the public safety changes in the 2014-15 California State Budget, *available at* http://www.ebudget.ca.gov/2014-15/pdf/Enacted/BudgetSummary/PublicSafety.pdf, p. 34.) • **The Proposed Criteria for Denying Mandatory Supervision in the 'Interests in of Justice' are Overbroad and Contrary to**	• To more accurately reflect the typical order of considerations during sentencing, the committee switched the order of subdivisions (a)(9)(C) and (a)(9)(D) of

	Commentator	Position	Comment	Committee Response
			Legislative Intent Every person sentenced to jail leaves jail at some point. The question is not whether that person returns to the community, but how they return. In many cases, the structured reentry provided by a period of mandatory supervision can help provide formerly-incarcerated persons the programming and services necessary to make a successful transition back to the community. This successful transition is important not only with respect to the individual, but is also important to improve public health and safety outcomes. The legislature's intent was to increase the use of mandatory supervision as a way to aid successful reintegration in the community and reduce recidivism. The legislation therefore created a presumption that an 1170(h) defendant would receive a split sentence unless the "interests of justice" demanded a denial of that sentence. The proposed rules outlining the criteria for denying supervision in the interests of justice deviate widely from this legislative intent and mandate. The rules set out such a broad array of factors for the court to consider in denying mandatory supervision that the exceptions threaten to swallow the rule. We urge the Judicial Council to revise and narrow these criteria to honor the presumption set forth in the legislation.	rule 4.411.5 (related to the content of probation reports) and subdivisions (b) and (c) of rule 4.415 (related to the factors for courts to consider during sentencing) so that the factors related to the denial of supervision appear *before* those related to the length and conditions of supervision. In addition, although the committee declined to modify the proposal precisely as suggested, to address concerns that the factors related to the court's decision to deny a period of mandatory supervision in the interests of justice are too broad and would frustrate the intent of the statutory presumption *against* denials of supervision, the committee modified proposed rule 4.415 in several ways. First, to emphasize the limited scope of the statutory authority to deny mandatory supervision, the committee added the following sentence to subdivision (a): "Because section 1170(h)(5)(A) establishes a statutory presumption in favor of the imposition of a period of mandatory supervision in all applicable cases, courts should limit the exercise of discretion to deny a period of mandatory supervision." Second, to narrow the list of criteria for denying supervision under subdivision (b), the committee deleted the following

	Commentator	Position	Comment	Committee Response
			Proposed criteria (1) sets forth that the court may consider the "nature, seriousness, and circumstances of the crime" in denying mandatory supervision in the interests of justice. Proposed criteria (2) states that the court may consider the "likelihood that the defendant will be a danger to others if not imprisoned." These criteria overlook the precise point of mandatory supervision. The bottom line is that a defendant who has committed a crime the court deems serious due to its nature or circumstances, or who the court considers a danger, will get out of jail at some point. The question is whether the defendant will be released into the supervision of the probation department or released straight out of jail. Although the structured transition and monitoring provided by mandatory supervision can be a more sound way to mitigate potential danger, criteria (1) and (2) send the contrary message that if a defendant is deemed dangerous it is safer to release that person with no supervision at all. These criteria should be stricken from the list of permissible considerations for denial. Proposed criteria (3) permits the court to consider the "defendant's lack of suitability and amenability to treatment or supervision." This criteria is vague and appears counter to the point of the legislation. Importantly, it is not clear upon what evidence or by what standard the court is to base this determination. Would this judgment be made on the basis of whether the	two broad factors: "The likelihood that the defendant will be a danger to others if not imprisoned" and "Any other factor reasonably related to the court's determination that mandatory supervision is not appropriate in the interests of justice." Third, to underscore the importance of supervision in the successful reintegration of defendants into the community upon release from custody, the committee replaced the factors related to the nature of the case and the defendant's suitability for supervision with the following under subdivision (b)(4), which encourages courts to consider whether those factors substantially outweigh the benefits of supervision: "Whether the nature, seriousness, or circumstances of the case or the defendant's past performance on supervision substantially outweigh the benefits of supervision in promoting public safety and the defendant's successful reentry into the community upon release from custody." Lastly, in recognition that some defendants may *lack* the need for supervision upon release from custody, the committee added the following factor under subdivision (b)(3): "Specific factors related to the defendant that indicate a lack of need for treatment or supervision

	Commentator	Position	Comment	Committee Response
			defendant had failed on probation supervision in the past? If so, in what circumstances would a past failure rise to the level of not being suitable or amendable to treatment or supervision at all? Finally, what is it that would make a defendant not suitable for treatment or supervision, but instead suitable for release with no supervision? It is, of course, the case that not every defendant needs supervision and treatment. But that is a distinct consideration from a "lack of suitability or amenability" as proposed here. Criteria (3) should also be stricken from the list of permissible considerations for denial. Proposed criteria (4) permits the court to consider "the balance of custody exposure available after imposition of custody credit." Although it is expected that a court will take potential lengths of custody time into account in its ultimate determination of the sentence, this is not an appropriate criteria for denying supervision in the interests of justice. At the time the legislature mandated the presumption of the split sentence, it was fully aware both that an 1170(h) defendant receives a default 16-month, two-year or three-year base term and that a locally sentenced defendant receives half time custody credit. The legislature did not set forth any sort of exemption where, for instance, a defendant sentenced to the lower end of the triad would be ineligible for mandatory supervision due to having a shorter length of time in custody. Instead it mandated the presumption that every defendant sentenced	upon release from custody." The committee declined to delete the factor related to consideration of the balance of custody exposure available after imposition of presentence custody credits. The committee believes that it would be prudent for courts to consider whether sufficient custody time remains to effectively suspend and impose supervision terms, including, for example, cases in which the defendant's presentence custody credits nearly satisfy the full term of imprisonment in county jail.

	Commentator	Position	Comment	Committee Response
			under this provision would be given a split except in narrow circumstances. Therefore, although it is expected that the court will take custody time into account in determining the ultimate sentence, it is inappropriate as a criteria for denial in the interests of justice. **The Proposed Criteria for Determining Length and Conditions of Mandatory Supervision Are Overbroad** • Proposed criteria (1) for the court's consideration in determining length and conditions of supervision is the "availability of appropriate community corrections programs." Although it is important that the court be informed about types of programming if it is to be engaged in determining mandatory supervision sentences, it is equally important that all county policy-makers and criminal justice officials are involved in ensuring proper resources are made available for such programs and services. Counties need to plan appropriately and redirect resources from incarceration to supervision. In addition, it is important to note that there is a time lag between time of sentencing and release onto mandatory supervision, which could result in inaccurate determinations of availability. Therefore a defendant's risks and needs should be the ultimate	• The committee declined to delete this factor because the availability of treatment and supervision services at the time of sentencing is an important practical consideration when determining the terms and length of supervision. In addition, risk/needs assessment information is not readily available to courts in all counties.

	Commentator	Position	Comment	Committee Response
			determinant of length and conditions of supervision. • Proposed criteria (2) for determining length and conditions of supervision states simply "victim restitution." First, this criteria is vague. What is it about restitution that is to be considered? Does a certain amount of restitution trigger either a shorter or longer period of supervision? Are there certain conditions of supervision more appropriate than others for a defendant who owes restitution? Second, even were the criteria more descriptive, just as the court can't condition probation on a defendant's ability to pay, it is similarly inappropriate to condition mandatory supervision on a certain amount of money owed or a defendant's ability to pay. This criteria should therefore be stricken. • Proposed criteria (6) states that the court may take into consideration the "defendant's suitability for treatment and supervision," when determining length and conditions of supervision. As stated previously, the concept of "suitability" is vague. The guidelines do not list what evidence the court is to consider in determining suitability nor what standard by which it is to make the determination. Nor is it clear how this	• The committee declined to delete this factor because the collection of victim restitution is an important consideration when deciding the length and terms of supervision. To clarify the purpose of the factor, however, the committee revised rule 4.415(c)(2) as follows: "Victim restitution, including any conditions or period of supervision necessary to promote the collection of any court-ordered restitution." • The committee deleted this criteria as unnecessary and duplicative of the factor under subdivision (c)(5): "Past performance and present status on probation, mandatory supervision, postrelease community supervision, and parole."

	Commentator	Position	Comment	Committee Response
			would influence length or conditions. It makes more sense for the court to take the risks and needs of the defendant into account in determining length and conditions of supervision, which is itself a separate proposed criteria. The criteria of suitability is vague and unnecessary given the separate criteria focusing on risk and needs, and should therefore be stricken. • Proposed criteria (7) and (8) concern consideration of the balance of custody exposure after credits and consideration of the difference between statutory accrual of custody credits for mandatory supervision and those for jail time. Although it is expected that a court will take into account the lengths of sentences under various options when making an ultimate sentencing determination, as discussed previously, it is important the court and the guidelines take into account that the legislature was aware of base sentences and custody credits for 1170(h) defendants at the time it mandated presumption of a split sentence. * * * A focus on community supervision rather than incarceration will help improve successful reintegration for the formerly-incarcerated and	• Consideration of the balance of custody time available to suspend and the accrual of post-sentence custody credits are appropriate considerations when deciding the length and terms of mandatory supervision.

	Commentator	Position	Comment	Committee Response
			increase positive public health and safety outcomes. We urge the Judicial Council to revise the proposed rules concerning mandatory supervision so that the exceptions do not swallow the rule. Instead the criteria should honor the legislative intent that a split sentence with some term of supervision is presumed absent narrow circumstances.	
2.	California District Attorneys Association by Mark Zahner, CEO	AM	The proposed rules of court go a long way in addressing the issue of presumptive mandatory supervision as required by newly amended Penal Code 1170.3; however, there a few modifications that could make them stronger as a whole. • First, replace all references to "a sentence in county jail" with the language used in Penal Code section 1170(h), "a term of imprisonment in county jail." This makes it clearer that a sentence imposed pursuant to Penal Code section 1170(h) is indeed a prison term, including any portion of mandatory supervision. This will ensure there is no confusion for anyone interpreting and applying these rules, as a sentence in county jail can also be ordered when a defendant is not granted probation on a misdemeanor and instead is ordered to complete a term of custody in county jail. Additionally, the proposed rules use multiple descriptors of a term in county jail, and only one	• To more accurately track the language of Penal Code section 1170(h), the committee replaced references to a county jail sentence with the phrase "a term of imprisonment in county jail under section 1170(h)."

	Commentator	Position	Comment	Committee Response
			should be applied throughout the rules in order to achieve the highest degree of consistency. • Secondly, the issue of whether to deny or grant mandatory supervision should be addressed prior to a discussion of the terms, length and conditions of mandatory supervision. As noted in Penal Code section 1170.3(b), the Judicial Council was directed to adopt rules "standardizing the minimum content and sequential presentation of material in probation officer reports. . ." Thus, in order to sequentially address the issues of the imposition of a period of mandatory supervision, before there is a discussion of what the terms and conditions of mandatory supervision will be, it should be determined whether a defendant will be granted mandatory supervision. Once the Court has decided to grant a period of mandatory supervision, only then should the terms, length and conditions be addressed. Therefore, please consider switching the order of Proposed Rule of Court 4.411.5 Subsection (a)(9)(C) and (a)(9)(D), as well as modifying the order of Proposed Rule of Court 4.415 subsection (b) and subsection (c). • Finally, there is some concern about the chilling effect of 4.415(d) on the plea	• To more accurately reflect the typical order of considerations during sentencing, the committee switched the order of subdivisions (a)(9)(C) and (a)(9)(D) of rule 4.411.5 (related to the content of probation reports) and subdivisions (b) and (c) of rule 4.415 (related to the factors for courts to consider during sentencing) so that the factors related to the denial of supervision appear *before* those related to the length and conditions of supervision. • The committee considered but declined to delete subdivision (d) from rule 4.415.

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Criminal Justice Realignment: Imposition of Mandatory Supervision *(amend Cal. Rules of Court, rules 4.411, 4.411.5; adopt rule 4.415)*

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			bargaining process. This proposed rule would require the court to state a reason for denying mandatory supervision even when the district attorney and defendant have stipulated to a sentence. The implication may be that even if there is a stipulated sentence, the court may decide to overrule the agreed upon terms. This may violate the holding in People v. Clancey, (2013) 56 Cal4th. 562, by inserting the Court into the plea bargaining process, and possibly even modifying the agreed upon contract post-plea between the parties, in violation of People v. Segura, (2014) [2008] 44 Cal.4th 921, and People v Superior Court, Sanchez (2014) 223 Cal.App.4th 567. We would respectfully request that this section be deleted from the proposed rules of court.	Requiring a statement of reasons for a denial of mandatory supervision, even when the parties have negotiated a plea agreement, would not unduly insert the court into the plea bargaining process. Plea agreements do not divest courts of inherent sentencing discretion. Courts must ensure that all sentences are lawful and all plea agreements are subject to court approval before imposition. Under Penal Code section 1170(h)(5)(A), denials of supervision are prohibited unless "the court finds that, in the interests of justice, it is not appropriate *in a particular case*." (Emphasis added.) Accordingly, lawful sentences under that section require the exercise of judicial discretion on a case-by-case basis, even when the parties have negotiated a plea agreement. A statement of reasons is necessary to demonstrate the lawfulness of the sentence, memorialize the basis for the exercise of judicial discretion, and aid appellate review.
3.	California Public Defenders Association by Garrick Byers, President	AM	The California Public Defenders Association (CPDA), composed of almost 4,000 public defenders, private attorneys, and investigators, the largest such association in California, respectfully submits the following comments. **Overall.** The Committee requested an overall comment on whether the proposal adequately addresses the stated purpose. CPDA believes	

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

	Commentator	Position	Comment	Committee Response
			that it does, but our comments suggest ways that the proposal can be improved and thus be more adequate. • **<u>Rule 4.411. subd. (d)</u>:** Proposed sentence: "The reports are also used by courts in deciding whether probation is appropriate and whether a period of mandatory supervision should be denied in the interests of justice under section 1170(h)." Change to read: "The reports are also used by court in deciding whether probation is appropriate, and if so, the length of any county jail term that is made a condition of probation. The reports are also used by the court in deciding the length of any period of mandatory supervision under section 1170(h), or if mandatory supervision should be denied in the interests of justice." *<u>The reason for this comment</u>:* Penal Code section 1170.3, subdivision (a)(5), as amended by AB 1468, effective January 1,2015, requires the Judicial Council to adopt rule that, inter alia, "... determine the appropriate period and conditions of mandatory supervision."	• To ensure that rule 4.411(d) more accurately reflects all purposes of the presentence probation report, the committee added the following phrase: "The reports are also used by courts in deciding … <u>the appropriate length and conditions of probation and mandatory supervision.</u>"

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	Commentator	Position	Comment	Committee Response
			Rule 4.111.5 • Proposed renumbered Subdivision (a)(9)(E), currently begins "A discussion of the defendant's ability to make restitution, pay any fine ...." Add, after "A" and before "discussion," the word "reasoned". *The reason for this comment:* Insertion of the word "reasoned" brings this rule in line with the many other rules that require not just a "discussion," but a "reasoned discussion."	• For consistency as suggested, the committee added the word "reasoned" to rule 4.411.5(a)(9)(E).
			• The unnumbered paragraph two of that same subdivision, (a)(9)(E), currently begins "Discussion of factors affecting suitability for probation and affecting the sentence length must refer to any sentencing rule…." Add, after the phrase "sentence length", and before the phrase "must refer to any sentencing rule", the phrase "or the length of mandatory supervision, or the denial of mandatory supervision in the interests of justice...." The beginning of that sentence would then read, "Discussion of factors affecting suitability for probation and affecting the sentence length, or the length of mandatory supervision, must	• To ensure that probation report discussions of the newly added factors related to mandatory supervision include references to other sentencing rules as currently required for factors related to probation, the committee amended rule 4.411.5(a)(9) to expressly cross-reference the new subdivisions: "Discussions of factors (A) through (D) ~~affecting suitability for probation and affecting the sentence length~~ must refer to any sentencing rule directly relevant to the facts of the case…"

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

SP14–08

Criminal Justice Realignment: Imposition of Mandatory Supervision *(amend Cal. Rules of Court, rules 4.411, 4.411.5; adopt rule 4.415)*

All comments are verbatim unless indicated by an asterisk (*).

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			refer to any sentencing rule ....” *The reason for this comment:* Penal Code section 1170.3, subdivision (a)(5), as amended by AB 1468, effective January 1, 2015, requires the Judicial Council to adopt rule that, inter alia, “... determine the appropriate period and conditions of mandatory supervision.” • **Proposed new Rule 4.415** Add to Subdivision (b), new criteria, (11) and (12), and re-number presently proposed (11) to be (13). The new criteria would be: (11) The likely effect of extended imprisonment in the county jail on the defendant and his or her dependents. (12) The likely effect of extended imprisonment on the defendant's life. *Reason for this comment* [:] These proposed new criteria parallel those of the Rule 4.414(b)(5) and (6), criteria affecting probation. Some sentence[s] under section 1170(h) can stretch to many years. In those cases, these are just as important as they are in considering probation instead of prison. Please feel free to contact me if you require further details regarding these comments.	• To include factors related to the effects of imprisonment on the defendant and any dependents, the committee added the following factors under rule 4.415(c)(9): “The likely effect of extended imprisonment on the defendant and any dependents.”

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4.	Kenneth R. Carver Senior Research Attorney, Superior Court of Fresno County	AM	In order to have sufficient information to make an intelligent sentencing decision as to what portion of a Penal Code section 1170, subdivision (h) sentence should be served on mandatory supervision, there must be some information provided by the probation department as to the minimal amount of time they require in order to provide the evidenced-based practices to those whom probation is tasked with supervising. This means some actual information to show that the time spent under probation's supervision will have the greatest opportunity for success in achieving the stated goal of AB 109 to reduce recidivism as to that particular defendant. (Pen. Code, § 17.5.) For example, the Court has determined that a 16 month mitigated term for a county jail felony is the appropriate sentence. Defendant has time credits equaling two months, in effect reducing the sentence from 16 months to 14 months. Will probation be able to effectively deliver those evidenced-based practices if the court were simply to split this remaining balance at seven months each? Does probation need at least a 12 month period of mandatory supervision time in order to have some measure of success in, not only delivering those evidenced-based practices, but also having an impact on this particular defendant so as to reduce his or her risk of recidivism? Does probation need more time than 12 months? Without some definitive time period provided by probation, will the Court simply be wasting valuable resources on	To ensure that probation reports include information about the length and conditions of supervision that are necessary to promote successful reentry into the community upon release from custody, the committee amended rule 4.411.5(a)(9)(D) to require reports to include the factors under rule 4.415(c), which include: "Consideration of length and conditions of supervision to promote the successful reintegration of the defendant into the community upon release from custody."

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			splitting sentences, such as the foregoing example, where the mandatory supervision period is too short to have any chance of success with that particular defendant?	
5.	Chief Probation Officers of California by Chief Michael Daly, President	AM	CPOC prepares this letter in response to the request for public comment on the proposed amendment to California Rules of Court 4.411, 4.411.5 and the adoption of rule 4.415. Both the proposed amended rules and the new rule arise out of AB 1468 (Chapter 26, Statutes of 2014) which was statutory action introduced by the Governor and supported by the CPOC for the purposes of increasing public safety in our communities and providing a platform for a more successful transition back after a period of incarceration in a county jail. Governor Brown stated in the release of the January Budget which contained the statutory change: "...Research shows that when a person is released from incarceration, a reentry plan with structured supervision and programs provides the best opportunity to lower recidivism rates... The use of split sentences is important for public safety and recidivism reduction so offenders have access to appropriate treatment services. Increased use of split sentences will also help relieve jail overcrowding..." We would urge the Council to adopt the rules to carry out the intent of the legislation which clearly sets forth the presumption that a term of	

	Commentator	Position	Comment	Committee Response
			mandatory supervision be made in Penal Code 1170(h) sentences. CPOC contends that the proposed rule should lay out guidance to courts as to when there are appropriate exceptions to that rule. When developing those exceptions, it is imperative that the exceptions are not so broad that they circumvent the purpose of putting a mandatory supervision term in place. • **Proposed new rule 4.415** The proposal lays out criteria for the court to consider when determining the length and conditions of the mandatory supervision and criteria for when a court should deny mandatory supervision. Again, we stress it is important that the rule reinforce that the criteria for either of these decisions are separate and that it is not confused or used as criteria to decide if a mandatory supervision term should be imposed. The statute settles the question that mandatory supervision should be imposed, therefore the rules of court should be written to support that base concept and the criteria to avoid a mandatory supervision term should be limited in scope. • **4.415 (a) Presumption** We respectfully suggest that the following language be adopted. This version modifies the language in the current proposal. This is not a	• Rule 4.415 sufficiently distinguishes between the factor related to denials of supervision and the factors related to the length and conditions of supervision. • Although the committee declined to modify the proposal precisely as suggested, to emphasize the limited scope of the statutory authority to deny supervision, the committee added the

	Commentator	Position	Comment	Committee Response
			significant departure from the proposal but the suggested change provides clearer direction in light of our comments above. When imposing a county jail sentence under section 1170(h)(5), the court must suspend execution of a concluding portion of the term to be served as a period of mandatory supervision. There may be some circumstances where the court finds in the interest of justice, that mandatory supervision is not appropriate in a particular case. The circumstances are intended to be limited in application. This wording supports the legislative intent to put into place a presumption of mandatory supervision. A presumption by definition presumes the cases where it will not be used would be limited. CPOC supports the above language as it is aligned with the legislative intent behind the statutory change. **4.415 (b) Criteria affecting conditions and length of mandatory supervision** The foundation of decisions made by a court in this section is based on two guiding factors, albeit not mutually exclusive, public safety and assisting the offender in their re-entry into the community. Supervision by probation affords the justice system public safety in the immediate	following sentence to rule 4.415(a): "Because section 1170(h)(5)(A) establishes a statutory presumption in favor of the imposition of a period of mandatory supervision in all applicable cases, courts should limit the exercise of discretion to deny a period of mandatory supervision."

	Commentator	Position	Comment	Committee Response
			term by laying conditions to the offender. Supervision by probation also addresses public safety in the long term by crafting conditions to attempt to modify behavior to reduce recidivism. These principles guide our comments in this section. This section is critical as it outlines the pivotal role the courts play in shaping the eventual re-entry of the offenders back into communities. We suggest the following section be modified as follows: In selecting the appropriate period and conditions of mandatory supervision, factors that the court may consider include: (1) Appropriate community corrections programs for the specific offender; (2) Victim restitution; (3) Promotion of the successful reintegration of the defendant into the community; (4) Protection orders of any victims and witnesses; (5) Past performance and present status on probation, mandatory supervision, postrelease community supervision, and parole; (6) The balance of custody exposure after imposition of custody credits; (7) Consideration of the difference between accrual of custody credits for mandatory supervision under section 1170(h)(5)(B) and straight county jail terms under section 4019(a)(6); (8) The defendant's specific risk and needs	

	Commentator	Position	Comment	Committee Response
			factors identified by any validated risk/needs assessments, if available; (9) Any other factors reasonably related to a sentencing decision *Description of the changes to the proposed rule* • 1. We suggest eliminating the word "availability" in proposed criteria (1). The availability of programs is not the pertinent question; the identification of the appropriate type of programming for a specific offender is key. At the time of sentencing, not all information relating to the types of programs will be available upon release. When the offender is released from the incarcerated portion of the sentence, programming availability could be different from the time of sentencing. In addition, the availability of programs is often a funding question which is within the purview and responsibility of the Board of Supervisors and the Community Corrections Partnership. • 2. We suggest eliminating all of proposed criteria (6) relating to the defendant's suitability for treatment and supervision. First, it is duplicative of other criteria (past performance on supervision and the risk/needs assessment). Second, mandatory supervision is different from felony	• The committee declined to amend this factor as suggested because the availability of treatment and supervision services at the time of sentencing is an important practical consideration when determining the terms and length of supervision. • The committee deleted this criteria as unnecessary and duplicative of the factor under rule 4.415(c)(5): "Past performance and present status on probation, mandatory supervision, postrelease community supervision, and parole."

	Commentator	Position	Comment	Committee Response
			probation. The statute presumes a period of mandatory supervision so the suitability of the defendant is irrelevant. Suitability is more a question about the appropriateness of a supervision term, such as the type of consideration made when making a felony probation grant. This section only speaks to setting the length of the term and the conditions.	
			• 3. We support proposed criteria (7) and (8) (or 6 and 7 in our changed proposal) above because it is important that the amount of time that the court has to maximize the principles of mandatory supervision, public safety and re-entry programming, is paramount in the decision on length and conditions.	• No response required.
			• 4. We suggest eliminating proposed criteria (9) as it is repetitive of other criteria. "Risk of re-offense" is part of the risk/needs assessment and by listing two similar criteria it could lead to confusion in its application. We also suggest adding if a risk/needs assessment *is available*. While most probation departments have moved to the use of these assessment tools, not all currently prepare these assessments at the time of sentencing or provide them to the courts. We suggest current practice be respected and add "availability" into this criteria.	• The committee deleted the factor related to the defendant's level of risk of reoffense as duplicative of the factor related to risk/needs assessments. In addition, because risk/needs assessment information is not readily available to all courts, the committee revised that factor to reflect availability: "The defendant's specific needs and risk factors identified by ~~any~~ a validated risk/needs assessment~~s~~, if available."

	Commentator	Position	Comment	Committee Response
			• **4.415 (c) Criteria for denying mandatory supervision in the interest of justice** CPOC strongly urges the Council to take the comments on this particular section into account when drafting the final rules. As previously stated, the legislative intent and reasonable contextual interpretation, supports presumption of mandatory supervision being the rule and the denial based on the interest of justice should be a limited exception to the rule. Exceptions to the rule should not be so numerous or broad so as to swallow the rule, thereby rendering the statute irrelevant. We suggest the following section be modified as follows: In determining that mandatory supervision is not appropriate in the interests of justice, the court's determination must be based on factors that are specific to a particular case or defendant. Factors the court may consider include: (1) Consideration of the balance of custody exposure available after the imposition of custody credits; (2) The defendant's specific risk and needs factors identified by any validated risk/needs assessment, if available,	• To more accurately reflect the typical order of considerations during sentencing, the committee switched the order of subdivisions (a)(9)(C) and (a)(9)(D) of rule 4.411.5 (related to the content of probation reports) and subdivisions (b) and (c) of rule 4.415 (related to the factors for courts to consider during sentencing) so that the factors related to the denial of supervision appear *before* those related to the length and conditions of supervision. In addition, although the committee declined to modify the proposal precisely as suggested, to address concerns that the factors related to the court's decision to deny a period of mandatory supervision in the interests of justice are too broad and would frustrate the intent of the statutory presumption *against* denials of supervision, the committee modified proposed rule 4.415 in several ways. First, to emphasize the limited scope of the statutory authority to deny mandatory supervision, the committee added the following sentence to subdivision (a): "Because section 1170(h)(5)(A) establishes a statutory presumption in favor of the imposition of a period of mandatory supervision in all applicable cases, courts should limit the exercise of discretion to deny a period of mandatory

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			indicates the defendant's risk level is low and therefore will not benefit from supervision. Based on the contention that the denial of the presumption should be limited, we suggest eliminating many of the criteria currently proposed. The cases consistent with denying the presumption should be when the imposition of mandatory supervision cannot accomplish the goal of the presumption. Therefore, appropriate reasons to deny a mandatory supervision term could be found when there is insufficient time within the sentence to accomplish a supervision term (time served) to facilitate re-entry and protect the community; or the risk assessment would suggest supervision would be counter-productive. If we take the question in the inverse, would a straight jail term accomplish the goals better, it brings into focus the public safety concern. A straight jail term for a defendant that is higher risk does little to add to the long term public safety of the community if not coupled with a supervision term. A straight jail term simply means: 1) less jurisdictional exposure to the system because of custody credits; and 2) release directly into the community after potentially years of incarceration – without any	supervision." Second, to narrow the list of criteria for denying supervision under subdivision (b), the committee deleted the following two broad factors: "The likelihood that the defendant will be a danger to others if not imprisoned" and "Any other factor reasonably related to the court's determination that mandatory supervision is not appropriate in the interests of justice." Third, to underscore the importance of supervision in the successful reintegration of defendants into the community upon release from custody, the committee replaced the factors related to the nature of the case and the defendant's suitability for supervision with the following under subdivision (b)(4), which encourages courts to consider whether those factors substantially outweigh the benefits of supervision: "Whether the nature, seriousness, or circumstances of the case or the defendant's past performance on supervision substantially outweigh the benefits of supervision in promoting public safety and the defendant's successful reentry into the community upon release from custody." Lastly, in recognition that some defendants may *lack* the need for

	Commentator	Position	Comment	Committee Response
			supervision. It is for these reasons that run counter to public safety that the Governor proposed the presumption for mandatory supervision, the Legislature passed it, and CPOC supported it.	supervision upon release from custody, the committee added the following factor under subdivision (b)(3): "Specific factors related to the defendant that indicate a lack of need for treatment or supervision upon release from custody."
			• **4.415 (d) Statement of reasons for denial of mandatory supervision** We support section (d) as drafted. CPOC agrees this addition is consistent with the enforcement of a presumption and further supports the intent to have the court weigh in on the composition of the mandatory supervision term.	• No response required.
			• **Proposed Amendments to Rule 4.411 and 4.411.5** CPOC asks the Council to consider making two changes to the proposed amendments. Current law allows for the waiver of presentence reports (Penal Code 1203(b)(4)). Many courts have established their own local procedures. CPOC urges recognition that nothing in this amendment changes those local procedures. If the Council incorporates this requested change, it will help alleviate the fiscal concerns raised by several counties. Without that clarification, the fiscal burden on many of the probation departments are currently unquantified but identified as significant.	• To clarify that the proposal is not designed to impair court authority to waive probation reports under appropriate circumstances, rule 4.411(a) was amended as follows: "~~Waivers of~~ Although courts may waive the presentence report, waivers should not be accepted except in unusual circumstances." In addition, because risk/needs assessment information is not readily available in all courts, rule 4.411.5(a)(8) only requires that information when "available."

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			CPOC would also point out that the new amendments call for any available risk/needs assessment information to be included in the presentence report. As stated earlier, most probation departments currently use risk/needs assessments but at different stages of our interaction with an offender. However, it is important to note that while a risk assessment may be available at the time a presentence report is prepared, there may be many cases where a needs assessment has not yet been administered. This could be for a variety of reasons, but many times it is due to the fact that the court officer is not the one preparing the needs assessment that helps build the case plan for supervision. When possible, the probation officer supervising the offender will administer the needs assessment which then helps him or her establish protocols/objectives for the offender's supervision. The inclusion of the term "any available" may be broad enough to take this situation into account, but we felt it was important to point this out in case there were clarifying advisory notes needed. We appreciate the opportunity to offer	

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			comments and request your consideration of our feedback and suggested revisions.	
6.	Michael C. McMahon Chief Deputy Public Defender County of Ventura	A	The proposal is fine. California has self-inflicted much damage by incarcerating too many people for too long for non-violent, non-serious offenses. However, we must also realize that we have also self-inflicted very similar damage by maintaining too many people for too long on formal supervision. As we transition to an era of more split-sentences and more people on mandatory supervision, it is important to remind ourselves that not everyone benefits from formal supervision, nor does formal supervision always promote public safety. The evidence strongly suggests that low-risk offenders often fare better when they get into and out of the criminal justice system more quickly. Replacing prolonged incarcerations with prolonged supervision may prove to be a false economy and an unsustainable and inefficient means of promoting reintegration and reducing recidivism. If a low risk offender has stable community ties, prospects for employment, and dependents to support, California would be better served by imposing a brief, but appropriate punishment and letting that person's life get back to normal rather than mandating lengthy supervision programs (formal probation or mandatory supervision) crowded with other criminals. If we don't become more selective about who we supervise and for how long, we will soon regret it.	In recognition that some defendants may *lack* the need for supervision upon release from custody, the committee added the following factor under rule 4.415(b)(3) for courts to consider when deciding whether to deny supervision: "Specific factors related to the defendant that indicate a lack of need for treatment or supervision upon release from custody."

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7.	Office of the Primary Public Defender of San Diego County by Marian Gaston	AM	The Office of the Primary Public Defender of San Diego County respectfully joins in the suggested text modifications proposed by the Office of the San Diego District Attorney. We emphasize the concern articulated regarding the chilling effect of 4.415(d) on the plea bargaining process. This proposed rule would require the court to state a reason for denying mandatory supervision even when the district attorney and defendant have stipulated to a sentence. The implication may be that even if there is a stipulated sentence, the court may decide to overrule the agreed upon terms. This may violate the holding in People v. Clancey, (2013) 56 Cal4th. 562, by inserting the Court into the plea bargaining process, and possibly even modifying the agreed upon contract post-plea between the parties, in violation of People v. Segura, (2014) 44 Cal.4th 921, and People v Superior Court, Sanchez (2014) 223 Cal.App.4th 567. We would respectfully request that this section be deleted from the proposed rules of court.	The committee considered but declined to delete subdivision (d) from rule 4.415. Requiring a statement of reasons for a denial of mandatory supervision, even when the parties have negotiated a plea agreement, would not unduly insert the court into the plea bargaining process. Plea agreements do not divest courts of inherent sentencing discretion. Courts must ensure that all sentences are lawful and all plea agreements are subject to court approval before imposition. Under Penal Code section 1170(h)(5)(A), denials of supervision are prohibited unless "the court finds that, in the interests of justice, it is not appropriate *in a particular case*." (Emphasis added.) Accordingly, lawful sentences under that section require the exercise of judicial discretion on a case-by-case basis, even when the parties have negotiated a plea agreement. A statement of reasons is necessary to demonstrate the lawfulness of the sentence, memorialize the basis for the exercise of judicial discretion, and aid appellate review.
8.	San Diego District Attorney's Office by David Greenberg, Chief Deputy District Attorney	AM	The proposed rules of court go a long way in addressing the issue of presumptive mandatory supervision as required by newly amended Penal Code 1170.3; however, there a few modifications that could make them stronger as a whole. • First, replace all references to "a sentence in county jail" with the	• To more accurately track the language of Penal Code section 1170(h), the

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			language used in Penal Code section 1170(h), "a term of imprisonment in county jail." This makes it clearer that a sentence imposed pursuant to Penal Code section 1170(h) is indeed a prison term, including any portion of mandatory supervision. This will ensure there is no confusion for anyone interpreting and applying these rules, as a sentence in county jail can also be ordered when a defendant is not granted probation on a misdemeanor and instead is ordered to complete a term of custody in county jail. Additionally, the proposed rules use multiple descriptors of a term in county jail, and only one should be applied throughout the rules in order to achieve the highest degree of consistency.	committee agreed to revise references to a county jail sentence under that section as "a term of imprisonment in county jail under section 1170(h)."
			• Secondly, the issue of whether to deny or grant mandatory supervision should be addressed *prior* to a discussion of the terms, length and conditions of mandatory supervision. As noted in Penal Code section 1170.3(b), the Judicial Council was directed to adopt rules "standardizing the minimum content and ***sequential*** presentation of material in probation officer reports. . ." Thus, in order to sequentially address the issues of the imposition of a period of mandatory supervision, before there is a discussion of what the terms and	• To more accurately reflect the typical order of considerations during sentencing, the committee switched the order of subdivisions (a)(9)(C) and (a)(9)(D) of rule 4.411.5 (related to the content of probation reports) and subdivisions (b) and (c) of rule 4.415 (related to the factors for courts to consider during sentencing) so that the factors related to the denial of supervision appear *before* those related to the length and conditions of supervision.

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			conditions of mandatory supervision will be, it should be determined whether a defendant will be granted mandatory supervision. Once the Court has decided to grant a period of mandatory supervision, only then should the terms, length and conditions be addressed. Therefore, please consider switching the order of Proposed Rule of Court 411.5 Subsection (a)(9)(C) and (a)(9)(D), as well as modifying the order of Proposed Rule of Court 4.415 subsection (b) and subsection (c). The criteria affecting the conditions and length of mandatory supervision provide the court with a good measure of guidance to weigh a variety of factors. However, please consider adding the following items to give the court and parties more guidance. • Defendant will benefit from a time of transition. • Prior intervention services. Did Defendant receive any intervention services, and if so, were they sufficient to address the risk and needs?	• The committee declined the suggestion because the following factors in rule 4.415(c)(3) and (c)(5) sufficiently encompass the underlying considerations: o "Consideration of length and conditions of supervision to promote the successful reintegration of the defendant into the community upon release from custody" (Rule 4.415(c)(3)); and o "Past performance and present status on probation, mandatory supervision, postrelease community supervision, and parole. (Rule 4.415(c)(5).)"

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9.	Barton Sheela San Diego, CA	N	I am a public defender. My clients are indigent. When a probation report is ordered in a felony case, the Court charges my client over $1000.00 for the report, and my clients are already responsible for paying fines and other fees. To REQUIRE a probation report in all cases, even when none is needed, will saddle my clients with horrendous fiscal responsibilities and serve no one.	In response to concerns about the costs and burdens of requiring probation reports in all cases eligible for terms of imprisonment in county jail under section 1170(h), the committee amended rule 4.411(a) to clarify that courts remain authorized to waive preparation of reports under appropriate circumstances.
10.	State of California, Department of Justice by Julie L. Garland, Acting Chief Assistant Attorney General, Division of Criminal Law	AM	In response to the Invitation to Comment SP14-08, the Office of the Attorney General offers the following five changes to the proposed amended new rules of court, Rules 4.411, 4.411.5, and 4.415. **I. The Need For Consistent Terminology Accurately Reflecting Sentencing Under Realignment** The proposed rules use the following terminology to describe sentences and terms of imprisonment when an offender is sentenced to a Penal Code section 1170(h)(5) commitment: - a county jail sentence under section 1170(h) - term of imprisonment in a county jail under section 1170(h) - a sentence in county jail under section 1170(h) - a county jail term under section 1170(h)	• To more accurately track the language of Penal Code section 1170(h), the committee replaced references to a county jail sentence with the phrase "a term of imprisonment in county jail under section 1170(h)" and specified references to subdivision (h)(5) as appropriate.

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			- a county jail sentence under section 1170(h)(5) - straight county jail terms - term of imprisonment imposed by the court - county jail terms under Penal Code section 1170(h)(5)(B) (See attachment A [highlighting instances of the use of differing terminology in the proposed rules].) Using these terms interchangeably is confusing and potentially inaccurate. The terms, as used, could be misunderstood in certain contexts. To promote the use of consistent and accurate terminology throughout the Rules and Comments, it would be helpful to have a definition of terms. Existing provisions offer guidance in identifying terminology that can be used consistently through these Rules. Section 1170(h)(1) provides: (1) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision where the term is not specified in the underlying offense shall be punishable by a term of imprisonment in a county jail for 16 months, or two or three years. Similarly, section 1170(h)(2) provides:	

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			(2) Except as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense. This means that an offender is sentenced to **imprisonment in a county jail** for the term prescribed under the Determinate Sentencing Act. Thus, whenever the Rules are referring to imprisonment in the context of determinate sentencing—i.e., selecting a term from the applicable triad—an appropriate reference would be "**imprisonment in a county jail under section 1170(h).**" Different terminology is required for consideration of section 1170(h)(5) custody. Once an aggregate term is calculated, the defendant will be ordered to serve that sentence as either a straight term or a split term with an initial portion of the defendant's sentenced term to be served in jail custody. Discretionary decisions as to how a term is to be apportioned pertain to "**a sentence to be served in a county jail under section 1170(h)(5).**" They do not affect determinate sentencing choices. This distinction is important to differentiate the existing directive to the courts to exercise discretion in selecting the term of "imprisonment in a county jail under section	

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			1170(h)" and the new directive to exercise discretion in determining how that term is to be divided between custody to be served in county jail and mandatory supervision. To illustrate this point, Attachment B utilizes the suggested new consistent terminology. • Additionally, a definition of terms in the Advisory Committee Comment and, perhaps, in Rule 4.405 would assure that the correct terminology is being used and understood. (Note that Rule 4.405(8) defining "imprisonment" as confinement in a state prison appears to be inaccurate in light of Realignment.) **II. Rule 4.415(d) Is Inconsistent with Existing Case Authority** To the extent that proposed Rule 4.415(d) provides, "Notwithstanding rule 4.412(a)," it is contrary to controlling case law. California Rules of Court, rule 4.412(a) provides: It is an adequate reason for a sentence or other disposition that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection to it. The agreement and lack of objection must be recited on the record. This section	• The committee is separately developing an omnibus rule proposal to update all criminal law rules of court, including new definitions for key aspects of criminal justice realignment. • The committee considered but declined to delete subdivision (d) from rule 4.415. The premise that courts need not state reasons for certain sentencing decisions when agreed upon by the parties derives from rule 4.412 and its predecessor, rule 440. Accordingly, the phrase "notwithstanding rule 4.412(a)" adequately exempts rule 4.415(d) from the exception for stating reasons under rule 4.412(a)

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			does not authorize a sentence that is not otherwise authorized by law. Rule 4.412(a) is consistent with well-established case law that a trial court need not state reasons for imposing a sentence pursuant to a negotiated plea. (*People v. Slaughter* (1987) 194 Cal.App.3d 95, 97-98 ["Under these circumstances, the court need not give any other reason than to state that the disposition is pursuant to the negotiated agreement."]; *People v. Quijada* (1984) 156 Cal.App.3d 789, 791 [A court may recite the plea bargain as its reason for the imposition of sentence.]; *People v. Witherow* (1983) 142 Cal.App.3d 485, 488 ["In sentencing a defendant to an upper term pursuant to a plea bargain 'the court, in stating its reasons for that sentence choice, need only give the bargain as its reason and need not give any other reason.'"].) By requiring that a court give reasons for denying mandatory supervision in the interests of justice when the sentence is imposed pursuant to a plea agreement, i.e., "notwithstanding Rule 4.412(a)," the proposed rule 4.415(d) is contrary to controlling authority. **III. Rule 4.415(c)(5) is Inconsistent with Rule 4.415(b)(5)** Proposed Rule 4.415(b)(5) identifies as a consideration for deciding the length of mandatory supervision the defendant's "*past performance and present status* on probation,	• The committee amended rule 4.415(b)(4) to add "past performance on supervision" as a factor for courts to consider when deciding whether to deny supervision. In addition, to underscore the importance of supervision in the successful reintegration of defendants into the community upon

	Commentator	Position	Comment	Committee Response
			mandatory supervision, postrelease community supervision, and parole." The parallel provision under proposed Rule 4.415(c)(5), identifying criteria for denying mandatory supervision in the interest of justice, provides that the court may consider "The defendant's *present status* on probation, mandatory supervision, postrelease community supervision, and parole." The inadvertent omission of "past performance" from the parallel provision in (c)(5) suggests that courts should not consider the defendant's past performance n supervision even if relevant to determining whether to deny mandatory supervision. Consequently, to maintain proper consistency between the two provisions, Rule 4.415(c)(5) should be amended to provide: (5) The defendant's *past performance and* present status on probation, mandatory supervision, postrelease community supervision, and parole. **IV. Rule 4.415(b) Criteria Should be Revised to Clarify Paragraphs 7 and 8** Paragraph 7 applies to presentence custody credit, and paragraph 8 applies to post-sentence time credits. Paragraph 8 need not include a reference to the "difference between the statutory accrual of credits" because those credits are calculated using static formulae and they apply to all offenders serving a sentence in county jail under section	release from custody, that factor also encourages courts to consider whether past performance substantially outweighs the benefits of supervision: "Whether the nature, seriousness, or circumstances of the case or the defendant's past performance on supervision substantially outweigh the benefits of supervision in promoting public safety and successful reentry into the community upon release from custody." • To more accurately reflect the typical order of considerations during sentencing, the committee switched the factors listed in subdivisions (b) and (c) of rule 4.415 so that the factors related to the denial of supervision appear *before* the factors related to the length and conditions of supervision. In addition, to clarify the distinction between presentence and post-sentence custody credits, the committee amended subdivisions (c)(6) and (c)(7) as

	Commentator	Position	Comment	Committee Response
			1170(h)(5). The following modifications would provide clarification: (7) The balance of custody exposure after imposition of *presentence* custody credits (8) Consideration of the statutory accrual of *post-sentence* custody credits for mandatory supervision under section 1170(h)(5)(B) and a sentence to be served in a county jail under section 4019(a)(6) **V. Proposed Minor Revision - Page 1, Lines 40-42** The first Advisory Comment provides: Section 1203 requires a presentence report in every felony case in which the defendant is eligible for probation. Subdivision (a) also requires a presentence report in every felony case in which the defendant is ***eligible for*** a county jail sentence under section 1170(h). The term "eligible for" should be replaced with "subject to." "Eligible" implies that this is a beneficial option. It is not: it is a term of imprisonment mandated under Realignment. Whereas probation is a grant of leniency and an offender would be considered "eligible" for	suggested. • The committee declined the suggestion as unnecessary.

	Commentator	Position	Comment	Committee Response
			a grant of probation, the same is not true for section 1170(h)(5) offenders. Section 1170(h)(5) offenders receive a county jail sentence by operation of law. Thank you for your consideration. If you have any questions about this matter or would like to discuss it, please feel free to contact me at (619) 645-2604 or Deputy Attorney General Doris Calandra at (916) 324-5250.	
11.	Superior Court of Los Angeles County by Janet Garcia, Court Manager	A	No comments submitted.	No response required.
12.	Superior Court of Orange County by Anabel Romero, Unit Manager, Criminal Operations	AM	**Would the proposal provide cost savings?** No. **What would the implementation requirements be for courts?** The implementation efforts would include staff educational training. In Orange County bench officers would receive legislative updates to PC 1170(h)(5) regarding the supervisory period, and informed of the updated Rules of Court related to this process. An informational component will be disseminated for courtroom staff regarding requirements for minutes where the supervisory period is denied. Some Case Management System changes may be required for purposes of minute entries.	• No response required. • No response required.

SP14–08

Criminal Justice Realignment: Imposition of Mandatory Supervision *(amend Cal. Rules of Court, rules 4.411, 4.411.5; adopt rule 4.415)*

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			How well would this proposal work in courts of different sizes? The proposal should generally work well in all courts. However, courts could experience an increase in hearings as a result of the emphasized requirement for courts to order probation reports whenever a defendant is eligible for county jail sentence under 1170(h)(5). Depending on the ability of each county's probation department to expeditiously produce such reports, this could cause additional hearings and increase in workloads. The historical culture in Orange County has been to routinely waive pre-sentence reports, particularly with a negotiated plea, adding this piece would increase work substantially for Probation and the Court, with an unknown value. The proposed amendment to CRC 4.411(a), which mandates a pre-sentence report in all 1170(h) cases with no waiver "except in unusual circumstances," could cause; 1.substantial delays in the resolution of cases, 2.substantial increase in jury trials, and 3.substantial increase in already sparse judicial resources " (The) reality that criminal justice today is for the most part a system of pleas, not a system of	• In response to concerns about the costs and burdens of requiring presentence probation reports in all cases eligible for terms of imprisonment in county jail under Penal Code section 1170(h), the committee amended rule 4.411(a) to clarify that courts remain authorized to waive preparation of reports under appropriate circumstances. NOTE: The "unusual circumstances" limitation on court waivers of reports is a longstanding component of the current rule and *not* being added by this proposal. Accordingly, the committee believes that the proposal will not impair courts from continuing appropriate waiver practices.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

	Commentator	Position	Comment	Committee Response
			trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.…the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences". Lafler v. Cooper (2012) 132 S. Ct. 1376, 1388 In 2013, our Court received felony filings of about 17,500 defendants. About 350 of these cases were resolved by a jury trial. An extremely small number were dismissed. The rest, over 95%, were resolved by plea. Many of these were the felonies per 1170(h) and many are resolved by an agreement by the DA and the defendant on the day of trial. Most of these pleas are accepted by the Court and the defendants are sentenced immediately. The above quote from Justice Stevens most definitely applies to Orange County. A pre-sentence report generally takes 2-4 weeks to prepare. What is the cost/benefit of such a report? The approximate cost to the taxpayer is about $1000. What is the benefit? To give the judge more information to modify the sentence agreed upon? If this were to happen, the defendant has the right to withdraw his or her plea per section 1192.5 of the Penal Code if he or she does not accept the modification and the case is set for trial. This benefit is not worth the cost nor the risk of unraveling a negotiated plea. Without these negotiated pleas, substantially	

	Commentator	Position	Comment	Committee Response
			more cases will go to trial without more courtrooms to try them. It is highly recommended that the proposed modification to CRC 4.411 requiring a pre-sentence report on all 1170(h) cases were the parties have waived such a report should be withdrawn. **Rule 4.411 Presentence investigation and reports** • (a)Eligible defendants – we recommend the following language be added to the existing language: Waivers of the presentence report should not be accepted except in unusual circumstances and the reason should be noted on the court record • We also recommend 1170(h) as referenced in this rule be further clarified by adding delineating words such as “terminal sentence” and “mandatory supervision” sentence • (b)Ineligible defendants Same as in section (a) – we recommend 1170(h) as referenced in this rule be further clarified by adding "terminal sentence" and "mandatory supervision"	• Please see above related response. • The committee declines the suggestion as unnecessary. • The committee declines the suggestion as unnecessary.

	Commentator	Position	Comment	Committee Response
			Rule 4.411.5. Probation officer's presentence investigation report • (b) Format - we recommend the following be added to this section: The report may be filed as eDelivery or eFiling and must include the digital signature or e-signature of person preparing the report.	• The committee declines the suggestion as beyond the scope of the proposal but will consider ways to promote electronic filing during future meetings.
13.	Superior Court of San Diego County by Michael M. Roddy, Court Executive Officer	AM	1) Our court is confused by Rule 4.415(b)(7) and (8): what do these sections mean? Our court would like a little more guidance on what it is intended for the court to consider and why?	• The committee switched the order of subdivisions (b) and (c) of rule 4.415 as noted above. The committee also amended the factors related to custody credits in subdivisions (c)(6) and (c)(7) to distinguish between *presentence* and *post-sentence* custody credits. In addition, the advisory committee comment includes the following additional information: "Under Penal Code section 1170(h)(5)(B), defendants serving a period of mandatory supervision are entitled to day-for-day credits: 'During the period when the defendant is under such supervision, unless in actual custody related to the sentence imposed by the court, the defendant shall be entitled to only actual time credit against the term of imprisonment imposed by the court.' In contrast, defendants serving terms of imprisonment in county jails under Penal Code section 1170(h)(5)(B) are entitled to

	Commentator	Position	Comment	Committee Response
				enhanced conduct credits under Penal Code section 4019(a)(6)."
			2) Can the court consider that a defendant does not want mandatory supervision?	• The lists of criteria in rule 4.415 are not exhaustive.
			3) With regard to Rule 4.415, switch the order of paragraphs (b) and (c) because current (c) would come first in the process. (Same for rule 4.411.5(a)(9)(C) and (D).)	• As noted above, the committee switched these two subdivisions as suggested.
			4) Our court's final comment relates to CRC 4.415(b)(2). We do not understand what the court is supposed to be considering with regard to victim restitution in deciding how long and under what conditions the defendant should be released on mandatory supervision. Is it that the defendant is better able to pay if on mandatory supervision, so if there is victim restitution owed, the mandatory supervision period should be longer? Is it that the court should make payment of victim restitution a condition of mandatory supervision? (This is confusing for a couple of reasons: (1) it was already ordered as part of the sentence, so that order would continue thru the period of mandatory supervision, and (2) why would payment of that differ from the orders to pay all the other fines and fees?) Clarification would be helpful.	• Distribution of victim restitution has the highest prioritization under the California Constitution. The committee believes that the collection of victim restitution is an important consideration when deciding the length and terms of supervision. To clarify the underlying purpose of the factor, the committee amended rule 4.415(c)(2) as follows: "Victim restitution, including any conditions or period of supervision necessary to promote the collection of any court-ordered restitution."

SP14–08

Criminal Justice Realignment: Imposition of Mandatory Supervision *(amend Cal. Rules of Court, rules 4.411, 4.411.5; adopt rule 4.415)*

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
14.	Sutter County Probation Department by Donna Garcia, Deputy Chief Probation Officer	AM	• "Advisory Committee Comment Section 1203 requires a presentence report in every felony case in which the defendant is eligible for probation. Subdivision (a) also requires a presentence report in every felony case in which the defendant is eligible for a county jail sentence under section 1170(h). Because such a probation investigation and report are valuable to the judge and to the jail and prison authorities, waivers of the report and requests for immediate sentencing are discouraged, even when the defendant and counsel have agreed to a prison or county jail sentence under section 1170(h). Notwithstanding a defendant's statutory ineligibility for probation or county jail sentence under section 1170(h), a presentence investigation and report should be ordered to assist the court in deciding the appropriate sentence and to facilitate compliance with section 1203c." Comments with regard to the Advisory Committee Comment above are as follows: It would seem appropriate to include 1170(h) sentencing criteria (Rule 4.415) in the presentence report, however, if the defendant is eligible for, or found to be an unusual case for, probation and is	• Rule 4.411(c) requires courts to order supplemental reports for sentencing proceedings that occur a "significant period of time after the original report was prepared." In response to concerns about the costs and burdens of requiring presentence probation reports in all cases eligible for terms of imprisonment in county jail under Penal Code section 1170(h), the committee amended rule 4.411(a) to clarify that courts remain authorized to waive preparation of reports under appropriate circumstances.

Positions: A = Agree; AM = Agree if modified; N = Do not agree; NI = Not indicated.

	Commentator	Position	Comment	Committee Response
			granted such, if a substantial period of time passes before a violation of probation occurs, and the defendant is then pending a possible sentence under 1170(h), his or her entire situation could be dramatically different than it was at the time the original presentence investigation and report were prepared. It would then seem logical for the Court to request a supplemental report. This would most assuredly increase the number of referrals to the probation department for supplemental reports, especially for my department. In most cases, when an offender violates probation, a supplemental report is waived and the defendant is sentenced outright. Also, the requirement for Rule 4.415 to be included in presentence reports would likely result in an increased number of referrals to probation for reports as a good number of reports are waived if the defendant takes a plea to a stipulated prison or 1170(h) sentence in my county. • Another question to consider if Rule 4.415 is included in the presentence report relates to the discussion of suitability for mandatory supervision and the length of the term prescribed. If the defendant is eligible for probation	• The committee amended rule 4.411.5(a)(9)(D) as follows to require discussions of the factors in rule 4.415(c) whenever a term of imprisonment in county jail under section 1170(h) is recommended: "If a term of imprisonment

	Commentator	Position	Comment	Committee Response
			and such is being recommended by the probation department, would the presentence report still then need to include a discussion of the split sentence. It would seem that the criteria discussed in Rule 4.415 would not apply in the event that probation is the appropriate disposition. This would seem to be simply answered by indicating that if the defendant is believed to be ineligible for probation that the rule be included, but many times defendants enter conditional pleas or are found to be "unusual cases" and are granted probation. Conversely, at times during the pretrial process a defendant is believed to be eligible for probation and is discovered later to be presumptively or mandatorily ineligible. Thus, with so many variables, it would be difficult to know when to include Rule 4.415 in the report.	in county jail under section 1170(h) is recommended, a reasoned discussion of the defendant's suitability for specific terms and length of period of mandatory supervision, including the factors prescribed by rule 4.415(c)."
			• On another note, currently only the static risk score is included in our presentence reports. The investigators in this unit do not conduct the needs assessment presentence. That assessment is done by supervision officers. The interview, and subsequent reporting of that information into the assessment tool, takes a considerable amount of time that the investigations unit does not have due to workload	• Because risk/needs assessment information is not readily available to all courts, that factor has been revised to reflect availability: "The defendant's specific needs and risk factors identified by a validated risk/needs assessment, if available."

SP14–08

Criminal Justice Realignment: Imposition of Mandatory Supervision *(amend Cal. Rules of Court, rules 4.411, 4.411.5; adopt rule 4.415)*

All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			issues. • As far as the content and language of Rule 4.415, I have no comments other than both appear to be appropriate and address the issues raised by my staff concerning criteria they would like to have available to them when making recommendations for mandatory supervision. Thank you for opportunity to comment.	• No response required.

RUPRO ACTION REQUEST FORM

RUPRO Meeting: November 5, 2014

RUPRO action requested:
Approve for Publication

Title:	**Jury Instructions**
Civil Jury Instructions: Approve Publication of Minor Revisions (Action Required)	**64 Instructions with only changes to Directions for Use, additions to Sources and Authority, or minor nonsubstantive changes to instruction text; and** **380 instructions with only deletions of verbatim language from statutes, rules of court, and regulations.**
Committee or other entity submitting the proposal: **Advisory Committee on Civil Jury Instructions**	Staff contact: **Bruce Greenlee, Attorney, Legal Services Office** **415-865-7698** **bruce.greenlee@jud.ca.gov**

If requesting July 1 or out of cycle, explain:

Rules 2.1050(d) and 10.58(a) of the California Rules of Court 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. Release 25 is the second CACI release for 2014. Release 24 was approved on June 27, 2014.

Additional Information for RUPRO: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary, including any substantial argument in opposition and any expected individual or organization likely to support or oppose the proposal.)

In addition to recommending approval of 64 revised *CACI* instructions under the provisions of the guidelines adopted on December 19, 2006 regarding Jury Instructions Corrections and Technical and Minor Substantive Changes, and of 380 instructions with deletions of verbatim language of statutes, rules, and regulations, the advisory committee also requests that RUPRO approve and submit to the Judicial Council 39 new, revised, restored, renumbered, and revoked *CACI* instructions and verdict forms.

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
October 10, 2014

To
Members of the Rules and Projects Committee

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

Subject
Civil Jury Instructions: Instructions With Minor Revisions

Action Requested
Review and Approve Publication of Instructions With Minor Revisions Effective December 12, 2014

Deadline
N/A

Contact
Bruce Greenlee, Attorney
415-865-7698 phone
415-865-4319 fax
bruce.greenlee@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions has completed revisions and additions to the Judicial Council of California Civil Jury Instructions *(CACI)*. This report addresses 64 instructions that have only the types of revisions that the Judicial Council has given the Rules and Projects Committee (RUPRO) final authority to approve—primarily instructions with changes only to the Directions for Use or to the Sources and Authority. It also addresses 380 instructions for which verbatim language from statutes, rules of court, and regulations has been removed in conformance with a decision that RUPRO approved on April 16, 2014, and that the Judicial Council approved on June 27, 2014, for the previous *CACI* release.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that RUPRO, effective December 12, 2014, approve for publication 64 revised civil jury instructions prepared by the advisory committee that contain changes that do not require Judicial Council approval. The committee also recommends that RUPRO approve for publication an additional 380 instructions with the verbatim language from statutes, rules of court, and regulations deleted. On RUPRO's

approval, these instructions will be officially published in the 2015 edition of the *Judicial Council of California Civil Jury Instructions (CACI).*

The 64 instructions and verdict forms presented for final RUPRO approval are attached at pages 7–xxx. The 380 instructions with verbatim language deleted are (TBD): [also attached at pages xxx–xxx/available at *URL*for review on request in a separate electronic file]. The committee in a separate report requests that RUPRO recommend to the Judicial Council for adoption 39 new, revised, renumbered, and revoked instructions and verdict forms.

Previous Council Action

At the October 20, 2006, Judicial Council meeting, the Judicial Council approved authority for RUPRO to:[1]

> 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).

Under the implementing guidelines that RUPRO adopted on December 19, 2006, titled *Jury Instructions Corrections and Technical and Minor Substantive Changes,* RUPRO 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;[2]
(c) Additions or changes to the Directions for Use;
(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.

Rationale for Recommendation

The Task Force on Jury Instructions was appointed in 1997 on the recommendation of the Blue Ribbon Commission on Jury System Improvement. The mission of the task force was to draft comprehensive, legally accurate jury instructions that are readily understood by the average

[1] Judicial Council of Cal., Rules and Projects Committee, *Jury Instructions: Approve New Procedure for RUPRO Review and Approval of Changes in the Jury Instructions* (Sep. 12, 2006), p. 1.

[2] In light of the decision made last release to remove verbatim quotes of statutes, rules, and regulations, this category (b) is now mostly moot. It might still apply if a statute, rule, or regulation is revoked, or if subdivisions are renumbered.

juror. In July 2003, the council approved its civil jury instructions for initial publication in September 2003. The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating those instructions.[3]

Overview of updates

Of the 64 revised instructions that are presented for final RUPRO approval:

- All but one (VF-2507C) have revisions under category (a) above (additional cases added to Sources and Authority);
- VF-2507C falls exclusively under category (d) above (nonsubstantive change to instruction);[4]
- Four fall under both categories (a) and (c) (Sources and Authority and Directions for Use);
- One (CACI No. 4320) falls under both categories (a) and (d) above (addition to Sources and Authority and nonsubstantive change to instruction);[5]
- Two (CACI Nos. 2430 and 3210) fall under categories (a), (c), and (d) above (Sources and Authority and Directions for Use, and nonsubstantive change to instruction).

Removal of statutory language

For the last release, RUPRO recommended and the Judicial Council approved the committee's proposal to remove the actual language of statutes, rules, and regulations included under Sources and Authority. Here is the relevant section of the committee's report to the Judicial Council:[6]

> **Elimination of statutory language from Sources and Authority**
> In the process of developing Judicial Council pattern jury instructions to replace BAJI and CALJIC, the civil instructions (CACI) were completed first (2003). The criminal instructions (CALCRIM) followed in 2005. The CACI task force decided that the Sources and Authority should set forth the complete text of statutes that were relevant to the instructions.[7] The CALCRIM task force made a different decision; in CALCRIM, only a brief description of the source and a citation are included, not actual language.
>
> The inclusion of statutory language in CACI has had some unanticipated consequences. All legislative enactments need to be reviewed after each legislative session to see if there have been amendments revising language for the many statutes quoted in CACI. And because the Governor's October deadline for

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[3] See Cal. Rules of Court, rules 2.1050(d), 10.58(a).

[4] The change was to replace "reasonable person" with "reasonable **[***describe member of protected group, e.g., woman***]**." This change was made to all of the other FEHA harassment instructions and verdict forms several releases ago. VF-2507C was inadvertently omitted.

[5] The nonsubstantive change is to replace the word "quit" with "vacate the property," which is a plain-language expression used throughout the Unlawful Detainer series.

[6] Judicial Council of Cal., Advisory Com. on Civil Jury Instructions, Civil Jury Instructions (CACI): New, Revised, and Revoked Instructions and Verdict Forms (June 27, 2014), pp. 6–7.

[7] Regulations and court rules are also sometimes quoted in their entirety. Further references below to statutory language also apply to regulations and rules.

signing or vetoing legislation falls very near the date by which CACI content must be final for the next year's full edition, only the most urgent of changes get included in the edition. Very few changes to statutory language have any effect on the actual instructions, much less an urgent one. Therefore, many minor statutory revisions are left to the midyear supplement. For 2013, 936 instances of legislation amending statutes were cited in CACI. These amendments affected 42 instructions.[8] If all of these changes were to be made in this supplement release, an additional 214 pages would be included. None of these pages would present information that would have any actual effect on any instruction.[9]

The committee voted not to include these 214 pages in this release. Instead, it proposes removing verbatim quotations of statutory language from CACI's Sources and Authority, conforming to the CALCRIM format. The instructions appended to this report reflect this proposal, replacing statutory language with a simple title and citation. The committee believes that any benefit derived from including statutory language does not justify the amount of work required to keep statutory language up to date and the amount of pages that must be replaced for nonsubstantive changes.

In this release, this project is being fully implemented. The 380 instructions [at pages XXX–XXX/at the URL (or linked) under Attachments] have no changes other than the removal of verbatim language. Those instructions having other changes to be approved by RUPRO per this report or by the Judicial Council for substantive changes also have all verbatim language deleted. The statutes, rules of court, and regulations are still included under Sources and Authority but with only a short identifying title rather than the language set forth verbatim.

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.

[8] Also, the regulations under the Fair Employment and Housing Act were renumbered. This change affected another 15 instructions.

[9] One instruction would be pulled into the supplement simply to change a *which* to a *that*.

7. If no Supreme Court authority is available, the most recent California appellate court authority for a point should be included.
8. A United States 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.

The advisory committee has deleted material from the Sources and Authority that duplicates other material that is already included or is to be added.

Nonfinal cases and incomplete citations

All cases to be included in Sources and Authority are final.

Except for United States Supreme Court Reports, all incomplete citations will be resolved before publication. Any current citations to LEXIS will be replaced once the official citation is available.

Sources and Authority format cleanup

CACI format for cases calls for entries to the Sources and Authority to be in the format of direct quoted material from the case. In some of the series, this format was not uniformly observed initially, and some excerpts are in the format of a legal statement with a citation rather than a direct quotation. Many of these out-of-format excerpts have been converted to direct quotations.

CACI format also orders excerpts with statutes, rules, and regulations first; then cases; and then any other authorities, such as a Restatement excerpt. Excerpts that were out of order have been moved to the proper location.

Comments, Alternatives Considered, and Policy Implications

Because the changes to these instructions do not change the legal effect of the instructions in any way, they were not circulated for public comment.

Rules 2.1050 and 10.58 of the California Rules of Court 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* regularly; and to submit its recommendations to the council for approval. The proposed revisions and additions are necessary to ensure that the instructions remain clear, accurate, and complete.

Implementation Requirements, Costs, and Operational Impacts

There are no implementation costs. To the contrary, under its publication agreement with the Judicial Council, the official publisher, LexisNexis, will print the 2015 edition and pay royalties to the council. The official publisher will also make the new edition available free of charge to

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

Attachments

1. Full text of 64 instructions for final RUPRO approval, attached at pages 7–xx
2. [Full text of 380 instructions with only statutory, rule, or regulatory language deleted, at [pages xx-xxx/URL]

CIVIL JURY INSTRUCTIONS
WINTER 2014—TABLE OF CONTENTS

303. Breach of Contract—Essential Factual Elements

To recover damages from [*name of defendant***] for breach of contract, [***name of plaintiff***] must prove all of the following:**

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

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

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

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

[*or***]**

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

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

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

Directions for Use

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

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

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

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

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

Sources and Authority

- Contract Defined. Civil Code section 1549.

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

- "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186 [169 Cal.Rptr.3d 475 ~~A statement of a cause of action for breach of contract requires a pleading of (1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damages to plaintiff therefrom." (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 [92 Cal.Rptr. 723~~].)

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

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

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

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

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

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

Secondary Sources

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

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

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

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

371. Common Count: Goods and Services Rendered

[*Name of plaintiff*] claims that [*name of defendant*] owes [him/her/it] money for [goods delivered/services rendered]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] requested, by words or conduct, that [*name of plaintiff*] [perform services/deliver goods] for the benefit of [*name of defendant*];**

2. **That [*name of plaintiff*] [performed the services/delivered the goods] as requested;**

3. **That [*name of defendant*] has not paid [*name of plaintiff*] for the [services/goods]; and**

4. **The reasonable value of the [goods/services] that were provided.**

New June 2005

Sources and Authority

- " ' "Quantum meruit refers to the well-established principle that 'the law implies a promise to pay for services performed under circumstances disclosing that they were not gratuitously rendered.' [Citation.] To recover in quantum meruit, a party need not prove the existence of a contract [citations], but it must show the circumstances were such that 'the services were rendered under some understanding or expectation of both parties that compensation therefor was to be made.' " [Citation.]' 'The underlying idea behind quantum meruit is the law's distaste for unjust enrichment. If one has received a benefit which one may not justly retain, one should "restore the aggrieved party to his [or her] former position by return of the thing or its equivalent in money." [Citation.]' " 'The measure of recovery in *quantum meruit* is the reasonable value of the services rendered *provided* they were of direct benefit to the defendant." [Citations.]' In other words, quantum meruit is equitable payment for services already rendered." (*E. J. Franks Construction, Inc. v. Sahota* (2014) 226 Cal.App.4th 1123, 1127−1128 [172 Cal.Rptr.3d 778], original italics, internal citations omitted.)

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim ... . Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial*, is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "To recover on a claim for the reasonable value of services under a quantum meruit theory, a plaintiff must establish both that he or she was acting pursuant to either an express or implied request for services from the defendant and that the services rendered were intended to and did benefit the defendant." (*Ochs v. PacifiCare of California* (2004) 115 Cal.App.4th 782, 794 [9 Cal.Rptr.3d 734],

internal citation omitted.)

- "[W]here services have been rendered under a contract which is unenforceable because not in writing, an action generally will lie upon a common count for quantum meruit." (*Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996 [90 Cal.Rptr.2d 665].)

- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. ... The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)

- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract.' " A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)

- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, ... rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (4th ed. 1997) Pleading, § 515

12 California Forms of Pleading and Practice, Ch. 121, *Common Counts*, §§ 121.25, 121.55–121.58 (Matthew Bender)

4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars*, §§ 43.33, 43.40 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions,* 9.02, 9.15, 9.32

400. Negligence—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] 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). ~~provides, in part: "Everyone is responsible, not only for the result of his or her willful acts, but also for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself or herself."~~

- "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].)

- "[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 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.)

- "[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].)

- " '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.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 831–838, 860–862, 865, 866

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.4–1.18

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.01–1.31, Ch. 2, *Causation*, §§ 2.01–2.11, Ch. 3, *Proof of Negligence*, §§ 3.01–3.34 (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)

406. Apportionment of Responsibility

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

1. **That [***insert name(s) or description(s) of nonparty tortfeasor(s)***] [was/were] [negligent/at fault]; and**

2. **That the [negligence/fault] of [***insert name(s) or description(s) of nonparty tortfeasor(s)***] was a substantial factor in causing [name of plaintiff]'s harm.]**

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

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

["Person" can mean an individual or a business entity.]

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

Directions for Use

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

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

Include the first paragraph if the defendant has presented evidence that the conduct of one or more nonparties contributed to the plaintiff's harm. (See *Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 33 [117 Cal.Rptr.3d 791] [defendant has burden to establish concurrent or alternate causes].) "Nonparties" include the universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (*Dafonte v. Up-Right* (1992) 2 Cal.4th 593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140].) Include "also" if the defendant concedes some degree of liability.

If the plaintiff's comparative fault is also at issue, give CACI No. 405, *Comparative Fault of Plaintiff*, in

addition to this instruction.

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

Sources and Authority

- Proposition 51. Civil Code section 1431.2.

- "[W]e hold that after *Li*, a concurrent tortfeasor whose negligence is a proximate cause of an indivisible injury remains liable for the total amount of damages, diminished only 'in proportion to the amount of negligence attributable to the person recovering.' " (*American Motorcycle Assn. v. Superior Court* (1978) 20 Cal.3d 578, 590 [146 Cal.Rptr. 182, 578 P.2d 899], citing *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226].)

- "In light of *Li,* however, we think that the long-recognized common law equitable indemnity doctrine should be modified to permit, in appropriate cases, a right of partial indemnity, under which liability among multiple tortfeasors may be apportioned on a comparative negligence basis. … Such a doctrine conforms to *Li's* objective of establishing 'a system under which liability for damage will be borne by those whose negligence caused it in direct proportion to their respective fault.' " (*American Motorcycle Assn., supra,* 20 Cal.3d at p. 583.)

- "The comparative fault doctrine 'is designed to permit the trier of fact to consider all relevant criteria in apportioning liability. The doctrine "is a flexible, commonsense concept, under which a jury properly may consider and evaluate the relative responsibility of various parties for an injury (whether their responsibility for the injury rests on negligence, strict liability, or other theories of responsibility), in order to arrive at an "equitable apportionment or allocation of loss.' " [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1285 [164 Cal.App.3d 112].)

- "[A] 'defendant['s]' liability for noneconomic damages cannot exceed his or her proportionate share of fault *as compared with all fault responsible for the plaintiff's injuries*, not merely that of 'defendant[s]' present in the lawsuit." (*Dafonte, supra,* 2 Cal.4th at p. 603, original italics.)

- "The proposition that a jury may apportion liability to a nonparty has been adopted in the Judicial Council of California Civil Jury Instructions (CACI) special verdict form applicable to negligence cases. (See CACI Verdict Form 402 and CACI Instruction No. 406 ['[Verdict Form] 402 is designed to compare the conduct of all defendants, the conduct of the plaintiff, and the conduct of any nonparty tortfeasors. [¶] … [¶] … "Nonparties" include the universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors.']." (*Vollaro v. Lispi* (2014) 224 Cal.App.4th 93, 100 fn. 5 [-- Cal.Rptr.3d --], internal citation omitted.)

- "[U]nder Proposition 51, fault will be allocated to an entity that is immune from *paying* for its tortious acts, but will not be allocated to an entity that is not a tortfeasor, that is, one whose actions have been declared not to be tortious." (*Taylor v. John Crane, Inc.* (2003) 113 Cal.App.4th 1063, 1071 [6 Cal.Rptr.3d 695], original italics.)

- "A defendant bears the burden of proving affirmative defenses and indemnity cross-claims. Apportionment of noneconomic damages is a form of equitable indemnity in which a defendant may reduce his or her damages by establishing others are also at fault for the plaintiff's injuries. Placing the burden on defendant to prove fault as to nonparty tortfeasors is not unjustified or unduly onerous." (*Wilson v. Ritto* (2003) 105 Cal.App.4th 361, 369 [129 Cal.Rptr.2d 336].)

- "When a defendant is liable *only* by reason of a derivative nondelegable duty arising from his status as employer or landlord or vehicle owner or coconspirator, or from his role in the chain of distribution of a single product in a products liability action, his liability is *secondary* (vicarious) to that of the actor and he is not entitled to the benefits of Proposition 51." (*Bayer-Bel v. Litovsky* (2008) 159 Cal.App.4th 396, 400 [71 Cal.Rptr.3d 518], original italics, internal citations omitted.)

- "Under the doctrine of strict products liability, all defendants in the chain of distribution are jointly and severally liable, meaning that each defendant can be held liable to the plaintiff for all damages the defective product caused. " (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1010 [169 Cal.Rptr.3d 208].)

- Proposition 51 does not apply in a strict products liability action when a single defective product produced a single injury to the plaintiff. That is, all the defendants in the stream of commerce of that single product remain jointly and severally liable. … [I]n strict products liability asbestos exposure actions, … Proposition 51 applies when there are multiple products that caused the plaintiff's injuries and there is evidence that provides a basis to allocate fault for noneconomic damages between the defective products." (*Romine, supra,* 224 Cal.App.4th at pp. 1011−1012, internal citations omitted.)

- "[T]he jury found that defendants are parties to a joint venture. The incidents of a joint venture are in all important respects the same as those of a partnership. One such incident of partnership is that all partners are jointly and severally liable for partnership obligations, irrespective of their individual partnership interests. Because joint and several liability arises from the partnership or joint venture, Civil Code section 1431.2 is not applicable." (*Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082, 1091 [111 Cal.Rptr.3d 165], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 50, 52–56, 59, 60, 63, 64, 68

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

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

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

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

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

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

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

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

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

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

418. Presumption of Negligence per se

[*Insert citation to statute, regulation, or ordinance***] states:**

_____

If you decide

1. **That [***name of plaintiff/defendant***] violated this law and**

2. **That the violation was a substantial factor in bringing about the harm,**

then you must find that [*name of plaintiff/defendant***] was negligent [unless you also find that the violation was excused].**

If you find that [*name of plaintiff/defendant***] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you must still decide whether [***name of plaintiff/defendant***] was negligent in light of the other instructions.**

New September 2003; Revised December 2005, June 2011

Directions for Use

This jury instruction addresses the establishment of the two factual elements underlying the presumption of negligence. If they are not established, then a finding of negligence cannot be based on the alleged statutory violation. However, negligence can still be proven by other means. (See *Nunneley v. Edgar Hotel* (1950) 36 Cal.2d 493, 500–501 [225 P.2d 497].)

If a rebuttal is offered on the ground that the violation was excused, then the bracketed portion in the second and last paragraphs should be read. For an instruction on excuse, see CACI No. 420, *Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused).*

If the statute is lengthy, the judge may want to read it at the end of this instruction instead of at the beginning. The instruction would then need to be revised, to tell the jury that they will be hearing the statute at the end.

Rebuttal of the presumption of negligence is addressed in the instructions that follow (see CACI Nos. 420 and 421).

Sources and Authority

- Negligence per se. Evidence Code section 669. ~~codifies the common law presumption of negligence per se and the grounds for rebutting the presumption. Subdivision (a) sets forth the conditions that cause the presumption to arise:~~

~~The failure of a person to exercise due care is presumed if:~~

~~(1) He violated a statute, ordinance, or regulation of a public entity;~~

~~(2) The violation proximately caused death or injury to person or property;~~

~~(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and~~

~~(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.~~

- "Although compliance with the law does not prove the absence of negligence, violation of the law does raise a presumption that the violator was negligent. This is called negligence per se. The presumption of negligence arises if (1) the defendant violated a statute; (2) the violation proximately caused the plaintiff's injury; (3) the injury resulted from the kind of occurrence the statute was designed to prevent; and (4) the plaintiff was one of the class of persons the statute was intended to protect. The first two elements are normally questions for the trier of fact and the last two are determined by the trial court as a matter of law. That is, the trial court decides whether a statute or regulation defines the standard of care in a particular case." (*Jacobs Farm/Del Cabo, Inc. v. Western Farm Service, Inc.* (2010) 190 Cal.App.4th 1502, 1526 [119 Cal.Rptr.3d 529], internal citations omitted; see also Cal. Law Revision Com. to Evid. Code, § 669.)

- "Under the doctrine of negligence per se, the plaintiff 'borrows' statutes to prove duty of care and standard of care. [Citation.] The plaintiff still has the burden of proving causation." (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 584 [172 Cal.Rptr.3d 204].)

- "Where a statute establishes a party's duty, ' "proof of the [party's] violation of a statutory standard of conduct raises a presumption of negligence that may be rebutted only by evidence establishing a justification or excuse for the statutory violation." This rule, generally known as the doctrine of negligence per se, means that where the court has adopted the conduct prescribed by statute as the standard of care for a reasonable person, a violation of the statute is presumed to be negligence." (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 263 [155 Cal.Rptr.3d 306], internal citation omitted.)

- " 'The significance of a statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. The decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it. In the absence of such a standard the case goes to the jury, which must determine whether the defendant has acted as a reasonably prudent man would act in similar circumstances. The jury then has the burden of deciding not only what the facts are but what the unformulated standard is of reasonable conduct. When a legislative body has generalized a standard from the experience of the community and prohibits conduct that is likely to cause harm, the court accepts the formulated standards and applies them [citations], except where they would serve to impose liability without fault.' " (*Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547 [25 Cal.Rptr.2d 97, 863 P.2d 167],

internal citations omitted.)

- "There is no doubt in this state that a federal statute or regulation may be adopted as a standard of care." (*DiRosa v. Showa Denko K. K.* (1996) 44 Cal.App.4th 799, 808 [52 Cal.Rptr.2d 128].)

- "[T]he courts and the Legislature may create a negligence duty of care, but an administrative agency cannot independently impose a duty of care if that authority has not been properly delegated to the agency by the Legislature." (*Cal. Serv. Station Etc. Ass'n v. Am. Home Assur. Co.* (1998) 62 Cal.App.4th 1166, 1175 [73 Cal.Rptr.2d 182].)

- "In combination, the [1999] language and the deletion [to Lab. Code, § 6304.5] indicate that henceforth, Cal-OSHA provisions are to be treated like any other statute or regulation and may be admitted to establish a standard or duty of care in all negligence and wrongful death actions, including third party actions." (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 928 [22 Cal.Rptr.3d 530, 102 P.3d 915].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 871–896

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-H, *Negligence Predicated On Statutory Violation ("Negligence Per Se")*, ¶ 2:1845 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8G-C, *Procedural Considerations--Presumptions*, ¶ 8:3604 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28-1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence,* §§ 3.10, 3.13 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument,* §§ 90.88, 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 7, *Proof,* § 7.04 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.50 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* §§ 165.70, 165.80, 165.81 (Matthew Bender)

419. Presumption of Negligence per se (Causation Only at Issue)

[*Insert citation to statute, regulation, or ordinance***] states: _____.**

A violation of this law has been established and is not an issue for you to decide.

[However, you must decide whether the violation was excused. If it was not excused, then you] [You] must decide whether the violation was a substantial factor in harming [*name of plaintiff***].**

If you decide that the violation was a substantial factor, then you must find that [*name of plaintiff/defendant***] was negligent.**

New September 2003; Revised December 2011

Directions for Use

The California Law Revision Commission comment on Evidence Code section 669 states that the trier of fact usually decides the question of whether the violation occurred. However, "if a party admits the violation or if the evidence of the violation is undisputed, it is appropriate for the judge to instruct the jury that a violation of the statute, ordinance, or regulation has been established as a matter of law." In such cases, the jury would decide causation and, if applicable, the existence of any justification or excuse. For an instruction on excuse, see CACI No. 420, *Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused).* See also Sources and Authority to CACI No. 418, *Presumption of Negligence per se.*

Sources and Authority

- Presumption of Negligence per se. Evidence Code section 669(a). ~~provides:~~
- "Under the doctrine of negligence per se, the plaintiff 'borrows' statutes to prove duty of care and standard of care. [Citation.] The plaintiff still has the burden of proving causation." (*David v. Hernandez* (2014) 226 Cal.App.4th 578, 584 [172 Cal.Rptr.3d 204].)
- ~~The failure of a person to exercise due care is presumed if:~~

  ~~(1) He violated a statute, ordinance, or regulation of a public entity;~~

  ~~(2) The violation proximately caused death or injury to person or property;~~

  ~~(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and~~

  ~~(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was~~

~~adopted.~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 871–896

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.28-1.31

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.10 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.89 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.110 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.70, 165.80 (Matthew Bender)

423. Public Entity Liability for Failure to Perform Mandatory Duty

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[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] violated [***insert reference to statute, regulation, or ordinance***] which states: _____ [***insert relevant language***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] violated [***insert reference to statute, regulation, or ordinance***];**

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

3. **That [***name of defendant***]'s failure to perform its duty was a substantial factor in causing [***name of plaintiff***]'s harm.**

[*Name of defendant***], however, is not responsible for [***name of plaintiff***]'s harm if [***name of defendant***] proves that it made reasonable efforts to perform its duties under the [statute/regulation/ordinance].**

New September 2003

Directions for Use

The judge decides the issues of whether the statute imposes a mandatory duty and whether it was designed to protect against the type of harm suffered. (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499 [93 Cal.Rptr.2d 327, 993 P.2d 983].)

Sources and Authority

- Government Liability for Failure to Perform Mandatory Duty. Government Code section 815.6. ~~provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."~~

- " 'Government Code section 815.6 contains a three-pronged test for determining whether liability may be imposed on a public entity: (1) an enactment must impose a mandatory, not discretionary, duty ... ; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability ... ; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered.' All three elements must be met before a government entity is required to confront the rebuttable presumption of negligence." (*Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 614 [101 Cal.Rptr.2d 48], internal citation omitted.)

- "In order to recover plaintiffs have to show that there is some specific statutory mandate that was violated by the County, which violation was a proximate cause of the accident." (*Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 896-897 [45 Cal.Rptr.2d 646], internal citations

omitted.)

- "[T]he term 'enactment' refers to 'a constitutional provision, statute, charter provision, ordinance or regulation.' … A 'contract cannot give rise to "a mandatory duty imposed by an enactment … ." ' " (*Tuthill v. City of San Buenaventura* (2014) 223 Cal.App.4th 1081, 1091−1092 [167 Cal.Rptr.3d 820].)

- " '[A]pplication of section 815.6 requires that the enactment at issue be *obligatory,* rather than merely discretionary or permissive, in its directions to the public entity; it must *require,* rather than merely authorize or permit, that a particular action be taken or not taken.' Even where an enactment imposes an obligation, it does not necessarily follow that the obligation gives rise to a mandatory duty. The key question is whether the obligation involves an exercise of discretion." (*County of Los Angeles v. Superior Court* (2012) 209 Cal.App.4th 543, 549 [147 Cal.Rptr.3d 33], original italics, internal citation omitted.)

- "Courts have recognized that as a practical matter the standard for determining whether a mandatory duty exists is 'virtually identical' to the test for an implied statutory duty of care under Evidence Code section 669." (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1185, fn. 3 [89 Cal.Rptr.2d 768], internal citations omitted.)

- "The injury must be ' " 'one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty.' " ' … 'That the enactment "confers some benefit" on the class to which plaintiff belongs is not enough; if the benefit is "incidental" to the enactment's protective purpose, the enactment cannot serve as a predicate for liability under section 815.6." (*Tuthill, supra,* 223 Cal.App.4th at p. 1092, internal citation omitted.)

- "Financial limitations of governments have never been, and cannot be, deemed an excuse for a public employee's failure to comply with mandatory duties imposed by law." (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 146 [32 Cal.Rptr.2d 643], internal citations omitted.)

- "Questions of statutory immunity do not become relevant until it has been determined that the defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity. However, a defendant may not be held liable for the breach of a duty if such an immunity in fact exists." (*Washington, supra,* 38 Cal.App.4th at p. 896, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 245–248

5 Levy et al., California Torts, Ch. 60, *General Principles of Liability and Immunity of Public Entities and Employees*, § 60.22 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers,* § 464.61 (Matthew Bender)

45 California Forms of Pleading and Practice, Ch. 514, *Schools: Injuries to Students*, § 514.17 (Matthew

Bender)

19 California Points and Authorities, Ch. 196, *Public Entities,* § 196.182 (Matthew Bender)

435. Causation for Asbestos-Related Cancer Claims

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It does not have to be the only cause of the harm.

[*Name of plaintiff***] may prove that exposure to asbestos from [***name of defendant***]'s product was a substantial factor causing [his/her/[***name of decedent***]'s] illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor contributing to [his/her] risk of developing cancer.**

New September 2003; Revised December 2007

Directions for Use

If the issue of medical causation is tried separately, revise this instruction to focus on that issue.

If necessary, CACI No. 431, *Causation: Multiple Causes,* may also be given. Unless there are other defendants who are not asbestos manufacturers or suppliers, do not give CACI No. 430, *Causation: Substantial Factor*.

Sources and Authority

- "In the context of a cause of action for asbestos-related latent injuries, the plaintiff must first establish some threshold *exposure* to the defendant's defective asbestos-containing products, and must further establish in reasonable medical probability that a particular exposure or series of exposures was a 'legal cause' of his injury, i.e., a *substantial factor* in bringing about the injury. In an asbestos-related cancer case, the plaintiff need *not* prove that fibers from the defendant's product were the ones, or among the ones, that actually began the process of malignant cellular growth. Instead, the plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer. The jury should be so instructed. The standard instructions on substantial factor and concurrent causation remain correct in this context and should also be given." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 982–983 [67 Cal.Rptr.2d 16, 941 P.2d 1203], original italics, internal citation and footnotes omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused

thereby.' " (*Rutherford, supra,* 16 Cal.4th at p. 969, internal citations omitted.)

- "[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chem. Co.* (1999), 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citation omitted.)

- "Contrary to defendant's assertion, the California Supreme Court's decision in *Viner v. Sweet* (2003) 30 Cal.4th 1232 [135 Cal. Rptr. 2d 629, 70 P.3d 1046] (*Viner*) did not alter the causation requirement in asbestos-related cases. In *Viner*, the court noted that subsection (1) of section 432 of the Restatement Second of Torts, which provides that 'the actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent,' 'demonstrates how the "substantial factor" test subsumes the traditional "but for" test of causation.' Defendant argues that *Viner* required plaintiffs to show that defendant's product 'independently caused [plaintiff's] injury or that, but for that exposure, [plaintiff] would not have contracted lung cancer.' *Viner*, however, is a legal malpractice case. It does not address the explicit holding in *Rutherford* that 'plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer, without the need to demonstrate that fibers from the defendant's particular product were the ones, or among the ones, that actually produced the malignant growth.' " *Viner* is consistent with *Rutherford* insofar as *Rutherford* requires proof that an individual asbestos-containing product is a substantial factor contributing to the plaintiff's risk or probability of developing cancer." (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn. 3 [35 Cal.Rptr.3d 144], internal citations omitted.)

- " 'A threshold issue in asbestos litigation is exposure to the defendant's product. … If there has been no exposure, there is no causation.' Plaintiffs bear the burden of 'demonstrating that exposure to [defendant's] asbestos products was, in reasonable medical probability, a substantial factor in causing or contributing to [plaintiff's] risk of developing cancer.' 'Factors relevant to assessing whether such a medical probability exists include frequency of exposure, regularity of exposure and proximity of the asbestos product to [plaintiff].' Therefore, '[plaintiffs] cannot prevail against [defendant] without evidence that [plaintiff] was exposed to asbestos-containing materials manufactured or furnished by [defendant] with enough frequency and regularity as to show a reasonable medical probability that this exposure was a factor in causing the plaintiff's injuries.' " (*Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1084 [109 Cal.Rptr.3d 371], internal citations omitted.)

- "Plaintiffs may prove causation in an asbestos case by demonstrating that the plaintiff's or decedent's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer." (*McGonnell v. Kaiser Gypsum Co., Inc.* (2002) 98 Cal.App.4th 1098, 1103 [120 Cal.Rptr.2d 23], internal citations omitted.)

- "Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff's asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. [Citation.] Additional factors may also be significant in individual cases,

such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff's injury. [Citations.] 'Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.' [Citation.] " (*Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363−1364 [169 Cal.Rptr.3d 373]~~*Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1416−1417 [37 Cal.Rptr.2d 902], internal citations omitted~~.)

- "We disagree with the trial court's view that *Rutherford* mandates that a medical doctor must expressly link together the evidence of substantial factor causation. The *Rutherford* court did not create a requirement that specific words must be recited by appellant's expert. Nor did the *Rutherford* court specify that the testifying expert in asbestos cases must always be 'somebody with an M.D. after his name.' The *Rutherford* court agreed with the *Lineaweaver* court that 'the reference to "medical probability" in the standard "is no more than a recognition that asbestos injury cases (like medical malpractice cases) involve the use of medical evidence." [Citation.]' The Supreme Court has since clarified that medical evidence does not necessarily have to be provided by a medical doctor." (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 675 [156 Cal.Rptr.3d 90], internal citations omitted.)

- "Nor is there a requirement that 'specific words must be recited by [plaintiffs'] expert.' [¶] The connection, however, must be made between the defendant's asbestos products and the risk of developing mesothelioma suffered by the decedent." (*Paulus, supra,* 224 Cal.App.4th at p. 1364.)

Secondary Sources

3 Witkin, California Procedure (4th ed. 1996) Actions, § 527

Flahavan et al., California Practice Guide: Personal Injury ~~(The Rutter Group)~~ ¶¶ 2:767.2, 2:984d, 5:180.2 (The Rutter Group)

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.03 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.22, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.72 (Matthew Bender)

455. Statute of Limitations—Delayed Discovery

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

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

[*or***]**

[[*name of plaintiff***] did not discover, and a reasonable and diligent investigation would not have disclosed, that [***specify factual basis for cause of action, e.g., "a medical device" or "inadequate medical treatment"***] contributed to [***name of plaintiff***]'s harm.]**

New April 2007; Revised December 2007, April 2009, December 2009

Directions for Use

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

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

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

Do not use this instruction for medical malpractice (see CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, and CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*) or attorney malpractice (see CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—*

Attorney Malpractice—Four-Year Limit). Also, do not use this instruction if the case was timely but a fictitiously named defendant was identified and substituted in after the limitation period expired. (See *McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 942 [63 Cal.Rptr.3d 615] [if lawsuit is initiated within the applicable period of limitations against one party and the plaintiff has complied with Code Civ. Proc., § 474 by alleging the existence of unknown additional defendants, the relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is what facts the plaintiff actually knew at the time the original complaint was filed].)

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

Sources and Authority

- "An exception to the general rule for defining the accrual of a cause of action—indeed, the 'most important' one—is the discovery rule. … It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [¶] … [T]he plaintiff discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof—when, simply put, he at least 'suspects … that someone has done something wrong' to him, 'wrong' being used, not in any technical sense, but rather in accordance with its 'lay understanding.' He has reason to discover the cause of action when he has reason at least to suspect a factual basis for its elements. He has reason to suspect when he has 'notice or information of circumstances to put a reasonable person on *inquiry*'; he need not know the 'specific "facts" necessary to establish' the cause of action; rather, he may seek to learn such facts through the 'process contemplated by pretrial discovery'; but, within the applicable limitations period, he must indeed seek to learn the facts necessary to bring the cause of action in the first place—he 'cannot wait for' them to 'find him' and 'sit on' his 'rights'; he 'must go find' them himself if he can and 'file suit' if he does." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397–398 [87 Cal.Rptr.2d 453, 981 P.2d 79], original italics, internal citations and footnote omitted.)

- "[I]t is the discovery of facts, not their legal significance, that starts the statute." (*Jolly, supra,* 44 Cal.3d at p. 1113.)

- "While ignorance of the existence of an injury or cause of action may delay the running of the statute of limitations until the date of discovery, the general rule in California has been that ignorance of the identity of the defendant is not essential to a claim and therefore will not toll the statute." (*Bernson v. Browning-Ferris Industries* (1994) 7 Cal.4th 926, 932 [30 Cal.Rptr.2d 440, 873 P.2d 613].)

- "[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not

have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis." (*Fox, supra,* 35 Cal.4th at p. 803.)

- "[A]s *Fox* teaches, claims based on two independent legal theories against two separate defendants can accrue at different times." (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1323 [64 Cal.Rptr.3d 9].)

- "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable. Developed to mitigate the harsh results produced by strict definitions of accrual, the common law discovery rule postpones accrual until a plaintiff discovers or has reason to discover the cause of action." (*Glue-Fold, Inc., supra,* 82 Cal.App.4th at p. 1029, internal citations omitted.)

- "A plaintiff's inability to discover a cause of action may occur 'when it is particularly difficult for the plaintiff to observe or understand the breach of duty, or when the injury itself (or its cause) is hidden or beyond what the ordinary person could be expected to understand.' " (*NBCUniversal Media, LLC v. Superior Court* (2014) 225 Cal.App.4th 1222, 1232 [171 Cal.Rptr.3d 1].)

- "[T]he plaintiff may discover, or have reason to discover, the cause of action even if he does not suspect, or have reason to suspect, the identity of the defendant. That is because the identity of the defendant is not an element of any cause of action. It follows that failure to discover, or have reason to discover, the identity of the defendant does not postpone the accrual of a cause of action, whereas a like failure concerning the cause of action itself does. 'Although never fully articulated, the rationale for distinguishing between ignorance' of the defendant and 'ignorance' of the cause of action itself 'appears to be premised on the commonsense assumption that once the plaintiff is aware of' the latter, he 'normally' has 'sufficient opportunity,' within the 'applicable limitations period,' 'to discover the identity' of the former. He may 'often effectively extend[]' the limitations period in question 'by the filing' and amendment 'of a Doe complaint' and invocation of the relation-back doctrine. 'Where' he knows the 'identity of at least one defendant … , [he] must' proceed thus." (*Norgart, supra,* 21 Cal.4th at p. 399, internal citations and footnote omitted.)

- "The discovery rule only delays accrual until the plaintiff has, or should have, inquiry notice of the cause of action. The discovery rule does not encourage dilatory tactics because plaintiffs are charged with presumptive knowledge of an injury if they have ' " 'information of circumstances to put [them] on inquiry' " ' or if they have ' " 'the opportunity to obtain knowledge from sources open to [their] investigation.' " ' In other words, plaintiffs are required to conduct a reasonable investigation after becoming aware of an injury, and are charged with knowledge of the information that would have been revealed by such an investigation." (*Fox, supra,* 35 Cal.4th at pp. 807–808, internal citations omitted.)

- "Thus, a two-part analysis is used to assess when a claim has accrued under the discovery rule. The initial step focuses on whether the plaintiff possessed information that would cause a reasonable person to inquire into the cause of his injuries. Under California law, this

inquiry duty arises when the plaintiff becomes aware of facts that would cause a reasonably prudent person to suspect his injuries were the result of wrongdoing. If the plaintiff was in possession of such facts, thereby triggering his duty to investigate, it must next be determined whether 'such an investigation would have disclosed a factual basis for a cause of action[.] [T]he statute of limitations begins to run on that cause of action when the investigation would have brought such information to light.' " (*Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1251 [162 Cal.Rptr.3d 617], internal citation omitted.)

- " [I]f continuing injury from a completed act generally extended the limitations periods, those periods would lack meaning. Parties could file suit at any time, as long as their injuries persisted. This is not the law. The time bar starts running when the plaintiff first learns of actionable injury, even if the injury will linger or compound. ' " '[W]here an injury, although slight, is sustained in consequence of the wrongful act of another, and the law affords a remedy therefor, the statute of limitations attaches at once. *It is not material that all the damages resulting from the act shall have been sustained at that time, and the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date … .*' " ' " (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)

- There is no doctrine of constructive or imputed suspicion arising from media coverage. "[Defendant]'s argument amounts to a contention that, having taken a prescription drug, [plaintiff] had an obligation to read newspapers and watch television news and otherwise seek out news of dangerous side effects not disclosed by the prescribing doctor, or indeed by the drug manufacturer, and that if she failed in this obligation, she could lose her right to sue. We see no such obligation." (*Nelson v. Indevus Pharmaceuticals, Inc.* (2006) 142 Cal.App.4th 1202, 1206 [48 Cal.Rptr.3d 668].)

- "The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only '[o]nce the plaintiff *has* a suspicion of wrongdoing.' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364 [76 Cal.Rptr.3d 146], original italics.)

- "Generally, the bar of the statute of limitations is raised as an affirmative defense, subject to proof by the defendant. [¶] However, when a plaintiff relies on the discovery rule or allegations of fraudulent concealment as excuses for an apparently belated filing of a complaint, 'the burden of pleading and proving belated discovery of a cause of action falls on the plaintiff.' " (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174 [144 Cal.Rptr.3d 522].)

- " '[R]esolution of the statute of limitations issue is normally a question of fact … .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

Secondary Sources

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

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

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

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

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, §§ 143.47, 143.52–143.64 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.15

500. Medical Negligence—Essential Factual Elements

Please see CACI No. 400, *Negligence—Essential Factual Elements*

New September 2003; Revised 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 of CACI No. 400. From a theoretical standpoint, medical negligence is still considered negligence. (See *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997–998 [35 Cal.Rptr.2d 685, 884 P.2d 142].)

Also give the appropriate standard-of-care instruction for the defendant's category of medical professional. (See CACI No. 501, *Standard of Care for Health Care Professionals,* CACI No. 502, *Standard of Care for Medical Specialists,* CACI No. 504, *Standard of Care for Nurses,* CACI No. 514, *Duty of Hospital*.)

Sources and Authority

- "Professional Negligence" of Health Care Provider Defined. Code of Civil Procedure section 340.5, ~~which sets the statute of limitations for medical malpractice cases based on professional negligence, and~~ Civil Code sections 3333.1 and 3333.2. ~~define "professional negligence" as follows: "a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital."~~

- "Section 340.5 defines 'professional negligence' as 'a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are *within the scope of services for which the provider is licensed* and which are not within any restriction imposed by the licensing agency or licensed hospital.' The term 'professional negligence' encompasses actions in which 'the injury for which damages are sought is directly related to the professional services provided by the health care provider' or directly related to 'a matter that is an ordinary and usual part of medical professional services.' '[C]ourts have broadly construed "professional negligence" to mean negligence occurring during the rendering of services for which the health care provider is licensed.' " (*Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 297 [170 Cal.Rptr.3d 125], original italics, internal citations omitted.)

- "With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional 'circumstances' relevant to an overall assessment of what constitutes 'ordinary prudence' in a particular situation." (*Flowers, supra,* 8 Cal.4th at pp. 997-998.)

- "Since the standard of care remains constant in terms of 'ordinary prudence,' it is clear that denominating a cause of action as one for 'professional negligence' does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which 'ordinary prudence' will be calculated and the defendant's conduct evaluated." (*Flowers, supra*, 8 Cal.4th at p. 998.)

- "The Medical Injury Compensation Reform Act (MICRA) contains numerous provisions effecting substantial changes in negligence actions against health care providers, including a limitation on noneconomic damages, elimination of the collateral source rule as well as preclusion of subrogation in most instances, and authorization for periodic payments of future damages in excess of $ 50,000. While in each instance the statutory scheme has altered a significant aspect of claims for medical malpractice, such as the measure of the defendant's liability for damages or the admissibility of evidence, the fundamental substance of such actions on the issues of duty, standard of care, breach, and causation remains unaffected." (*Flowers, supra,* 8 Cal.4th at p. 999.)

- "The law is well settled that in a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. … That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, *it becomes more likely than not that the injury was a result of its action*. This is the outer limit of inference upon which an issue may be submitted to the jury." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1118 [8 Cal.Rptr.3d 363], original italics, internal citations omitted.)

- "The rationale advanced by the hospital is that … if the need for restraint is 'obvious to all,' the failure to restrain is ordinary negligence. … [T]his standard is incompatible with the subsequently enacted statutory definition of professional negligence, which focuses on whether the negligence occurs in the rendering of professional services, rather than whether a high or low level of skill is required. [Citation.]" (*Bellamy v. Appellate Dep't of the Superior Court* (1996) 50 Cal.App.4th 797, 806-807 [57 Cal.Rptr.2d 894].)

- "[E]ven in the absence of a physician-patient relationship, a physician has liability to an examinee for negligence or professional malpractice for injuries incurred during the examination itself." (*Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1478 [37 Cal.Rptr.2d 769].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 933–936, 938, 939

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.65

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.11, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.01 (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 209, *Dentists*, § 209.15 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, §§ 295.13, 295.43 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.11 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.20 et seq. (Matthew Bender)

533. Failure to Obtain Informed Consent—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] was negligent because [he/she] performed [a/an] [***insert medical procedure***] on [***name of plaintiff***] without first obtaining [his/her] 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 he or she 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

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.)

- "[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 (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 (10th ed. 2005) Torts, §§ 395, 400

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] 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

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 he or she 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. ~~provides:~~

  ~~In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.~~

  ~~For the purposes of this section:~~

  ~~(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;~~

  ~~(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.~~

- Notice of Intent to Commence Action. Code of Civil Procedure section 364(a). ~~provides:~~

  ~~No action based upon the health care provider's professional negligence may be commenced unless the defendant has been given at least 90 days' prior notice of the intention to commence the action.~~

- 90-Day Extension of Limitation Period. Code of Civil Procedure section 364(d). ~~provides:~~

  ~~If the notice is served within 90 days of the expiration of the applicable statute of limitations, the time for the commencement of the action shall be extended 90 days from the service of the notice.~~

- "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].)

- "~~[T]he *Jolly* [*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923]] analysis applies to section 340.5: 'The one-year period [section 340.5] commences when the plaintiff is aware of both the physical manifestation of the injury and its negligent cause.' [¶] 'Our Supreme Court has often discussed the one-year rule's requirement of discovery of the negligent cause of injury.~~ 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.)

- "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. Mem'l Hosp.* (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.)

Secondary Sources

Haning, et al., California Practice Guide: Personal Injury, Ch. 1-B, *Initial Evaluation Of Case: Decision To Accept Or Reject Employment Or Undertake Further Evaluation Of Claim*, ¶ 1:67.1 (The Rutter Group)

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

1 California Medical Malpractice: Law and Practice §§ 7:1–7:7 (Thomson Reuters~~West~~)

556. Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-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 [***name of plaintiff***]'s alleged injury occurred before [***insert date three years before date of filing***].**

[If, however, [*name of plaintiff***] proves**

[*Choose one or more of the following options:***]**

[that [he/she/it] did not discover the alleged wrongful act or omission because [*name of defendant***] acted fraudulently[,/; or]]**

[that [*name of defendant***] intentionally concealed facts constituting the wrongful act or omission[,/; or]]**

[that the alleged wrongful act or omission involved the presence of an object that had no therapeutic or diagnostic purpose or effect in [*name of plaintiff***]'s body[,/;]]**

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] intentionally concealed the facts***].]**

New April 2009

Directions for Use

Use CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.5 is at issue, read only the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the date on which the alleged injury occurred; (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 date of injury and determine whether the action is timely.

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 limitation period. (See Code Civ. Proc., § 364; *Russell v. Stanford Univ. Hosp.* (1997) 15 Cal.4th 783, 789–790 [64 Cal.Rptr.2d 97, 937 P.2d 640].) 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.

Sources and Authority

- Three-Year Limitation Period for Medical Malpractice. Code of Civil Procedure section 340.5, ~~provides:~~

  ~~In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person. Actions by a minor shall be commenced within three years from the date of the alleged wrongful act except that actions by a minor under the full age of six years shall be commenced within three years or prior to his eighth birthday whichever provides a longer period. Such time limitation shall be tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor for professional negligence.~~

  ~~For the purposes of this section:~~

  ~~(1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with Section 500) of the Business and Professions Code, or licensed pursuant to the Osteopathic Initiative Act, or the Chiropractic Initiative Act, or licensed pursuant to Chapter 2.5 (commencing with Section 1440) of Division 2 of the Health and Safety Code and any clinic, health dispensary, or health facility, licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code. "Health care provider" includes the legal representatives of a health care provider;~~

  ~~(2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.~~

- "No tolling provision outside of MICRA can extend the three-year maximum time period that section 340.5 establishes." (*Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 931 [86 Cal.Rptr.2d 107, 978 P.2d 591]; see also *Fogarty v. Superior Court* (1981) 117 Cal.App.3d 316, 319–321 [172 Cal.Rptr. 594] [Code Civ. Proc., § 352 does not toll statute for insanity].)

- "The three-year limitations period of section 340.5 provides an outer limit which terminates all malpractice liability and it commences to run when the patient is aware of the physical manifestation of her injury without regard to awareness of the negligent cause." (*Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 760 [199 Cal.Rptr. 816].)

- "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. Mem'l Hosp.* (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104], original italics.)

- "The same considerations of legislative intent that compelled us, in [*Woods v. Young* (1991) 53 Cal.3d 315, 325–326 [279 Cal.Rptr. 613, 807 P.2d 455]], to construe Code of Civil Procedure section 364, subdivision (d), as 'tolling' the one-year limitations period also apply to the three-year limitation. Unless the limitations period is so construed, the legislative purpose of reducing the cost and increasing the efficiency of medical malpractice litigation by, among other things, encouraging negotiated resolution of disputes will be frustrated. Moreover, a plaintiff's attorney who gives notice within the last 90 days of the 3-year limitations period will confront the dilemma we addressed in *Woods,* i.e., a choice between preserving the plaintiff's cause of action by violating the 90-day notice period under Code of Civil Procedure section 364, subdivision (d)--thereby invoking potential disciplinary proceedings by the State Bar--and forfeiting the client's cause of action. In the absence of tolling, the practical effect of the statute would be to shorten the statutory limitations period from three years to two years and nine months. As in the case of the one-year limitation, we discern no legislative intent to do so." (*Russell, supra,* 15 Cal.4th at pp. 789–790.)

- "[T]he 'no therapeutic or diagnostic purpose or effect' qualification in section 340.5 means the foreign body exception does not apply to objects and substances intended to be permanently implanted, but items temporarily placed in the body as part of a procedure and meant to be removed at a later time do come within it." (*Maher v. County of Alameda* (2014) 223 Cal.App.4th 1340, 1352 [168 Cal.Rptr.3d 56].)

Secondary Sources

Haning et al., California Practice Guide: Personal Injury ~~(The Rutter Group)~~ ¶¶ 1:67.1 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.26, 9.67–9.72

4 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

1 California Medical Malpractice: Law and Practice ~~(Thomson Reuters West)~~ §§ 7:1–7:7 (Thomson Reuters)

1006. Landlord's Duty

A landlord must conduct reasonable periodic inspections of rental property whenever the landlord has the legal right of possession. Before giving possession of leased property to a tenant [or on renewal of a lease] [or after retaking possession from a tenant], a landlord must conduct a reasonable inspection of the property for unsafe conditions and must take reasonable precautions to prevent injury due to the conditions that were or reasonably should have been discovered in the process. The inspection must include common areas under the landlord's control.

After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the landlord's control if the landlord knows or reasonably should have known about it.

[After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the tenant's control if the landlord has actual knowledge of the condition and the right and ability to correct it.]

New September 2003; Revised April 2008, April 2009, December 2009, June 2010

Directions for Use

Give this instruction with CACI No. 1000, *Premises Liability—Essential Factual Elements,* CACI No. 1001, *Basic Duty of Care,* and CACI No. 1003, *Unsafe Conditions,* if the injury occurred on rental property and the landlord is alleged to be liable. Include the last paragraph if the property is not within the landlord's immediate control.

Include "or on renewal of a lease" for commercial tenancies. (See *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669].) While no case appears to have specifically addressed a landlord's duty to inspect on renewal of a residential lease, it would seem impossible to impose such a duty with regard to a month-to-month tenancy. Whether there might be a duty to inspect on renewal of a long-term residential lease appears to be unresolved.

Under the doctrine of nondelegable duty, a landlord cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726 [28 Cal.Rptr.2d 672].) For an instruction for use with regard to a landlord's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

- "A landlord owes a duty of care to a tenant to provide and maintain safe conditions on the leased premises. This duty of care also extends to the general public. 'A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is

transferred so as to prevent any unreasonable risk of harm to the public who may enter. An agreement to renew a lease or relet the premises ... cannot relieve the lessor of his duty to see that the premises are reasonably safe at that time.' [¶] Where there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability. 'Although liability might easily be found where the landowner has actual knowledge of the dangerous condition "[t]he landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." ' " (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134 [32 Cal.Rptr.2d 755], internal citations omitted.)

- "Historically, the public policy of this state generally has precluded a landlord's liability for injuries to his tenant or his tenant's invitees from a dangerous condition on the premises which comes into existence after the tenant has taken possession. This is true even though by the exercise of reasonable diligence the landlord might have discovered the condition. [¶] The rationale for this rule has been that property law regards a lease as equivalent to a sale of the land for the term of the lease. As stated by Prosser: 'In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and he has no right even to enter without the permission of the lessee. Consequently, it is the general rule that he is under no obligation to anyone to look after the premises or keep them in repair, and is not responsible, either to persons injured on the land or to those outside of it, for conditions which develop or are created by the tenant after possession has been transferred. Neither is he responsible, in general, for the activities which the tenant carries on upon the land after such transfer, even when they create a nuisance.' " (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510–511 [118 Cal.Rptr. 741], internal citations omitted.)

- "To this general rule of nonliability, the law has developed a number of exceptions, such as where the landlord covenants or volunteers to repair a defective condition on the premises, where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant, where there is a nuisance existing on the property at the time the lease is made or renewed, when a safety law has been violated, or where the injury occurs on a part of the premises over which the landlord retains control, such as common hallways, stairs, elevators, or roof. [¶] A common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act." (*Uccello, supra,* 44 Cal.App.3d at p. 511, internal citations omitted.)

- "[W]here a landlord has relinquished control of property to a tenant, a 'bright line' rule has developed to moderate the landlord's duty of care owed to a third party injured on the property as compared with the tenant who enjoys possession and control. ' "Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show

that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition." [¶] Limiting a landlord's obligations releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested.' " (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412 [82 Cal.Rptr.3d 735], internal citations omitted.)

- "[A] commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease. As the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons. At the time the lease is executed and upon renewal a landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the premises reasonably safe from dangerous conditions. Even if the commercial landlord executes a contract which requires the tenant to maintain the property in a certain condition, the landlord is obligated at the time the lease is executed to take reasonable precautions to avoid unnecessary danger." (*Mora, supra, ~~v. Baker Commodities, Inc.~~ (1989)* 210 Cal.App.3d at p.~~771,~~ 781 ~~[258 Cal.Rptr. 669]~~, internal citations omitted.)

- "[T]he landlord's responsibility to inspect is limited. Like a residential landlord, the duty to inspect charges the lessor 'only with those matters which would have been disclosed by a reasonable inspection.' The burden of reducing or avoiding the risk and the likelihood of injury will affect the determination of what constitutes a reasonable inspection. The landlord's obligation is only to do what is reasonable under the circumstances. The landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant. When there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and conduct a reasonable inspection before passing possession to the tenant. However, if no such inspection is warranted, the landlord has no such obligation." (*Mora, supra,* 210 Cal.App.3d at p. 782, internal citations and footnote omitted.)

- "It is one thing for a landlord to leave a tenant alone who is complying with its lease. It is entirely different, however, for a landlord to ignore a defaulting tenant's possible neglect of property. Neglected property endangers the public, and a landlord's detachment frustrates the public policy of keeping property in good repair and safe. To strike the right balance between safety and disfavored self-help, we hold that [the landlord]'s duty to inspect attached upon entry of the judgment of possession in the unlawful detainer action and included reasonable periodic inspections thereafter." (*Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 613 [77 Cal.Rptr.3d 556].)

- "[I]t is established that a landlord owes a duty of care to its tenants to take reasonable steps to secure the common areas under its control." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 675 [25 Cal.Rptr.2d 137, 863 P.2d 207].)

- "The existence of the landlord's duty to others to maintain the property in a reasonably safe condition is a question of law for the court." (*Johnson v. Prasad* (2014) 224 Cal.App.4th 74, 79 [168 Cal.Rptr.3d 196].)

- "The reasonableness of a landlord's conduct under all the circumstances is for the jury. A triable issue of fact exists as to whether the defendants' maintenance of a low, open, unguarded window in a common hallway where they knew young children were likely to play constituted a breach of their

duty to take reasonable precautions to prevent children falling out of the window." (*Amos v. Alpha Prop. Mgmt.* (1999) 73 Cal.App.4th 895, 904 [87 Cal.Rptr.2d 34], internal citation omitted.)

- ~~"Simply stated, ' "[t]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]" ' " (*Srithong, supra*, 23 Cal.App.4th at p. 726.)~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1142, 1143

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

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.03 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.53 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, §§ 421.01–421.121 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.23 (Matthew Bender)

1 California Civil Practice: Torts §§ 16:12–16:16 (Thomson Reuters~~ West~~)

1103. Notice (Gov. Code, § 835.2)

[*Name of plaintiff*] must prove that [*name of defendant*] had notice of the dangerous condition before the incident occurred. To prove that there was notice, [*name of plaintiff*] must prove:

[That [*name of defendant*] knew of the condition and knew or should have known that it was dangerous. A public entity knows of a dangerous condition if an employee knows of the condition and reasonably should have informed the entity about it.]

[or]

[That the condition had existed for enough time before the incident and was so obvious that the [*name of defendant*] reasonably should have discovered the condition and known that it was dangerous.]

New September 2003

Directions for Use

This instruction is intended to be used where the plaintiff relies on Government Code section 835(b). This instruction should be modified if the plaintiff is relying on both section 835(a) and section 835(b) to clarify that proof of notice is not necessary under section 835(a).

For an instruction regarding reasonable inspection systems, see CACI No. 1104, *Inspection System*.

Sources and Authority

- Actual Notice. Government Code section 835.2(a). ~~provides: "A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character."~~

- Constructive Notice. Government Code section 835.2(b). ~~provides, in part: "A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."~~

- "[Defendant] asserts that '[t]he absence of any prior accidents or injuries on the gravel shoulder is evidence of lack of notice.' Assuming this to be true, at most it establishes grounds for a finding in [defendant]'s favor, which is hardly enough to sustain a summary judgment. Nor is plaintiff required to prove that [defendant] knew for a fact that accidents of this kind would occur. The test for actual notice was satisfied if [defendant] had 'actual knowledge of the existence of the condition and knew or should have known of its dangerous character.' " (*Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 779–780 [140 Cal.Rptr.3d 722].)

- "To establish 'actual notice,' it is not enough to show that the state employees had a general knowledge that people do leave hot coals on public beaches. There must be some evidence that the employees had knowledge of the particular dangerous condition in question." (*State of California v. Superior Court* (1968) 263 Cal.App.2d 396, 399–400 [69 Cal.Rptr. 683], internal citations omitted.)

- "Whether the dangerous condition was obvious and whether it existed for a sufficient period of time are threshold elements to establish a claim of constructive notice. Where the plaintiff fails to present direct or circumstantial evidence as to either element, his claim is deficient as a matter of law." (*Heskel v. City of San Diego* (2014) 227 Cal.App.4th 313, 317 [-- Cal.Rptr.3d --], internal citation omitted.)

- " 'It is well settled that constructive notice can be shown by the long continued existence of the dangerous or defective condition, and it is a question of fact for the jury to determine whether the condition complained of has existed for a sufficient time to give the public agency constructive notice.' " (*Erfurt v. State of California* (1983) 141 Cal.App.3d 837, 844-845 [190 Cal.Rptr 569], internal citations omitted.)

~~"To establish 'actual notice,' it is not enough to show that the state employees had a general knowledge that people do leave hot coals on public beaches. There must be some evidence that the employees had knowledge of the particular dangerous condition in question." (*State of California v. Superior Court* (1968) 263 Cal.App.2d 396, 399-400 [69 Cal.Rptr. 683], internal citations omitted.)~~

- "Admissible evidence for establishing constructive notice is defined by [Government Code section 835.2(b)] as including whether a reasonably adequate inspection system would have informed the public entity, and whether it maintained and operated such an inspection system with due care." (*Heskel, supra*, 227 Cal.App.4th at p. 317.)

- "~~Briefly stated, constructive notice may be imputed if it can be shown that an obvious danger existed for an adequate period of time before the accident to have permitted the state employees, in the exercise of due care, to discover and remedy the situation had they been operating under a reasonable plan of inspection.~~ In the instant case, it can be validly argued that there was a triable issue on the question of inspection, but in determining whether there is constructive notice, the method of inspection has been held to be secondary. ~~The primary and indispensable element of constructive notice is a showing that the obvious condition existed a sufficient period of time before the accident.~~" (*State of California*, *supra*, 263 Cal.App.2d at p. 400, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 271

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.45-12.51

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[4][b] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Torts Claim Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

1111. Affirmative Defense—Condition Created by Reasonable Act or Omission (Gov. Code, § 835.4(a))

A public entity is not legally responsible for harm caused by a dangerous condition if the act or omission of its employee that created the dangerous condition was reasonable. If [*name of defendant***] proves that the act or omission that created the dangerous condition was reasonable, then your verdict must be for [***name of defendant***].**

In determining whether the employee's conduct was reasonable, you must weigh the likelihood and the seriousness of the potential injury against the practicality and cost of either:

(a) taking alternative action that would not have created the risk of injury; or

(b) protecting against the risk of injury.

New September 2003; Revised April 2007, April 2008

Directions for Use

This instruction states a defense to the theory that the entity created a dangerous condition of public property. (Gov. Code, §§ 835(a), 835.4(a).)

Sources and Authority

- No Public Entity Liability for Reasonable Act or Omission. Government Code section 835.4(a). ~~provides: "A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury."~~

- "There are, of course, affirmative defenses pleaded which may require trial as well: such as … the special defense under Government Code, section 835.4 of the reasonableness, practicability, and cost of the alternative measures plaintiffs claim should have been taken to protect against a dangerous condition."~~Government Code section 835.4 is an affirmative defense.~~ (*Hibbs v. Los Angeles County Flood Control Dist.* (1967) 252 Cal.App.2d 166, 172 [60 Cal.Rptr. 364].)

- "Reasonableness is a question of fact for the trier of fact, and is determined by weighing the probability and gravity of potential injury against the practicability and cost of the action." (*Biron v. City of Redding* (2014) 225 Cal.App.4th 1264, 1281 [170 Cal.Rptr.3d 848]~~[T]he question of the reasonableness of a public entity's action in any particular situation is one of fact for a jury." (*Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 810 [198 Cal.Rptr. 208]~~.)

- "The Court of Appeal found conceptual difficulties in the interplay between section 835, subdivision (a) (plaintiff must establish negligence) and section 835.4, subdivision (a) (providing a defense if the public entity establishes that the act or omission that created the condition was reasonable). As it noted, normally 'negligence is the absence of reasonableness.' That being the case, the court reasoned, one cannot reasonably act negligently. Because of this conundrum, the Court of Appeal found that section 835.4 does not provide an affirmative defense. (¶) We disagree. Section 835.4 clearly creates an affirmative defense that the public entity must establish. Moreover, the Legislature created this defense specifically for public entities. The California Law Revision Commission explained, 'Under this section, a public entity may absolve itself from liability for creating or failing to remedy a dangerous condition by showing that it would have been too costly and impractical for the public entity to have done anything else. … This defense has been provided public entities in recognition that, despite limited manpower and budgets, there is much that they are required to do. Unlike private enterprise, a public entity often cannot weigh the advantage of engaging in an activity against the cost and decide not to engage in it. Government cannot 'go out of the business' of governing. Therefore, a public entity should not be liable for injuries caused by a dangerous condition if it is able to show that under all the circumstances, including the alternative courses of action available to it and the practicability and cost of pursuing such alternatives, its action in creating or failing to remedy the condition was not unreasonable.' " (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1137–1138 [72 Cal.Rptr.3d 382, 176 P.3d 654], footnote and internal citation omitted.)

- "The reasonableness standard referred to in section 835.4 differs from the reasonableness standard that applies under sections 830 and 835 and ordinary tort principles. Under the latter principles, the reasonableness of the defendant's conduct does not depend upon the existence of other, conflicting claims on the defendant's resources or the political barriers to acting in a reasonable manner." (*Metcalf, supra,* 42 Cal.4th at p. 1138.)

- "In sum, we conclude that negligence under section 835, subdivision (a), is established under ordinary tort principles concerning the reasonableness of a defendant's conduct in light of the foreseeable risk of harm. The plaintiff has the burden to demonstrate that the defendant's conduct was unreasonable under this standard … . If the plaintiff carries this burden, the public entity may defend under the provisions of section 835.4—a defense that is unique to public entities." (*Metcalf, supra,* 42 Cal.4th at p. 1139.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 272

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.61–12.62

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 Tort Claims Act*, § 464.86 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.300 (Matthew Bender)

1112. Affirmative Defense—Reasonable Act or Omission to Correct (Gov. Code, § 835.4(b))

A public entity is not responsible for harm caused by a dangerous condition if its failure to take sufficient steps to protect against the risk of injury was reasonable. If [*name of defendant***] proves that its conduct was reasonable, then your verdict must be for [***name of defendant***].**

In determining whether [*name of defendant***]'s conduct was reasonable, you must consider how much time and opportunity it had to take action. You must also weigh the likelihood and the seriousness of the potential injury against the practicality and cost of protecting against the risk of injury.**

New September 2003; Revised April 2007, April 2008

Directions for Use

This instruction states a defense to the theory that the entity had notice of a dangerous condition (that it did not create) and failed to take adequate protective measures. (Gov. Code, §§ 835(b), 835.4(b).)

Sources and Authority

- No Public Entity Liability for Reasonable Act or Omission. Government Code section 835.4(b). ~~provides: "A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury."~~

- "There are, of course, affirmative defenses pleaded which may require trial as well: such as … the special defense under Government Code, section 835.4 of the reasonableness, practicability, and cost of the alternative measures plaintiffs claim should have been taken to protect against a dangerous condition."~~Government Code section 835.4 is an affirmative defense.~~ (*Hibbs v. Los Angeles County Flood Control Dist.* (1967) 252 Cal.App.2d 166, 172 [60 Cal.Rptr. 364].)

- "Under section 835.4, subdivision (b), however, the question of the reasonableness of the state's action in light of the practicability and cost of the applicable safeguards is a matter for the jury's determination."~~[T]he question of the reasonableness of a public entity's action in any particular situation is one of fact for a jury." (*Swaner v. City of Santa Monica* (1984) 150 Cal.App.3d 789, 810 [198 Cal.Rptr. 208]; see also~~ (*Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 720 [159 Cal.Rptr. 835, 602 P.2d 755], footnote omitted.)

- "Unlike section 830.6 relating to design immunity, section 835.4 subdivision (b), does not provide that the reasonableness of the action taken shall be determined by the 'trial or appellate court.' " (*De*

La Rosa v. City of San Bernardino (1971) 16 Cal.App.3d 739, 749 [94 Cal.Rptr. 175].)

- "The reasonableness standard referred to in section 835.4 differs from the reasonableness standard that applies under sections 830 and 835 and ordinary tort principles. Under the latter principles, the reasonableness of the defendant's conduct does not depend upon the existence of other, conflicting claims on the defendant's resources or the political barriers to acting in a reasonable manner. But, as the California Law Revision Commission recognized, public entities may also defend against liability on the basis that, because of financial or political constraints, the public entity may not be able to accomplish what reasonably would be expected of a private entity." (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1138 [72 –Cal.Rptr.3d 382, 176 –P.3d 654].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 272

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.63–12.65

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 Tort Claims Act*, § 464.86 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.300 (Matthew Bender)

1200. Strict Liability—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by a product [distributed/manufactured/sold] by [***name of defendant***] that:**

[contained a manufacturing defect;] [or]

[was defectively designed;] [or]

[did not include sufficient [instructions] [or] [warning of potential safety hazards].]

New September 2003

Sources and Authority

- "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. GM Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298], internal citations omitted.)

- "Strict liability has been invoked for three types of defects—manufacturing defects, design defects, and 'warning defects,' i.e., inadequate warnings or failures to warn." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 995 [281 Cal.Rptr. 528, 810 P.2d 549].)

- "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. ... The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62-63 [27 Cal.Rptr. 697, 377 P.2d 897].)

- "[S]trict products liability causes of action need not be pled in terms of classic negligence elements (duty, breach, causation and damages)." (*Elsheref v. Applied Materials, Inc.* (2014) 223 Cal.App.4th 451, 464 [167 Cal.Rptr.3d 257].)

- "[S]trict liability has never been, and is not now, absolute liability. As has been repeatedly expressed, under strict liability the manufacturer does not thereby become the insurer of the safety of the product's user." (*Sanchez v. Hitachi Koki, Co.* (2013) 217 Cal.App.4th 948, 956 [158 Cal.Rptr.3d 907].)

- "Beyond manufacturers, anyone identifiable as 'an integral part of the overall producing and marketing enterprise' is subject to strict liability." (*Arriaga v. CitiCapital Commercial Corp.* (2008) 167 Cal.App.4th 1527, 1534 [85 Cal.Rptr.3d 143].)

- "The component parts doctrine provides that the manufacturer of a component part is not liable for

injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 355 [135 Cal.Rptr.3d 288, 266 P.3d 987].)

- "The only exceptions to this rule [that a product manufacturer generally may not be held strictly liable for harm caused by another manufacturer's product] arise when the defendant bears some direct responsibility for the harm, either because the defendant's own product contributed substantially to the harm, or because the defendant participated substantially in creating a harmful combined use of the products." (*O'Neil, supra,* 53 Cal.4th at p. 362, internal citation omitted.)

- "[T]o hold a defendant strictly liable under a marketing/distribution theory, the plaintiff must demonstrate that: '(1) the defendant received a direct financial benefit from its activities and from the sale of the product; (2) the defendant's role was integral to the business enterprise such that the defendant's conduct was a necessary factor in bringing the product to the initial consumer market; and (3) the defendant had control over, or a substantial ability to influence, the manufacturing or distribution process.' " (*Arriaga, supra,* 167 Cal.App.4th at p. 1535.)

- "[T]he doctrine of strict liability may not be restricted on a theory of privity of contract. Since the doctrine applies even where the manufacturer has attempted to limit liability, they further make it clear that the doctrine may not be limited on the theory that no representation of safety is made to the bystander. [¶¶] If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, whereas the bystander ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made, contrary to the position of defendants, to extend greater liability in favor of the bystanders." (*Elmore v. American Motors Corp.* (1969) 70 Cal.2d 578, 586 [75 Cal.Rptr. 652, 451 P.2d 84].)

- "Engineers who do not participate in bringing a product to market and simply design a product are not subject to strict products liability." (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1008 [169 Cal.Rptr.3d 208].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1428–1437

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1207, 2:1215 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.10 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability,* § 190.20 et seq. (Matthew Bender)

1203. Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements

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[*Name of plaintiff***] claims the [***product***]'s design was defective because the [***product***] did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**

2. **That the [***product***] did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way;**

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

4. **That the [***product***]'s failure to perform safely was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2005, April 2009, December 2009, June 2011

Directions for Use

If both tests (the consumer expectation test and the risk-benefit test) for design defect are asserted by the plaintiff, the burden-of-proof instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].)

The court must make an initial determination as to whether the consumer expectation test applies to the product. In some cases, the court may determine that the product is one to which the test may, but not necessarily does, apply, leaving the determination to the jury. (See *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233–1234 [115 Cal.Rptr.3d 151].) In such a case, modify the instruction to advise the jury that it must first determine whether the product is one about which an ordinary consumer can form reasonable minimum safety expectations.

To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or she was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [risk-benefit case]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "[A] product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors … , the benefits of the challenged design do not outweigh the risk of danger inherent in such design." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 418 [143 Cal.Rptr. 225, 573 P.2d 443].)

- "The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303 [144 Cal.Rptr.3d 326].)

- "The rationale of the consumer expectations test is that '[t]he purposes, behaviors, and dangers of certain products are commonly understood by those who ordinarily use them.' Therefore, in some cases, ordinary knowledge of the product's characteristics may permit an inference that the product did not perform as safely as it should. '*If* the facts permit such a conclusion, and *if* the failure resulted from the product's design, a finding of defect is warranted without any further proof,' and the manufacturer may not defend by presenting expert evidence of a risk/benefit analysis. … Nonetheless, the inherent complexity of the product itself is not controlling on the issue of whether the consumer expectations test applies; a complex product 'may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers.' " (*Saller, supra,* 187 Cal.App.4th at p. 1232, original italics, internal citations omitted.)

- "The critical question, in assessing the applicability of the consumer expectation test, is not whether the product, when considered in isolation, is beyond the ordinary knowledge of the consumer, but whether the product, *in the context of the facts and circumstances of its failure,* is one about which the ordinary consumers can form minimum safety expectations." (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1311–1312 [120 Cal.Rptr.3d 605].)

- "Whether the jury should be instructed on either the consumer expectations test or the risk/benefit test depends upon the particular facts of the case. In a jury case, the trial court must initially determine as a question of foundation, within the context of the facts and circumstances of the particular case, whether the product is one about which the ordinary consumer can form reasonable minimum safety expectations. 'If the court concludes it is not, no consumer expectation instruction should be given. … If, on the other hand, the trial court finds there is sufficient evidence to support a finding that the ordinary consumer can form reasonable minimum safety expectations, the court should instruct the jury, consistent with Evidence Code section 403, subdivision (c), to determine whether the consumer expectation test applies to the product at issue in the circumstances of the case [or] to disregard the

evidence about consumer expectations unless the jury finds that the test is applicable. If it finds the test applicable, the jury then must decide whether the product failed to perform as safely as an ordinary consumer would expect when the product is used in an intended or reasonably foreseeable manner.' " (*Saller, supra,* 187 Cal.App.4th at pp. 1233–1234, internal citations omitted.)

- "[The] dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety or that, on balance, are not as safely designed as they should be." (*Barker, supra,* 20 Cal.3d at p. 418.)

- "The consumer expectation test "acknowledges the relationship between strict tort liability for a defective product and the common law doctrine of warranty, which holds that a product's presence on the market includes an implied representation 'that it [will] safely do the jobs for which it was built.' " (*Soule, supra,* 8 Cal.4th at p. 562, internal citations omitted.)

- "[T]he jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses. Unless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users, the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*. Accordingly, as *Barker* indicated, instructions are misleading and incorrect if they allow a jury to avoid this risk-benefit analysis in a case where it is required." (*Soule, supra,* 8 Cal.4th at p. 568.)

- "[T]he consumer expectation test is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*." (*Soule, supra,* 8 Cal.4th at p. 567, original italics.)

- "If the facts permit an inference that the product at issue is one about which consumers may form minimum safety assumptions in the context of a particular accident, then it is enough for a plaintiff, proceeding under the consumer expectation test, to show the circumstances of the accident and 'the objective features of the product which are relevant to an evaluation of its safety' [citation], leaving it to the fact finder to 'employ "[its] own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence." ' [Citations.] Expert testimony as to what consumers ordinarily 'expect' is generally improper." (*Chavez, supra,* 207 Cal.App.4th at p. 1303.)

- "That causation for a plaintiff's injuries was proved through expert testimony does not mean that an ordinary consumer would be unable to form assumptions about the product's safety. Accordingly, the trial court properly instructed the jury on the consumer expectations test." (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1004 [169 Cal.Rptr.3d 208], internal citations omitted.)

- " An exception [to the rule that expert testimony is generally improper] exists where the product is in specialized use with a limited group of consumers. In such cases, 'if the expectations of the product's limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product's actual consumers do expect may be proper.' " (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120 fn. 3 [123 Cal.Rptr.2d 303], internal citations omitted.)

- "In determining whether a product's safety satisfies [the consumer expectation test], the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case." (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126, fn. 6 [184 Cal.Rptr. 891, 649 P.2d 224].)

- "[E]vidence as to what the scientific community knew about the dangers … and when they knew it is not relevant to show what the ordinary consumer of [defendant]'s product reasonably expected in terms of safety at the time of [plaintiff]' s exposure. It is the knowledge and reasonable expectations of the consumer, not the scientific community, that is relevant under the consumer expectations test." (*Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 Cal.App.4th 1529, 1536 [40 Cal.Rptr.2d 22].)

- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

- " '[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. … [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact.' " (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422].)

- "[T]he plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra,* 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)

- "The use of asbestos insulation is a product that is within the understanding of ordinary lay consumers." (*Saller, supra,* 187 Cal.App.4th at p. 1236.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1449–1467

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1220–2:1222 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.02 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability,* § 190.116 (Matthew Bender)

1305. Battery by Peace Officer

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by using unreasonable force to [arrest [him/her]/prevent [his/her] escape/overcome [his/her] resistance/[***insert other applicable action***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally touched [***name of plaintiff***] [or caused [***name of plaintiff***] to be touched];**

2. **That [***name of defendant***] used unreasonable force to [arrest/prevent the escape of/overcome the resistance of/***insert other applicable action***] [***name of plaintiff***];**

3. **That [***name of plaintiff***] did not consent to the use of that force;**

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

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

[A/An] [*insert type of peace officer***] may use reasonable force to arrest or detain a person when he or she has reasonable cause to believe that that person has committed a crime. Even if the [***insert type of peace officer***] is mistaken, a person being arrested or detained has a duty not to use force to resist the [***insert type of peace officer***] unless the [***insert type of peace officer***] is using unreasonable force.**

In deciding whether [*name of defendant***] used unreasonable force, you must determine the amount of force that would have appeared reasonable to [a/an] [***insert type of peace officer***] in [***name of defendant***]'s position under the same or similar circumstances. You should consider, among other factors, the following:**

(a) The seriousness of the crime at issue;

(b) Whether [*name of plaintiff***] reasonably appeared to pose an immediate threat to the safety of [***name of defendant***] or others; and**

(c) Whether [*name of plaintiff***] was actively resisting arrest or attempting to evade arrest.**

[[A/An] [*insert type of peace officer***] who makes or attempts to make an arrest is not required to retreat or cease from his or her efforts because of the resistance or threatened resistance of the person being arrested.]**

New September 2003; Revised December 2012

Directions for Use

For additional authorities on excessive force, see the Sources and Authority for CACI No. ~~3001~~3020, *Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements.*

Sources and Authority

- Use of Reasonable Force to Arrest. California Penal Code section 835a. ~~states: "Any peace officer, who has reasonable cause to believe that the person to be arrested has committed a public offense, may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance."~~

- Duty to Submit to Arrest. California Penal Code section 834a. ~~states: "If a person has knowledge, or by the exercise of reasonable care, should have knowledge, that he is being arrested by a peace officer, it is the duty of such person to refrain from using force or any weapon to resist such arrest."~~

- "Plaintiff must prove ~~A plaintiff bringing a battery action against a police officer has the burden of proving~~ unreasonable force as an element of the tort." (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272 [74 Cal.Rptr.2d 614].)

- " ' "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. … [T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. …" ' In calculating whether the amount of force was excessive, a trier of fact must recognize that peace officers are often forced to make split-second judgments, in tense circumstances, concerning the amount of force required." (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527–528 [89 Cal.Rptr.3d 801], internal citations omitted.)

- "A police officer's use of deadly force is reasonable if ' " 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.' …" …' " (*Brown, supra,* 171 Cal.App.4th at p. 528.)

- "[T]here is no right to use force, reasonable or otherwise, to resist an unlawful detention ... ." (*Evans v. City of Bakersfield* (1994) 22 Cal.App.4th 321, 333 [27 Cal.Rptr.2d 406].)

- "[E]xecution of an unlawful arrest or detention does not give license to an individual to strike or assault the officer unless excessive force is used or threatened; excessive force in that event triggers the individual's right of self-defense." (*Evans, supra,* 22 Cal.App.4th at p. 331, internal citation omitted.)

  "Consistent with these principles and the factors the high court has identified, the federal court in this case did not instruct the jury to conduct some abstract or nebulous balancing of competing interests. Instead, as noted above, it instructed the jury to determine the reasonableness of the officers' actions in light of 'the totality of the circumstances at the time,' including 'the severity of the crime at issue, whether the plaintiff posed a reasonable threat to the safety of the officer or others, and whether the

plaintiff was actively resisting detention or attempting to escape.' The same consideration of the totality of the circumstances is required in determining reasonableness under California negligence law. Moreover, California's civil jury instructions specifically direct the jury, in determining whether police officers used unreasonable force for purposes of tort liability, to consider the same factors that the high court has identified and that the federal court's instructions in this case set forth. (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 1305.) Thus, plaintiffs err in arguing that the federal and state standards of reasonableness differ in that the former involves a fact finder's balancing of competing interests." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 514 [94 Cal. Rptr. 3d 1, 207 P.3d 506], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 424

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

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, §§ 58.22, 58.61, 58.92 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery,* § 21.20 et seq. (Matthew Bender)

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

1602. Intentional Infliction of Emotional Distress—"Outrageous Conduct" Defined

"Outrageous conduct" is conduct so extreme that it goes beyond all possible bounds of decency. Conduct is outrageous if a reasonable person would regard the conduct as intolerable in a civilized community. Outrageous conduct does not include trivialities such as indignities, annoyances, hurt feelings, or bad manners that a reasonable person is expected to endure.

In deciding whether [*name of defendant***]'s conduct was outrageous, you may consider, among other factors, the following:**

(a) Whether [*name of defendant***] abused a position of authority or a relationship that gave [him/her] real or apparent power to affect [***name of plaintiff***]'s interests;**

(b) Whether [*name of defendant***] knew that [***name of plaintiff***] was particularly vulnerable to emotional distress; and**

(c) Whether [*name of defendant***] knew that [his/her] conduct would likely result in harm due to mental distress.**

New September 2003

Directions for Use

Read the appropriate factors that apply to the facts of the case. Factors that do not apply may be deleted from this instruction.

Sources and Authority

- "Conduct to be outrageous must be so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209 [185 Cal.Rptr. 252, 649 P.2d 894].)

- "[W]hether conduct is outrageous is 'usually a question of fact' … . [However] many cases have dismissed intentional infliction of emotional distress cases on demurrer, concluding that the facts alleged do not amount to outrageous conduct as a matter of law." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 235 [170 Cal.Rptr.3d 293], internal citations omitted.)

- "[L]iability 'does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. ... There is no occasion for the law to intervene ... where someone's feelings are hurt.' " (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946 [160 Cal.Rptr. 141, 603 P.2d 58], quoting Rest.2d Torts, § 46, com. d, overruled on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 579-580 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- " 'Behavior may be considered outrageous if a defendant (1) abuses a relation or position that gives him power to damage the plaintiff's interests; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to

result in illness through mental distress. ...' " (*Molko v. Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1122 [252 Cal.Rptr. 122, 762 P.2d 46], internal citation omitted.)

- Relationships that have been recognized as significantly contributing to the conclusion that particular conduct was outrageous include: employer-employee (*Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493, 498, fn.2 [86 Cal.Rptr. 88, 468 P.2d 216]), insurer-insured (*Fletcher v. Western National Life Insurance Co.* (1970) 10 Cal.App.3d 376, 403-404 [89 Cal.Rptr. 78]), landlord-tenant (*Aweeka v. Bonds* (1971) 20 Cal.App.3d 278, 281-282 [97 Cal.Rptr. 650]), hospital-patient (*Bundren v. Superior Court* (1983) 145 Cal.App.3d 784, 791-792 [193 Cal.Rptr. 671]), attorney-client (*McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 373 [281 Cal.Rptr. 242]), collecting creditors (*Bundren, supra,* at p. 791, fn. 8), and religious institutions (*Molko, supra,* 46 Cal.3d at pp. 1122-1123).

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 451–454

4 Levy et al., California Torts, Ch. 44, *Intentional Infliction of Emotional Distress*, §§ 44.01, 44.03 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.10[3] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, § 153.20 (Matthew Bender)

1731. Trade Libel—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making a statement that disparaged [***name of plaintiff***]'s [***specify product***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made a statement that disparaged the quality of [***name of plaintiff***]'s [***product/service***];**
2. **That the statement was made to a person other than [***name of plaintiff***];**
3. **That the statement was untrue;**
4. **That [***name of defendant***] [knew that the statement was untrue/acted with reckless disregard of the truth or falsity of the statement];**
5. **That [***name of defendant***] knew or should have recognized that someone else might act in reliance on the statement, causing [***name of plaintiff***] financial loss;**
6. **That [***name of plaintiff***] suffered direct financial harm because someone else acted in reliance on the statement;**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2013

Directions for Use

The tort of trade libel is a form of injurious falsehood similar to slander of title. (See *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 548 [216 Cal.Rptr. 252]; *Erlich v. Etner* (1964) 224 Cal.App. 2d 69, 74 [36 Cal.Rptr. 256].) The tort has not often reached the attention of California's appellate courts (see *Polygram, supra*.), perhaps because of the difficulty in proving damages. (See *Erlich*, *supra*.)

Elements 4 and 5 are supported by section 623A of the Restatement 2d of Torts, which has been accepted in California. (See *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1360−1361 [78 Cal.Rptr.2d 627].) There is some authority, however, for the proposition that no intent or reckless disregard is required (element 4) if the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher. (See *Nichols v. Great Am. Ins. Cos.* (1985) 169 Cal.App.3d 766, 773 [215 Cal.Rptr. 416].)

The privileges of Civil Code section 47 almost certainly apply to actions for trade libel. (See *Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405] [slander-of-title case]; *117 Sales Corp. v. Olsen*

(1978) 80 Cal.App.3d 645, 651 [145 Cal.Rptr. 778] [publication by filing small claims suit is absolutely privileged].) The defendant has the burden of proving privilege as an affirmative defense. (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339].) If privilege is claimed, additional instructions will be necessary to state the affirmative defense and frame the privilege. For further discussion, see the Directions for Use to CACI No. 1730, *Slander of Title—Essential Factual Elements*. See also CACI No. 1723, *Qualified Privilege.*

Limitations on liability arising from the First Amendment apply. (*Hofmann Co. v. E. I. du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 397 [248 Cal.Rptr. 384]; see CACI Nos. 1700−1703, instructions on public figures and matters of public concern.) See also CACI No. 1707, *Fact Versus Opinion*.

Sources and Authority

- "Trade libel is the publication of matter disparaging the quality of another's property, which the publisher should recognize is likely to cause pecuniary loss to the owner. [Citation.] The tort encompasses 'all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so.' [Citation.] [¶] To constitute trade libel, a statement must be false." (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 376 [154 Cal.Rptr.3d 698].)

- "The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods." (*Shores v. Chip Steak Co.* (1955) 130 Cal.App.2d 627, 630 [279 P.2d 595].)

- "[A]n action for 'slander of title' … is a form of action somewhat related to trade libel … ." (*Erlich, supra,* 224 Cal.App.2d at p. 74.)

- "Confusion surrounds the tort of 'commercial disparagement' because not only is its content blurred and uncertain, so also is its very name. The tort has received various labels, such as 'commercial disparagement,' 'injurious falsehood,' 'product disparagement,' 'trade libel,' 'disparagement of property,' and 'slander of goods.' These shifting names have led counsel and the courts into confusion, thinking that they were dealing with different bodies of law. In fact, all these labels denominate the same basic legal claim." (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 289 [172 Cal. Rptr. 3d 653, 326 P.3d 253].)

- "The protection the common law provides statements which disparage products as opposed to reputations is set forth in the Restatement Second of Torts sections 623A and 626. Section 623A provides: 'One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if [P] (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and [P]*(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity*.' [¶] Section 626 of Restatement Second of Torts in turn states: 'The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of matter disparaging the quality of another's land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the

conduct of a third person in respect to the other's interests in the property.' " (*Melaleuca, Inc., supra,* 66 Cal.App.4th at pp. 1360−1361, original italics.)

- "According to section 629 of the Restatement Second of Torts (1977), '[a] statement is disparaging if it is understood to cast doubt upon the quality of another's land, chattels or intangible things, or upon the existence or extent of his property in them, and [¶] (a) the publisher intends the statement to cast the doubt, or [¶] (b) the recipient's understanding of it as casting the doubt was reasonable.' " (*Hartford Casualty Ins. Co., supra*, 59 Cal.4th at p. 288.)

- "What distinguishes a claim of disparagement is that an injurious falsehood has been directed *specifically* at the plaintiff's business or product, derogating that business or product and thereby causing that plaintiff special damages." (*Hartford Casualty Ins. Co., supra*, 59 Cal.4th at p. 294, original italics.)

- "The Restatement [2d Torts] view is that, like slander of title, what is commonly called 'trade libel' is a particular form of the tort of injurious falsehood and need not be in writing." (*Polygram Records, Inc., supra,* 170 Cal.App.3d at p. 548.)

- "While … general damages are presumed in a libel of a businessman, this is not so in action for trade libel. Dean Prosser has discussed the problems in such actions as follows: 'Injurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general, . . . The cause of action founded upon it resembles that for defamation, but differs from it materially in the greater burden of proof resting on the plaintiff, and the necessity for special damage in all cases. . . . [The] plaintiff must prove in all cases that the publication has played a material and substantial part in inducing others not to deal with him, and that as a result he has suffered special damages. . . . Usually, . . . the damages claimed have consisted of loss of prospective contracts with the plaintiff's customers. Here the remedy has been so hedged about with limitations that its usefulness to the plaintiff has been seriously impaired. It is nearly always held that it is not enough to show a general decline in his business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.' " (*Erlich, supra,* 224 Cal.App. 2d at pp. 73−74.)

- "Because the gravamen of the complaint is the allegation that respondents made false statements of fact that injured appellant's business, the 'limitations that define the First Amendment's zone of protection' are applicable. '[It] is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property . . . .' " (*Hofmann Co., supra,* 202 Cal.App.3d at p. 397, internal citation omitted.)

- "If respondents' statements about appellant are opinions, the cause of action for trade libel must of course fail. 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.' Statements of fact can be true or false, but an opinion─'a view, judgment, or appraisal

formed in the mind . . . [a] belief stronger than impression and less strong than positive knowledge'—is the result of a mental process and not capable of proof in terms of truth or falsity." (*Hoffmann Co., supra,* 202 Cal.App.3d at p. 397, footnote and internal citation omitted.)

- "[I]t is not absolutely necessary that the disparaging publication be intentionally designed to injure. If the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher, it is not material that the publisher did not intend the disparaging statement to be so understood." (*Nichols, supra,* 169 Cal.App.3d at p. 773.)

- "Disparagement by 'reasonable implication' requires more than a statement that may conceivably or plausibly be construed as derogatory to a specific product or business. A 'reasonable implication' in this context means a clear or necessary inference." (*Hartford Casualty Ins. Co., supra*, 59 Cal.4th at p. 295, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005), Torts §§ 642-645

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.70 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.103 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 9, *Commercial Defamation*, 9.04

1805. Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (*Comedy III*)

[*Name of defendant***] claims that [he/she] has not violated [***name of plaintiff***]'s right of privacy because the [***insert type of work, e.g., "picture"***] is protected by the First Amendment's guarantee of freedom of speech and expression. To succeed, [***name of defendant***] must prove either of the following:**

1. **That the [***insert type of work, e.g., "picture"***] adds something new to [***name of plaintiff***]'s likeness, giving it a new expression, meaning, or message; or**

2. **That the value of the [***insert type of work, e.g., "picture"***] does not result primarily from [***name of plaintiff***]'s fame.**

New September 2003; Revised October 2008

Directions for Use

This instruction assumes that the plaintiff is the celebrity whose likeness is the subject of the trial. This instruction will need to be modified if the plaintiff is not the actual celebrity.

Sources and Authority

- "In sum, when an artist is faced with a right of publicity challenge to his or her work, he or she may raise as affirmative defense that the work is protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame." (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797].)

- "We have explained that '[o]nly if [a defendant] is entitled to the [transformative] defense *as a matter of law* can it prevail on its motion to strike,' because the California Supreme Court 'envisioned the application of the defense as a question of fact.' As a result, [defendant] 'is only entitled to the defense as a matter of law if no trier of fact could reasonably conclude that the [game] [i]s not transformative.' " (*Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)* (9th Cir. 2013) 724 F.3d 1268, 1274, original italics.)

- "[C]ourts can often resolve the question as a matter of law simply by viewing the work in question and, if necessary, comparing it to an actual likeness of the person or persons portrayed. Because of these circumstances, an action presenting this issue is often properly resolved on summary judgment or, if the complaint includes the work in question, even demurrer." (*Winter v. DC Comics* (2003) 30 Cal.4th 881, 891-892 [134 Cal.Rptr.2d 634, 69 P.3d 473], internal citation omitted.)

- "Although surprisingly few courts have considered in any depth the means of reconciling the right of publicity and the First Amendment, we follow those that have in concluding that depictions of

celebrities amounting to little more than the appropriation of the celebrity's economic value are not protected expression under the First Amendment." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 400.)

- "Furthermore, in determining whether a work is sufficiently transformative, courts may find useful a subsidiary inquiry, particularly in close cases: does the marketability and economic value of the challenged work derive primarily from the fame of the celebrity depicted? If this question is answered in the negative, then there would generally be no actionable right of publicity. When the value of the work comes principally from some source other than the fame of the celebrity—from the creativity, skill, and reputation of the artist-it may be presumed that sufficient transformative elements are present to warrant First Amendment protection. If the question is answered in the affirmative, however, it does not necessarily follow that the work is without First Amendment protection—it may still be a transformative work." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 407.)

- "As the Supreme Court has stated, the central purpose of the inquiry into this fair use factor 'is to see ... whether the new work merely "supersede[s] the objects" of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." ' " (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 404, internal citations omitted.)

- "We emphasize that the transformative elements or creative contributions that require First Amendment protection are not confined to parody and can take many forms, from factual reporting to fictionalized portrayal, from heavy-handed lampooning to subtle social criticism." (*Comedy III Productions, Inc., supra,* 25 Cal.4th at p. 406.)

- "This 'transformative use' defense poses 'what is essentially a balancing test between the First Amendment and the right of publicity.' " (*Hilton v. Hallmark Cards* (9th Cir. 2009) 580 F.3d 874, 889.)

- "Simply stated, the transformative test looks at 'whether the celebrity likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question. We ask, in other words, whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness.' This transformative test is the court's primary inquiry when resolving a conflict between the right of publicity and the First Amendment." (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 686 [166 Cal.Rptr.3d 359], ~~The application of the defense, which the California Supreme Court based loosely on the intersection of the First Amendment and copyright liability, depends upon 'whether the celebrity likeness is one of the "raw materials" from which an original work is synthesized, or whether the depiction or imitation of the celebrity is the very sum and substance of the work in question.' In other words, '[w]e ask . . . whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness. And when we use the word "expression," we mean expression of something other than the likeness of the celebrity.' '[U]nder [this] test,' yet another formulation cautions, 'when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the~~

artist's right of free expression is outweighed by the right of publicity.' " (*Hilton, supra*, 580 F.3d at p. 889, footnote and internal citations omitted.)

- "The First Amendment defense does not apply only to visual expressions, however. 'The protections may extend to all forms of expression, including written and spoken words (fact or fiction), music, films, paintings, and entertainment, whether or not sold for a profit.' " (*Ross, supra*, 222 Cal.App.4th at p. 687.)

- "The distinction between parody and other forms of literary expression is irrelevant to the *Comedy III* transformative test. It does not matter what precise literary category the work falls into. What matters is whether the work is transformative, not whether it is parody or satire or caricature or serious social commentary or any other specific form of expression." (*Winter, supra,* 30 Cal.4th at p. 891.)

Secondary Sources

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

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

1900. Intentional Misrepresentation

[*Name of plaintiff*] claims that [*name of defendant*] made a false representation that harmed [him/her/it]. 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 false;**
3. **That [*name of defendant*] knew that the representation was false when [he/she] made it, or that [he/she] made the representation recklessly and without regard for its truth;**
4. **That [*name of defendant*] intended that [*name of plaintiff*] rely on the 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/its] harm.**

New September 2003; Revised December 2012, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made an intentional misrepresentation of fact. (See Civ. Code, § 1710(1).) If element 5 is contested, give CACI No. 1907, *Reliance,* and CACI No. 1908, *Reasonable Reliance*. If it is disputed that a representation was made, the jury should be instructed that "a representation may be made orally, in writing, or by nonverbal conduct." (See *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567 [54 Cal.Rptr.2d 468].)

The representation must ordinarily be an affirmation of fact, as opposed to an opinion. (See *Cohen v. S&S Construction Co.* (1983) 151 Cal.App.3d 941, 946 [201 Cal.Rptr. 173].) Opinions are addressed in CACI No. 1904, *Opinions as Statements of Fact.*

Sources and Authority

- Actionable Deceit. Civil Code section 1709 ~~provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."~~.

- Intentional Misrepresentation. Civil Code section 1710(1). ~~provides:~~

  ~~A deceit, within the meaning of [section 1709], is either:~~

  ~~1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true [intentional misrepresentation of fact];~~

  ~~2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true [negligent misrepresentation of fact];~~

  ~~3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact [concealment or suppression of fact]; or,~~

  ~~4. A promise, made without any intention of performing it [promissory fraud].~~

- Fraud in Contract Formation. Civil Code section 1572~~, dealing specifically with fraud in the making of contracts, provides:~~.

  ~~Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:~~

  ~~1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;~~

  ~~2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;~~

  ~~3. The suppression of that which is true, by one having knowledge or belief of the fact;~~

  ~~4. A promise made without any intention of performing it; or,~~

  ~~5. Any other act fitted to deceive.~~

- "The elements of fraud that will give rise to a tort action for deceit are: '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal quotation marks omitted.)

- "A complaint for fraud must allege the following elements: (1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816 [52 Cal.Rptr.2d 650] [combining misrepresentation and scienter as a single element].)

- "Puffing," or sales talk, is generally considered opinion, unless it involves a representation of product safety. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 112 [120 Cal.Rptr. 681, 534 P.2d 377].)

- "Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 482 [80 Cal.Rptr.2d 329], internal citations omitted.)

- "[F]raudulent intent is an issue for the trier of fact to decide." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1061 [141 Cal.Rptr.3d 142].)

- "A misrepresentation need not be oral; it may be implied by conduct." (*Thrifty-Tel, Inc., supra,* 46 Cal.App.4th at p. 1567, internal citations omitted.)

- " '[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.' " (*Engalla, supra,* 15 Cal.4th at p. 974, quoting *Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 55 [30 Cal.Rptr. 629].)

- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith, supra,* 205 Cal.App.4th at p. 1062.)

- "A 'complete causal relationship' between the fraud or deceit and the plaintiff's damages is required. ... Causation requires proof that the defendant's conduct was a ' "substantial factor" ' in bringing about the harm to the plaintiff." (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132 [39 Cal.Rptr.2d 658], internal citations omitted.)

- "In order to recover for fraud, as in any other tort, the plaintiff must plead and prove the `detriment proximately caused' by the defendant's tortious conduct. Deception without resulting loss is not actionable fraud." (*Service by Medallion, Inc., supra,* 44 Cal.App.4th at p. 1818, internal citations omitted.)

- "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.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 243, 767–817, 821, 822, 826

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.02, 40.05

(Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.19 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.80 et seq. (Matthew Bender)

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

1903. Negligent Misrepresentation

[*Name of plaintiff*] claims [he/she/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] had no reasonable grounds for believing the representation was true when [he/she] 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/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. ~~provides:~~

  ~~A deceit, within the meaning of [section 1709], is either:~~

  ~~1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true [intentional misrepresentation of fact];~~

2. ~~The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true [negligent misrepresentation of fact];~~

3. ~~The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact [concealment or suppression of fact]; or,~~

4. ~~A promise, made without any intention of performing it.~~

- "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 pp. 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.)

- "The elements of negligent misrepresentation are (1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196 [147 Cal.Rptr.3d 41].)

- " '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.)

- " ' "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.)

- "Parties cannot read something into a neutral statement in order to justify a claim for negligent misrepresentation. The tort requires a 'positive assertion.' 'An "implied" assertion or representation is not enough.' " (*Diediker, supra,* 60 Cal.App.4th at pp. 297-298, internal citations omitted.)

- "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].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 818–820, 823–826

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-G, *Negligent Misrepresentation*, ¶ 5:591 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)

2 California Civil Practice: Torts, §§ 22:13–22:15 (Thomson Reuters)

1904. Opinions as Statements of Fact

Ordinarily, an opinion is not considered a representation of fact. An opinion is a person's belief that a fact exists, a statement regarding a future event, or a judgment about quality, value, authenticity, or similar matters. However, [*name of defendant***]'s opinion is considered a representation of fact if [***name of plaintiff***] proves that:**

[[*Name of defendant***] claimed to have special knowledge about the subject matter that [***name of plaintiff***] did not have;] [or]**

[[*Name of defendant***] made a representation, not as a casual expression of belief, but in a way that declared the matter to be true;] [or]**

[[*Name of defendant***] had a relationship of trust and confidence with [***name of plaintiff***];] [or]**

[[*Name of defendant***] had some other special reason to expect that [***name of plaintiff***] would rely on his or her opinion.]**

New September 2003; Revised April 2004

Directions for Use

This is not a stand-alone instruction. It should be read in conjunction with one of the elements instructions (CACI Nos. 1900–1903).

The second bracketed option appears to be limited to cases involving professional opinions. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

Alternative bracketed options that do not apply to the facts of the case may be deleted.

Sources and Authority

- "Representations of opinion, particularly involving matters of value, are ordinarily not actionable representations of fact. A representation is an opinion ' "if it expresses only (a) the belief of the maker, without certainty, as to the existence of a fact; or (b) his judgment as to quality, value … or other matters of judgment." ' " (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 606−607 [172 Cal.Rptr.3d 218], internal citations omitted.)

- "Plaintiffs cite the exceptions to the general rule that, to be actionable, a misrepresentation must be of an existing fact, not an opinion or prediction of future events. They arise '(1) where a party holds himself out to be specially qualified and the other party is so situated that he may reasonably rely upon the former's superior knowledge; (2) where the opinion is by a fiduciary or other trusted person; (3) where a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion. [Citation.]' " (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769 [153 Cal.Rptr.3d 1], internal citation omitted.)

- "[W]hen one of the parties possesses, or assumes to possess, superior knowledge or special information regarding the subject matter of the representation, and the other party is so situated that he may reasonably rely upon such supposed superior knowledge or special information, a representation made by the party possessing or assuming to possess such knowledge or information, though it might be regarded as but the expression of an opinion if made by any other person, is not excused if it be false." (*Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 892 [153 Cal.Rptr.3d 546].)

- "Since the appraisal is a value opinion performed for the benefit of the lender, there is no representation of fact upon which a buyer may reasonably rely." (*Graham, supra,* 226 Cal.App.4th at p. 607.)

- "Whether a statement is nonactionable opinion or actionable misrepresentation of fact is a question of fact for the jury." (*Furla v. Jon Douglas Co.* (1998) 65 Cal.App.4th 1069, 1080-1081 [76 Cal.Rptr.2d 911], internal citations omitted.)

- "If defendants' assertion of safety is merely a statement of opinion—mere 'puffing'—they cannot be held liable for its falsity." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 111 [120 Cal.Rptr. 681, 534 P.2d 377].)

- "The alleged false representations in the subject brochures were not statements of 'opinion' or mere 'puffing.' They were, in essence, representations that the DC-10 was a safe aircraft. In *Hauter,* [*supra,*] the Supreme Court held that promises of safety are not statements of opinion—they are 'representations of fact.' " (*Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 424 [264 Cal.Rptr. 779].)

- "Under certain circumstances, expressions of professional opinion are treated as representations of fact. When a statement, although in the form of an opinion, is 'not a casual expression of belief' but 'a deliberate affirmation of the matters stated,' it may be regarded as a positive assertion of fact. Moreover, when a party possesses or holds itself out as possessing superior knowledge or special information or expertise regarding the subject matter and a plaintiff is so situated that it may reasonably rely on such supposed knowledge, information, or expertise, the defendant's representation may be treated as one of material fact." (*Bily, supra,* 3 Cal.4th at p. 408, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 774–778

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[1][b] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.17 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.50 (Matthew Bender)

2 California Civil Practice: Torts, §§ 22:21–22:28 (Thomson Reuters)

1908. Reasonable Reliance

In determining whether [*name of plaintiff*]'s reliance on the [misrepresentation/concealment/false promise] was reasonable, [he/she/it] must first prove that the matter was material. A matter is material if a reasonable person would find it important in determining his or her choice of action.

If you decide that the matter is material, you must then decide whether it was reasonable for [*name of plaintiff*] to rely on the [misrepresentation/concealment/false promise]. In making this decision, take into consideration [*name of plaintiff*]'s intelligence, knowledge, education, and experience.

However, it is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] that is preposterous. It also is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] if facts that are within [his/her] observation show that it is obviously false.

New September 2003; Revised October 2004, December 2013

Directions for Use

There would appear to be three considerations in determining reasonable reliance. First, the representation or promise must be material, as judged by a reasonable-person standard. (*Charpentier v. Los Angeles Rams* (1999) 75 Cal.App.4th 301, 312–313 [89 Cal.Rptr.2d 115].) Second, if the matter is material, reasonableness must take into account the plaintiff's own knowledge, education, and experience; the objective reasonable person is irrelevant at this step. Third, some matters are simply too preposterous to be believed by anyone, notwithstanding limited knowledge, education, and experience. (*Blankenheim v. E. F. Hutton, Co., Inc.* (1990) 217 Cal.App.3d 1463, 1474 [266 Cal.Rptr. 593].)

See also CACI No. 1907, *Reliance.*

Sources and Authority

- "According to the Restatement of Torts, '[r]eliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material. ... The matter is material if ... a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question ... .' But materiality is a jury question, and a 'court may [only] withdraw the case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Charpentier, supra,* 75 Cal.App.4th at pp. 312–313, internal citations omitted.)

- "[T]he issue is whether the person who claims reliance was justified in believing the representation in the light of his own knowledge and experience." (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503 [198 Cal.Rptr. 551, 674 P.2d 253], internal citations omitted.)

- "[N]or is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' ~~If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery. 'He may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.'~~ " (*Blankenheim, supra,* 217 Cal.App.3d at p. 1474, internal citations omitted.)

- "[G]enerally speaking, ' "[a] plaintiff will be denied recovery only if his conduct is manifestly unreasonable in the light of his own intelligence or information. It must appear that he put faith in representations that were 'preposterous' or 'shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.' [Citation.] Even in case of a mere negligent misrepresentation, a plaintiff is not barred unless his conduct, in the light of his own information and intelligence, is preposterous and irrational. … The effectiveness of disclaimers is assessed in light of these principles. [Citation.]" ' " (*Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 673 [172 Cal.Rptr.3d 238].)

- "[I]f the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery." (*Thrifty Payless, Inc. v. The Americana at Brand, LLC* (2013) 218 Cal.App.4th 1230, 1239 [160 Cal.Rptr.3d 718].)

- "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1067 [141 Cal.Rptr.3d 142].)

- " 'What would constitute fraud in a given instance might not be fraudulent when exercised toward another person. The test of the representation is its actual effect on the particular mind ... .' " (*Blankenheim, supra,* 217 Cal.App.3d at p. 1475, internal citation omitted.)

- "[Plaintiff]'s deposition testimony on which appellants rely also reveals that she is a practicing attorney and uses releases in her practice. In essence, she is asking this court to rule that a practicing attorney can rely on the advice of an equestrian instructor as to the validity of a written release of liability that she executed without reading. In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered. Under these circumstances, we conclude as a matter of law that any such reliance was not reasonable." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843–844 [2 Cal.Rptr.2d 437], internal citations omitted.)

- "[I]t is inherently unreasonable for any person to rely on a prediction of future IRS enactment, enforcement, or non-enforcement of the law by someone unaffiliated with the federal government. As such, the reasonable reliance element of any fraud claim based on these predictions fails as a matter of law." (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769 [153 Cal.Rptr.3d 1].)

- "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a

misrepresentation was material. A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' and as such, materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 812–815

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.06 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.19 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.229 (Matthew Bender)

2 California Civil Practice: Torts, § 22:32 (Thomson Reuters)

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

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

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

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

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

4. **That by engaging in this conduct, [***name of defendant***] [intended to disrupt the relationship/ [or] knew that disruption of the relationship was certain or substantially certain to occur];**

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

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

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

New September 2003; Revised June 2013, December 2013

Directions for Use

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

Sources and Authority

- "The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which

fall outside the boundaries of fair competition." (*Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757], internal citation omitted.)

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

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

- "The question is whether a plaintiff must plead and prove that the defendant engaged in wrongful acts *with the specific intent* of interfering with the plaintiff's business expectancy. We conclude that specific intent is not a required element of the tort of interference with prospective economic advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Korea Supply Co., supra,* 29 Cal.4th at p. 1154, original italics.)

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

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

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

- "Justice Mosk's concurring opinion in *Della Penna* advocates that proscribed conduct be limited to

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

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

- "[A] plaintiff need not allege the interference and a second act independent of the interference. Instead, a plaintiff must plead and prove that the conduct alleged to constitute the interference was independently wrongful, i.e., unlawful for reasons other than that it interfered with a prospective economic advantage. [Citations.]" (*Crown Imports, LLC v. Superior Court* (2014) 223 Cal.App.4th 1395, 1404 [168 Cal.Rptr.3d 228].)

- "The question has arisen as to whether, in order to be actionable as interference with prospective economic advantage, the interfering act must be independently wrongful *as to the plaintiff*. It need not be. There is 'no sound reason for requiring that a defendant's wrongful actions must be directed towards the plaintiff seeking to recover for this tort. The interfering party is liable to the interfered-with party [even] "when the independently tortious means the interfering party uses are independently tortious *only as to a third party*." ' " (*Crown Imports LLC, supra*, 223 Cal.App.4th at p. 1405, original italics.)

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

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

- "If a party has no liability in tort for refusing to perform an existing contract, no matter what the reason, he or she certainly should not have to bear a burden in tort for refusing to *enter into* a contract where he or she has no obligation to do so. If that same party cannot conspire with a third party to breach or interfere with his or her own contract then certainly the result should be no different where the 'conspiracy' is to disrupt a relationship which has not even risen to the dignity of an existing contract and the party to that relationship was entirely free to 'disrupt' it on his or her own without legal restraint or penalty." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 266 [45 Cal.Rptr.2d 90], original italics.)

- "Although varying language has been used to express this threshold requirement, the cases generally agree it must be reasonably probable that the prospective economic advantage would have been

realized but for defendant's interference." (*Youst, supra,* 43 Cal.3d at p. 71, internal citations omitted.)

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

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

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

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

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

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

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

- "[I]n the absence of other evidence, timing alone *may be sufficient* to prove causation … . Thus, … the real issue is whether, in the circumstances of the case, the proximity of the alleged cause and effect tends to demonstrate some relevant connection. If it does, then the issue is one for the fact

finder to decide." (*Overhill Farms, Inc. v. Lopez* (2010) 190 Cal.App.4th 1248, 1267 [119 Cal.Rptr.3d 127], original italics.)

- "There are three formulations of the manager's privilege: (1) absolute, (2) mixed motive, and (3) predominant motive.." (*Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391 [77 Cal.Rptr.2d 383].)

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

Secondary Sources

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

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

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

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

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

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

2330. Implied Obligation of Good Faith and Fair Dealing Explained

In every insurance policy there is an implied obligation of good faith and fair dealing that neither the insurance company nor the insured will do anything to injure the right of the other party to receive the benefits of the agreement.

To fulfill its implied obligation of good faith and fair dealing, an insurance company must give at least as much consideration to the interests of the insured as it gives to its own interests.

To breach the implied obligation of good faith and fair dealing, an insurance company must, unreasonably or without proper cause, act or fail to act in a manner that deprives the insured of the benefits of the policy. It is not a mere failure to exercise reasonable care. However, it is not necessary for the insurer to intend to deprive the insured of the benefits of the policy.

New September 2003; Revised December 2007

Directions for Use

This instruction may be used to introduce a "bad-faith" claim arising from an alleged breach of the implied covenant of good faith and fair dealing.

Sources and Authority

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

- "For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it again must give at least as much consideration to the latter's interests as it does to its own." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 818–819 [169 Cal.Rptr. 691, 620 P.2d 141].)

- "[T]o establish the insurer's 'bad faith' liability, the insured must show that the insurer has (1) withheld benefits due under the policy, and (2) that such withholding was 'unreasonable' or 'without proper cause.' The actionable withholding of benefits may consist of the denial of benefits due; paying less than due; and/or unreasonably delaying payments due." (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1209 [87 Cal.Rptr.3d 556], internal citations omitted.)

- " '[T]he covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive.' … [A]n insured plaintiff need only show, for example, that the insurer unreasonably refused to pay benefits or failed to accept a reasonable settlement offer; there is no requirement to establish *subjective* bad faith." (*Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744], original italics, internal citations omitted.)

- "Bad faith may involve negligence, or negligence may be indicative of bad faith, but negligence alone is insufficient to render the insurer liable." *Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689 [319 P.2d 69].)

- "Thus, a breach of the implied covenant of good faith and fair dealing involves something more than a breach of the contract or mistaken judgment. There must be proof the insurer failed or refused to discharge its contractual duties not because of 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.' " (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468], internal citations omitted.)

- "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312].)

- "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." (*R. J. Kuhl Corp. v. Sullivan* (1993) 13 Cal.App.4th 1589, 1602 [17 Cal.Rptr.2d 425].)

- "[A]n insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims. Such a practice inevitably would prejudice the insurance seeking public because of the necessity to increase rates, and would finally drive the insurer out of business." (*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 30 [148 Cal.Rptr. 653], overruled on other grounds in *Egan, supra,* 24 Cal.3d at p. 824 fn. 7.)

- "Unique obligations are imposed upon true fiduciaries which are not found in the insurance relationship. For example, a true fiduciary must first consider and always act in the best interests of its trust and not allow self-interest to overpower its duty to act in the trust's best interests. An insurer, however, may give its own interests consideration equal to that it gives the interests of its insured; it is not required to disregard the interests of its shareholders and other policyholders when evaluating claims; and it is not required to pay noncovered claims, even though payment would be in the best interests of its insured." (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148–1149 [271 Cal.Rptr. 246], internal citations omitted.)

- "[I]n California, an insurer has the same duty to act in good faith in the uninsured motorist context as it does in any other insurance context." (*Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 636 [173 Cal.Rptr.3d 854].)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 239

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 11-B, *Theories For Extracontractual Liability—In General*, ¶¶ 11:7–11:8.1 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-A, *Definition of Terms*, ¶¶ 12:1–12:10 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-B, *Capsule History Of Insurance "Bad Faith" Cases*, ¶¶ 12:13–12:23 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-C, *Theory Of Recovery—Breach Of Implied Covenant Of Good Faith And Fair Dealing ("Bad Faith")*, ¶¶ 12:27–12:54 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-D, *Who May Sue For Tortious Breach Of Implied Covenant (Proper Plaintiffs)*, ¶¶ 12:56–12:90.17 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-E, *Persons Who May Be Sued For Tortious Breach Of Implied Covenant (Proper Defendants)*, ¶¶ 12:92–12:118 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-F, *Compare—Breach Of Implied Covenant By Insured*, ¶¶ 12:119–12:121 (The Rutter Group)

1 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar), Overview of Rights and Obligations of Policy, §§ 2.9–2.15

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.03[1][a]–[c] (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20–24.21, 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24[1] (Matthew Bender)

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17[9] (Matthew Bender)

2331. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] breached the obligation of good faith and fair dealing by [failing to pay/delaying payment of] benefits due under the insurance policy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] suffered a loss covered under an insurance policy with [***name of defendant***];**

2. **That [***name of defendant***] was notified of the loss;**

3. **That [***name of defendant***], unreasonably or without proper cause, [failed to pay/delayed payment of] policy benefits;**

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

5. **That [***name of defendant***]'s [failure to pay/delay in payment of] policy benefits was a substantial factor in causing [***name of plaintiff***]'s harm.**

In determining whether [*name of defendant***] acted unreasonably or without proper cause, you should consider only the information that [***name of defendant***] knew or reasonably should have known at the time when it [failed to pay/delayed payment of] policy benefits.**

New September 2003; Revised December 2007, April 2008, December 2009

Directions for Use

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

If there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad-faith liability imposed on the insurer for advancing its side of that dispute. This is known as the "genuine dispute" doctrine. The genuine-dispute doctrine is subsumed within the test of reasonableness or proper cause (element 3). No specific instruction on the doctrine need be given. (See *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 792–794 [90 Cal.Rptr.3d 74].)

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

Sources and Authority

- If an insurer "fails to deal *fairly and in good faith* with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of

action in tort for breach of an implied covenant of good faith and fair dealing. ... [¶] ... [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort." (*Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 574-575 [108 Cal.Rptr. 480, 510 P.2d 1032], original italics.)

- "An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party coverage include a duty not to unreasonably withhold benefits due under the policy. An insurer that unreasonably delays, or fails to pay, benefits due under the policy may be held liable in tort for breach of the implied covenant. The withholding of benefits due under the policy may constitute a breach of contract even if the conduct was reasonable, but liability in tort arises only if the conduct was unreasonable, that is, without proper cause. In a first party case, as we have here, the withholding of benefits due under the policy is not unreasonable if there was a genuine dispute between the insurer and the insured as to coverage or the amount of payment due." (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [53 Cal.Rptr.3d 245], internal citations omitted.)

- "[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause." (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1151 [271 Cal.Rptr. 246], internal citations omitted.)

- "[A]n insurer's erroneous failure to pay benefits under a policy does not necessarily constitute bad faith entitling the insured to recover tort damages. '[T]he ultimate test of [bad faith] liability in the first party cases is whether the refusal to pay policy benefits was unreasonable.' ... In other words, 'before an [insurer] can be found to have acted tortiously, i.e., in bad faith, in refusing to bestow policy benefits, it must have done so "without proper cause." ' " (*Opsal v. United Servs Auto. Ass'n* (1991) 2 Cal.App.4th 1197, 1205 [10 Cal.Rptr.2d 352], citations omitted.)

- "[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured's coverage claim is not liable in bad faith even though it might be liable for breach of contract." (*Chateau Chamberay Homeowners Assn. v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 335, 347 [108 Cal.Rptr.2d 776].)

- "The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured's claim. A *genuine* dispute exists only where the insurer's position is maintained in good faith and on reasonable grounds. … 'The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable—for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. … On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.' " (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724 [68 Cal.Rptr.3d 746, 171 P.3d 1082], original italics, internal citations omitted.)

- "We evaluate the reasonableness of the insurer's actions and decision to deny benefits as of the time

they were made rather than with the benefit of hindsight." (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468].)

- "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312].)

- "While many, if not most, of the cases finding a genuine dispute over an insurer's coverage liability have involved *legal* rather than *factual* disputes, we see no reason why the genuine dispute doctrine should be limited to legal issues. That does not mean, however, that the genuine dispute doctrine may properly be applied in every case involving purely a factual dispute between an insurer and its insured. This is an issue which should be decided on a case-by-case basis." (*Chateau Chamberay Homeowners Assn., supra,* 90 Cal.App.4th at p. 348, original italics, footnote and internal citations omitted.)

- "[I]f the conduct of [the insurer] in defending this case was objectively reasonable, its subjective intent is irrelevant." (*Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744]; cf. *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372 [6 Cal.Rptr.2d 467, 826 P.2d 710] ["[I]t has been suggested the covenant has both a subjective and objective aspect—subjective good faith and objective fair dealing. A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable."].)

- "[W]hile an insurer's subjective bad intentions are not a sufficient basis on which to establish a bad faith cause of action, an insurer's subjective mental state may nonetheless be a circumstance to be considered in the evaluation of the *objective* reasonableness of the insurer's actions." (*Bosetti, supra,* 175 Cal.App.4th at p. 1239, original italics.)

- "[A]n insured cannot maintain a claim for tortious breach of the implied covenant of good faith and fair dealing absent a covered loss. If the insurer's investigation—adequate or not—results in a correct conclusion of no coverage, no tort liability arises for breach of the implied convenant." (*Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250 [39 Cal.Rptr.3d 650], internal citations omitted; cf. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1236 [83 Cal.Rptr.3d 410] ["[B]reach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing. … [E]ven an insurer that pays the full limits of its policy may be liable for breach of the implied covenant, if improper claims handling causes detriment to the insured"].)

- " '[D]enial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable. "A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on those facts which justify denial of the claim." ' " (*Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 634 [173 Cal.Rptr.3d 854~~An insurance company may not ignore evidence which supports coverage. If it does so, it acts unreasonably towards its insured and breaches the covenant of good faith and fair dealing." (*Mariscal v. Old Republic Life Ins. Co.* (1996) 42 Cal.App.4th 1617, 1624 [50 Cal.Rptr.2d 224~~].)

- "We conclude ... that the duty of good faith and fair dealing on the part of defendant insurance companies is an absolute one. ... [T]he nonperformance by one party of its contractual duties cannot excuse a breach of the duty of good faith and fair dealing by the other party while the contract between them is in effect and not rescinded." (*Gruenberg, supra,* 9 Cal.3d at p. 578.)

- "Thus, an insurer may be liable for bad faith in failing to attempt to effectuate a prompt and fair settlement (1) where it unreasonably demands arbitration, or (2) where it commits other wrongful conduct, such as failing to investigate a claim. An insurer's statutory duty to attempt to effectuate a prompt and fair settlement is not abrogated simply because the insured's damages do not plainly exceed the policy limits. Nor is the insurer's duty to investigate a claim excused by the arbitrator's finding that the amount of damages was lower than the insured's initial demand. Even where the amount of damages is lower than the policy limits, an insurer may act unreasonably by failing to pay damages that are certain and demanding arbitration on those damages." (*Maslo, supra*, 227 Cal.App.4th at pp. 638−639 [uninsured motorist coverage case].)

- "[T]he insurer's duty to process claims fairly and in good faith [is] a nondelegable duty." (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 848 [263 Cal.Rptr. 850].)

- "[I]n [a bad–faith action] 'damages for emotional distress are compensable as *incidental damages flowing from the initial breach,* not as a separate cause of action.' Such claims of emotional distress must be incidental to 'a substantial invasion of property interests.' " (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1214 [87 Cal.Rptr.3d 556], original italics, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, §§ 240–242

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group) ¶¶ 12:822–12:1016

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad Faith Actions, §§ 24.25–24.45A

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, §§ 13.03[2][a]–[c], 13.06 (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20–24.21, 24.40 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.140 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.21, 82.50

(Matthew Bender)

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

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.208 (Matthew Bender)

2404. Breach of Employment Contract—Unspecified Term-"Good Cause" Defined

Good cause exists when an employer's decision to [discharge/demote] an employee is made in good faith and based on a fair and honest reason. Good cause does not exist if the employer's reasons for the [discharge/demotion] are trivial, arbitrary, inconsistent with usual practices, [or] unrelated to business needs or goals [or if the stated reasons conceal the employer's true reasons].

In deciding whether [*name of defendant***] had good cause to [discharge/demote] [***name of plaintiff***], you must balance [***name of defendant***]'s interest in operating the business efficiently and profitably against the interest of [***name of plaintiff***] in maintaining employment.**

[If [*name of plaintiff***] had a sensitive managerial position, then [***name of defendant***] had substantial, though not unlimited, discretion in [discharging/demoting] [him/her].]**

New September 2003

Directions for Use

This instruction may not be appropriate in the context of an implied employment contract where the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). If so, the instruction should be modified accordingly.

Only read the last bracketed phrase in the first paragraph in cases where there is an issue involving pretext.

The last optional paragraph should be given when the employee is in such a position that the employer would be allowed greater discretion in its decision to discharge the employee: "[W]here, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment." (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917], disapproved on other grounds in *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 350−351 [100 Cal. Rptr. 2d 352, 8 P.3d 1089].) Note that the term "confidential position" has not been defined by California case law.

When the reason given for the discharge is misconduct, and there is a factual dispute whether the misconduct occurred, then the court should give CACI No. 2405, *Breach of Implied Employment Contract—Unspecified Term—"Good Cause" Defined—Misconduct*, instead of this instruction. (See *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 107 [69 Cal.Rptr.2d 900, 948 P.2d 412].)

Sources and Authority

- "If the evidence is uncontradicted and permits only one conclusion, then the issue [of good cause] is legal, not factual. Where, however, as here, the evidence is contradicted, the issue is one for the trier of fact to decide."~~Whether good cause exists is usually a matter to be determined by the trier of fact.~~

(*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 733 [269 Cal.Rptr. 299].)

- " 'Good cause' in the context of implied employment contracts is defined as: 'fair and honest' reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 872−873 [172 Cal.Rptr.3d 732], internal citations omitted.)

- "~~'Good cause' or 'just cause' for termination connotes ' "a fair and honest cause or reason," ' regulated by the good faith of the employer.~~ The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. …~~ While the scope of such discretion is substantial, it is not unrestricted. Good cause is not properly found where the asserted reasons for discharge are 'trivial, capricious, unrelated to business needs or goals, or pretextual.'~~ Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 351 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)

- ~~The Court of Appeal in *Pugh I* observed that~~ " '[G]~~g~~ood cause~~" '~~ in [the context of wrongful termination based on an implied contract] ~~"~~is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term." (*Pugh, supra,* 116 Cal.App.3d at p. 330.)

- "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual (and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh, supra,* 116 Cal.App.3d at pp. 329-330, internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 208, 209, 231

Chin et al., Cal. Practice Guide: Employment Litigation ~~(The Rutter Group)~~ ¶¶ 4:270–4:273, 4:300 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22–8.25

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.09[5][b] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.21, 249.63 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.27, 100.29, 100.34 (Matthew Bender)

California Civil Practice: Employment Litigation, ~~(Thomson West)~~ § 6:19 (Thomson Reuters)

2405. Breach of Implied Employment Contract-Unspecified Term—"Good Cause" Defined—Misconduct

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[*Name of plaintiff*] claims that [*name of defendant*] did not have good cause to [discharge/demote] [him/her] for misconduct. [*Name of defendant*] had good cause to [discharge/demote] [*name of plaintiff*] for misconduct if [*name of defendant*], acting in good faith, conducted an appropriate investigation giving [him/her/it] reasonable grounds to believe that [*name of plaintiff*] engaged in misconduct.

An appropriate investigation is one that is reasonable under the circumstances and includes notice to the employee of the claimed misconduct and an opportunity for the employee to answer the charge of misconduct before the decision to [discharge/demote] is made. You may find that [*name of defendant*] had good cause to [discharge/demote] [*name of plaintiff*] without deciding if [*name of plaintiff*] actually engaged in misconduct.

New September 2003

Directions for Use

This instruction should be given when there is a dispute as to whether misconduct, in fact, occurred. (*Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93 [69 Cal.Rptr.2d 900, 948 P.2d 412].)

Sources and Authority

- "The proper inquiry for the jury ... is not, 'Did the employee *in fact* commit the act leading to dismissal?' It is 'Was the factual basis on which the employer concluded a dischargeable act had been committed reached honestly, after an appropriate investigation and for reasons that are not arbitrary or pretextual?' The jury conducts a factual inquiry in both cases, but the questions are not the same. In the first, the jury decides the ultimate truth of the employee's alleged misconduct. In the second, it focuses on the *employer's response* to allegations of misconduct." (*Cotran, supra,* 17 Cal.4th at p. 107.)

- " 'Good cause' in the context of implied employment contracts is defined as: 'fair and honest' reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.' 'Three factual determinations are relevant to the question of employer liability: (1) did the employer act with good faith in making the decision to terminate; (2) did the decision follow an investigation that was appropriate under the circumstances; and (3) did the employer have reasonable grounds for believing the employee had engaged in the misconduct.' '*Cotran* did not delineate the earmarks of an appropriate investigation but noted that investigative fairness contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict relevant statements prejudicial to

their case, without the procedural formalities of a trial.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 872−873 [172 Cal.Rptr.3d 732], internal citations omitted.)

- ~~"We give operative meaning to the term 'good cause' in the context of implied employment contracts by defining it ... as fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond." (*Cotran*, *supra*, 17 Cal.4th at pp. 107-108, internal citations omitted.)~~

- ~~"*Cotran* set forth a new standard for good cause in termination decisions. Three factual determinations are relevant to the question of employer liability: (1) did the employer act with good faith in making the decision to terminate; (2) did the decision follow an investigation that was appropriate under the circumstances; and (3) did the employer have reasonable grounds for believing the employee had engaged in the misconduct." (*Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 264 [76 Cal.Rptr.2d 382], internal citation omitted.)~~

- "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh v. See's Candies, Inc.* (1981) 116 Cal.App.3d 311, 329−330 [171 Cal.Rptr. 917], disapproved on other grounds in *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 350−351 [100 Cal. Rptr. 2d 352, 8 P.3d 1089]~~, *supra*, 116 Cal.App.3d at pp. 329-330~~, internal citation omitted.)

- "[Plaintiff] contends that it was up to a jury to decide whether the [defendant] 'honestly and objectively reasonably' believed that her conduct was egregious enough to be 'gross misconduct' and that the court therefore erred in granting summary adjudication of her fourth cause of action for breach of contract. Although the elements of the *Cotran* standard are triable to the jury, 'if the facts are undisputed or admit of only one conclusion, then summary judgment may be entered … .' " (*Serri*, *supra*, 226 Cal.App.4th at p. 873.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 208, 209

Chin et al., Cal. Practice Guide: Employment Litigation ~~(The Rutter Group)~~ ¶¶ 4:270–4:271, 4:289 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22–8.26

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.09[5][b] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.21, 249.43 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.25, 100.29 (Matthew Bender)

California Civil Practice: Employment Litigation, ~~(Thomson West)~~ § 6:19 (Thomson Reuters)

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

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

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

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

3. **That [***insert alleged violation of public policy, e.g., "***[***name of plaintiff***]***'s refusal to engage in price fixing"***] was a substantial motivating reason for [***name of plaintiff***]'s discharge; and**

4. **That the discharge caused [***name of plaintiff***] harm.**

New September 2003; Revised June 2013; June 2014, December 2014

Directions for Use

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.-Rptr.-2d 874, 824 P.2d 680; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.-4th 66, 80 fn. 6 [78 Cal. Rptr.-2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Note that this instruction uses the term "substantial motivating reason" to express causation between the public policy and the discharge (see element 3). "Substantial motivating reason" has been held to be the appropriate standard for cases alleging termination in violation of public policy. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.-App.-4th 466, 479 [161 Cal.Rptr.3d 758]; see *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

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

This instruction may be modified for adverse employment actions other than discharge, for example demotion, if done in violation of public policy. (See *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561 [232 Cal.Rptr. 490], disapproved on other grounds in *Gantt v. Sentry Ins.* (1992)

1 Cal.4th 1083, 1093 [4 Cal. Rptr. 2d 874, 824 P.2d 680] [public policy forbids retaliatory action taken by employer against employee who discloses information regarding employer's violation of law to government agency].) See also CACI No. 2509, *"Adverse Employment Action" Explained*..

Sources and Authority

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

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

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

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

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

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

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

- "[A]n employer's authority over its employee does not include the right to demand that the employee

commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order ... .” (*Tameny, supra,* 27 Cal.3d at p. 178.)

- “An action for wrongful termination in violation of public policy ‘can only be asserted against *an employer*. An individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which *an employer* commits that tort.’ ” (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1351 [172 Cal.Rptr.3d 686], original italics.)

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

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

- “In sum, a wrongful termination against public policy common law tort based on sexual harassment can be brought against an employer of any size.” (*Kim, supra,* 226 Cal.App.4th at p. 1351.)

- “It would be nonsensical to provide a different standard of causation in FEHA cases and common law tort cases based on public policies encompassed by FEHA.” (*Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, 1341 [166 Cal.Rptr.3d 720].)

- “FEHA's policy prohibiting disability discrimination in employment is sufficiently substantial and fundamental to support a claim for wrongful termination in violation of public policy.” (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal. App. 4th 635, 660 [163 Cal.Rptr.3d 392].)

- “Although the fourth cause of action references FEHA as one source of the public policy at issue, this is not a statutory FEHA cause of action. FEHA does not displace or supplant common law tort claims for wrongful discharge.” (*Kim, supra,* 226 Cal.App.4th at p. 1349.)

- “California's minimum wage law represents a fundamental policy for purposes of a claim for wrongful termination or constructive discharge in violation of public policy.” (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 831−832 [166 Cal.Rptr.3d 242].)

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

- “ ‘ “[P]ublic policy’ as a concept is notoriously resistant to precise definition, and … courts should venture into this area, if at all, with great care … .” [Citation.] Therefore, *when the constitutional provision or statute articulating a public policy also includes certain substantive limitations in scope or remedy, these limitations also circumscribe the common law wrongful discharge cause of action.* Stated another way, the common law cause of action cannot be broader than the constitutional

provision or statute on which it depends, and therefore it 'presents no impediment to employers that operate within the bounds of law.' [Citation.]' " (*Dutra v. Mercy Medical Center Mt. Shasta* (2012) 209 Cal.App.4th 750, 756 [146 Cal.Rptr.3d 922], original italics.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 222

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

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

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

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

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

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

2508. Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))—Plaintiff Alleges Continuing Violation

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[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit may not proceed because [***name of plaintiff***] did not timely file a complaint with the Department of Fair Employment and Housing (DFEH). A complaint is timely if it was filed within one year of the date on which [***name of defendant***]'s alleged unlawful practice occurred.**

[*Name of plaintiff***] filed a complaint with the DFEH on [***date***]. [***Name of defendant***] claims that its alleged unlawful practice that triggered the requirement to file a complaint occurred no later than [***date more than one year before DFEH complaint was filed***]. [***Name of plaintiff***] claims that [***name of defendant***]'s unlawful practice was a continuing violation so that the requirement to file a complaint was triggered no earlier than [***date less than one year before DFEH complaint was filed***].**

[*Name of defendant***]'s alleged unlawful practice is considered as continuing to occur as long as all of the following three conditions continue to exist:**

1. **Conduct occurring within a year of the date on which [***name of plaintiff***] filed [his/her] complaint with the DFEH was similar or related to the conduct that occurred earlier;**

2. **The conduct was reasonably frequent; and**

3. **The conduct had not yet become permanent.**

"Permanent" in this context means that the conduct has stopped, [*name of plaintiff***] has resigned, or [***name of defendant***]'s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.**

The burden is on [*name of plaintiff/name of defendant***] to prove that the complaint [was/was not] filed on time with the department.**

New June 2010; Revised December 2011

Directions for Use

Give this instruction if the plaintiff relies on the continuing-violation doctrine in order to avoid the bar of the limitation period of one year within which to file an administrative complaint. (See Gov. Code, § 12960(d).) Although the continuing-violation doctrine is labeled an equitable exception to the one-year deadline, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723-724 [85 Cal.Rptr.3d 705].)

If the case involves multiple claims of FEHA violations, replace "lawsuit" in the opening sentence with reference to the particular claim or claims to which the continuing-violation rule may apply.

In the second paragraph, insert the date on which the administrative complaint was filed and the dates on which both sides allege that the complaint requirement was triggered. The verdict form should ask the jury to specify the date that it finds that the requirement accrued. If there are multiple claims with different continuing-violation dates, repeat this paragraph for each claim.

No case directly addresses which party has the burden of proof regarding the continuing-violation doctrine. One view is that because the statute of limitations is an affirmative defense, the defendant bears the burden of proving every aspect of the defense including disproving a continuing violation. Another view is that the continuing-violation doctrine is similar to the delayed-discovery rule, on which the plaintiff bears the burden of proof under most circumstances. (See CACI No. 455, *Statute of Limitations—Delayed Discovery*.) Give the last sentence according to how the court determines that the burden of proof should be allocated.

Sources and Authority

- Administrative Complaint for FEHA Violation. Government Code section 12960 ~~provides:~~.

  ~~(a) The provisions of this article govern the procedure for the prevention and elimination of practices made unlawful pursuant to Article 1 (commencing with Section 12940) of Chapter 6.~~

  ~~(b) Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department. The director or his or her authorized representative may in like manner, on his or her own motion, make, sign, and file a complaint.~~

  ~~(c) Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this part may file with the department a verified complaint asking for assistance by conciliation or other remedial action.~~

  ~~(d) No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred, except that this period may be extended as follows:~~

  ~~(1) For a period of time not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence.~~

  ~~(2) For a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer.~~

  ~~(3) For a period of time, not to exceed one year from the date the person aggrieved by an alleged violation of Section 51.7 of the Civil Code becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if~~

~~during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation.~~

~~(4) For a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.~~

- "Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department 'after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,' with an exception for delayed discovery not relevant here." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652], original italics, internal citations omitted.)

- "[I]t is 'plaintiff's burden to plead and prove timely exhaustion of administrative remedies, such as filing a sufficient complaint with [DFEH] and obtaining a right-to-sue letter.' " (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1345 [172 Cal.Rptr.3d 686].)

- "[Plaintiff] argued below, as she does on appeal, that her DFEH complaint was timely under an equitable exception to the one-year deadline known as the continuing violation doctrine. Under this doctrine, a FEHA complaint is timely if discriminatory practices occurring outside the limitations period continued into that period. A continuing violation exists if (1) the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of permanence." (*Dominguez, supra,* 168 Cal.App.4th at pp. 720–721, internal citations omitted.)

- " '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824 [111 Cal.Rptr.2d 87, 29 P.3d 175], internal citations omitted.)

- "[T]he *Richards* court interpreted section 12960 to mean that when a continuing pattern of wrongful conduct occurs partly in the statutory period and partly outside the statutory period, the limitations period begins to accrue once an employee is on notice of the violation of his or her rights and on notice that 'litigation, not informal conciliation, is the only alternative for the vindication of his or her rights.' " (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1412 [159 Cal.Rptr.3d 749].)

- "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' 'The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions." ' The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." … The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.' " (*Morgan, supra,* 88 Cal.App.4th at p. 64, internal citations omitted.)

- "[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [he] was being discriminated against at the time the earlier events occurred." (*Morgan, supra,* 88 Cal.App.4th at p. 65.)

- "The Supreme Court has extended the continuing violation doctrine to retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of University of California, supra,* 88 Cal.App.4th 52, 65: 'Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.' " (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296], internal citations omitted.)

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 948

3 Witkin, California Procedure (5th ed. 2008) Actions, § 564

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act,* ¶¶ 7:561.1, 7:975 (The Rutter Group)

Chin, et al., California Practice Guide: Employment Litigation, Ch. 16-A, *Failure To Exhaust Administrative Remedies,* ¶ 16:85 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.51[1] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.59 (Matthew Bender)

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

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

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

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] was [***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 or abusive;**

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

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

   [That a supervisor engaged in the conduct;]

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

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

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

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

Directions for Use

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

"Severe or Pervasive" Explained.

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

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

Sources and Authority

- 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).
- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [6 Cal.Rptr.3d 441, 79 P.3d 556].)
- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.2d 464].)
- "[I]n order for the employer to avoid strict liability for the supervisor's actions under the FEHA, the harassment must result from a completely private relationship unconnected with the employment. Otherwise, the employer is strictly liable for the supervisor's actions regardless of whether the supervisor was acting as the employer's agent." (*Myers v. Trendwest Resorts, Inc.* (2007) 148 Cal.App.4th 1403, 1421 [56 Cal.Rptr.3d 501].)
- Employers may be liable for the conduct of certain agents. (See Gov. Code, §§ 12925(d), 12926(d), and 12940(j)(1) and *Reno v. Baird* (1998) 18 Cal.4th 640, 658 [76 Cal.Rptr.2d 499, 957 P.2d 1333] [California Supreme Court declined to express opinion whether "agent" language in the FEHA merely incorporates respondeat superior principles or has some other meaning].)

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

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

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

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

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

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

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering

all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle v. Warner Brothers. Television Productions* (2006) 38 Cal.4th 264, 284 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

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

- "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 [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.)

Secondary Sources

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

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

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment*, ¶¶ 10:40,

10:110–10:260 (The Rutter Group)

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

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

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

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

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

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

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

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

2. **That [***name of plaintiff***] was subjected to unwanted harassing conduct because [he/she] was [***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 or abusive;**

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

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

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

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

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

Directions for Use

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

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

Sources and Authority

- 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.)
- "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.)
- "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].)
- "[A]lthough no California cases have directly addressed racial harassment in the workplace, the California courts have applied the federal threshold standard to claims of sexual harassment and held that FEHA is violated when the harassment was ' " 'sufficiently severe or pervasive to alter the conditions of the victim's employment.' " ' " (*Etter v. Veriflo Corp.* (1998) 67 Cal.App.4th 457, 464–465 [79 Cal.Rptr.2d 33], internal citations and footnote omitted.)
- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact

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

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

- "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, supra*, 224 Cal.App.4th at p. 1525, original italics~~[A] cause of action for sexual harassment in violation of Government Code section 12940, subdivision (h) may be stated by a member of the same sex as the harasser … ." (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1418 [26 Cal.Rptr.2d 116]~~.)

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

- "The 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, 1229 [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.)

Secondary Sources

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

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

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

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

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

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

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

2523. "Harassing Conduct" Explained

Harassing conduct may include [any of the following:]

[a. Verbal harassment, such as obscene language, demeaning comments, slurs, [or] threats [or] [*describe other form of verbal harassment***];] [or]**

[b. Physical harassment, such as unwanted touching, assault, or physical interference with normal work or movement;] [or]

[c. Visual harassment, such as offensive posters, objects, cartoons, or drawings;] [or]

[d. Unwanted sexual advances;] [or]

[e. [*Describe other form of harassment if appropriate***].]**

New September 2003; Revised December 2007

Directions for Use

Read this instruction with CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant;* CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant;* CACI No. 2522A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Individual Defendant;* or CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual Defendant*. Read also CACI No. 2524, *"Severe or Pervasive" Explained*, if appropriate.

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1). ~~provides that it is an unlawful employment practice for "an employer ... or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation, to harass an employee, an applicant, or a person providing services pursuant to a contract."~~

- "Harassment" Defined. ~~The Fair Employment and Housing Commission's regulations (~~Cal. Code Regs., tit. 2, § 7287.6(b)(1).~~) provide:~~

  ~~"Harassment" includes but is not limited to:~~

  ~~(A) Verbal harassment, e.g., epithets, derogatory comments or slurs on a basis enumerated in the Act;~~

~~(B) Physical harassment, e.g., assault, impeding or blocking movement, or any physical interference with normal work or movement, when directed at an individual on a basis enumerated in the Act;~~

~~(C) Visual forms of harassment, e.g., derogatory posters, cartoons, or drawings on a basis enumerated in the Act; or~~

~~(D) Sexual favors, e.g., unwanted sexual advances which condition an employment benefit upon an exchange of sexual favors.~~

- "Harassment is distinguishable from discrimination under the FEHA. '[D]iscrimination refers to bias in the exercise of official actions on behalf of the employer, and harassment refers to bias that is expressed or communicated through interpersonal relations in the workplace.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 869 [172 Cal.Rptr.3d 732].)

- "[H]arassment consists of a type of conduct not necessary for performance of a supervisory job. Instead, harassment consists of conduct outside the scope of necessary job performance, conduct presumably engaged in for personal gratification, because of meanness or bigotry, or for other personal motives. Harassment is not conduct of a type necessary for management of the employer's business or performance of the supervisory employee's job." (*Reno v. Baird* (1998) 18 Cal.4th 640, 645–646 [76 Cal.Rptr.2d 499, 957 P.2d 1333], internal citations omitted.)

- "No supervisory employee needs to use slurs or derogatory drawings, to physically interfere with freedom of movement, to engage in unwanted sexual advances, etc., in order to carry out the legitimate objectives of personnel management. Every supervisory employee can insulate himself or herself from claims of harassment by refraining from such conduct." (*Serri, supra,* 226 Cal.App.4th at p. 869.)

- "We conclude, therefore, that the Legislature intended that commonly necessary personnel management actions such as hiring and firing, job or project assignments, office or work station assignments, promotion or demotion, performance evaluations, the provision of support, the assignment or nonassignment of supervisory functions, deciding who will and who will not attend meetings, deciding who will be laid off, and the like, do not come within the meaning of harassment. These are actions of a type necessary to carry out the duties of business and personnel management. These actions may retrospectively be found discriminatory if based on improper motives, but in that event the remedies provided by the FEHA are those for discrimination, not harassment. Harassment, by contrast, consists of actions outside the scope of job duties which are not of a type necessary to business and personnel management. This significant distinction underlies the differential treatment of harassment and discrimination in the FEHA." (*Reno, supra,* 18 Cal.4th at pp. 646-647, internal citation omitted.)

- "[W]e can discern no reason why an employee who is the victim of discrimination based on some official action of the employer cannot also be the victim of harassment by a supervisor for abusive messages that create a hostile working environment, and under the FEHA the employee would have two separate claims of injury." (*Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 707 [101

Cal.Rptr.3d 773, 219 P.3d 749].)

- "Here, [plaintiff]'s *discrimination* claim sought compensation for official employment actions that were motivated by improper bias. These discriminatory actions included not only the termination itself but also official employment actions that preceded the termination, such as the progressive disciplinary warnings and the decision to assign [plaintiff] to answer the office telephones during office parties. [Plaintiff]'s *harassment* claim, by contrast, sought compensation for hostile social interactions in the workplace that affected the workplace environment because of the offensive message they conveyed to [plaintiff]. These harassing actions included [supervisor]'s demeaning comments to [plaintiff] about her body odor and arm sores, [supervisor]'s refusal to respond to [plaintiff]'s greetings, [supervisor]'s demeaning facial expressions and gestures toward [plaintiff], and [supervisor]'s disparate treatment of [plaintiff] in handing out small gifts. None of these events can fairly be characterized as an official employment action. None involved [supervisor]'s exercising the authority that [employer] had delegated to her so as to cause [employer], in its corporate capacity, to take some action with respect to [plaintiff]. Rather, these were events that were unrelated to [supervisor]'s managerial role, engaged in for her own purposes." (*Roby, supra,* 47 Cal.4th at pp. 708–709, original italics, footnote omitted.)

- "[S]ome official employment actions done in furtherance of a supervisor's managerial role can also have a secondary effect of communicating a hostile message. This occurs when the actions establish a widespread pattern of bias. Here, some actions that [supervisor] took with respect to [plaintiff] are best characterized as official employment actions rather than hostile social interactions in the workplace, but they may have contributed to the hostile message that [supervisor] was expressing to [plaintiff] in other, more explicit ways. These would include [supervisor]'s shunning of [plaintiff] during staff meetings, [supervisor]'s belittling of [plaintiff]'s job, and [supervisor]'s reprimands of [plaintiff] in front of [plaintiff]'s coworkers. Moreover, acts of discrimination can provide evidentiary support for a harassment claim by establishing discriminatory animus on the part of the manager responsible for the discrimination, thereby permitting the inference that rude comments or behavior by that same manager were similarly motivated by discriminatory animus." (*Roby, supra,* 47 Cal.4th at p. 709.)

- "[A]busive conduct that is not facially sex specific can be grounds for a hostile environment sexual harassment claim *if it is inflicted because of gender,* i.e., if men and women are treated differently and the conduct is motivated by gender bias." (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 130 [129 Cal.Rptr.3d 384], original italics.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 10-B, *Sexual Harassment,* ¶¶ 10:125–10:155 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Sexual and Other Harassment, §§ 3.13, 3.36

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

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

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

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

We answer the questions submitted to us as follows:

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

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

2. **Was 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 widespread, and also 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***]~~person~~ in [***name of plaintiff***]'s circumstances have considered the work environment to be hostile or abusive?**
   ____ Yes ____ No

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

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

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

6. **Did [***name of defendant***] [participate in/assist/ [or] encourage] the 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

Directions for Use

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

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

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*.

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

2702. Nonpayment of Overtime Compensation—Essential Factual Elements (Lab. Code, § 1194)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her] 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 plaintiff***] was [not paid/paid less than the overtime rate] for some or all of the overtime hours worked; and**

4. **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 he or she agrees to work for a lower rate.

New September 2003; Revised June 2005, June 2014

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).) The jury must be instructed accordingly. It is possible that the overtime rate will be different over different periods of time.

The assertion of an employee's exemption from overtime laws is an affirmative defense. (*Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) For example, outside salespersons are exempt from overtime requirements (see Lab. Code, § 1171). An employee's exemption from overtime laws presents a mixed question of law and fact. (*Id.*) 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).
- 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.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 382–384, 398, 399

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment Of Wages*, ¶¶ 11:456, 11:470.1, 11:499 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment Of Overtime Compensation*, ¶¶ 11:730, 11:955.2 (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* (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:76 (Thomson Reuters)

2804. Removal or Noninstallation of Power Press Guards—Essential Factual Elements (Lab. Code, § 4558)

A "power press" is a machine that forms materials with a die in the manufacture of other products. A "die" is a tool that imparts shape to material by pressing against or through the material. A "guard" is any device that keeps a worker's hands or other parts of the body outside the point of operation.

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] [removed/failed to install] guards on a power press. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [employer/supervisor];**

2. **That [***name of plaintiff***] was injured while operating a power press;**

3. **That [***name of defendant***] gave an affirmative instruction to [remove/not install] the guards before [***name of plaintiff***]'s injury;**

4. **That when [***name of defendant***] did so, [he/she/it] knew that the lack of guards would create a probability of serious injury or death;**

5. **That the power press's [designer/fabricator/assembler] [designed the press with guards/installed guards on the press/required guards be attached/specified that guards be attached] and directly or indirectly conveyed this information to [***name of defendant***]; and**

6. **That [***name of defendant***]'s [removal/failure to install] the guards was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2011

Directions for Use

This instruction is for use if the plaintiff alleges that the claim for injury or death falls outside of the workers' compensation exclusivity rule because the employer removed or failed to install power press guards. (See Lab. Code § 4558.)

Sources and Authority

- Exclusive Remedy: Power-Press Guard Exception. Labor Code section 4558. ~~provides:~~

  ~~(a) As used in this section:~~

~~(1) "Employer" means a named identifiable person who is, prior to the time of the employee's injury or death, an owner or supervisor having managerial authority to direct and control the acts of employees.~~

~~(2) "Failure to install" means omitting to attach a point of operation guard either provided or required by the manufacturer, when the attachment is required by the manufacturer and made known by him or her to the employer at the time of acquisition, installation, or manufacturer-required modification of the power press.~~

~~(3) "Manufacturer" means the designer, fabricator, or assembler of a power press.~~

~~(4) "Power press" means any material-forming machine that utilizes a die which is designed for use in the manufacture of other products.~~

~~(5) "Removal" means physical removal of a point of operation guard which is either installed by the manufacturer or installed by the employer pursuant to the requirements or instructions of the manufacturer.~~

~~(6) "Specifically authorized" means an affirmative instruction issued by the employer prior to the time of the employee's physical injury or death, but shall not mean any subsequent acquiescence in, or ratification of, removal of a point of operation safety guard.~~

~~(b) An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death.~~

~~(c) No liability shall arise under this section absent proof that the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer. Proof of conveyance of this information to the employer by the manufacturer may come from any source.~~

~~(d) No right of action for contribution or indemnity by any defendant shall exist against the employer; however, a defendant may seek contribution after the employee secures a judgment against the employer pursuant to the provisions of this section if the employer fails to discharge his or her comparative share of the judgment.~~

- "The obvious legislative intent and purpose in section 4558 is to protect workers from employers who

wilfully remove or fail to install appropriate guards on large power tools. Many of these power tools are run by large mechanical motors or hydraulically. These sorts of machines are difficult to stop while they are in their sequence of operation. Without guards, workers are susceptible to extremely serious injuries. For this reason, the Legislature passed section 4558, subdivision (b), which subjects employers to legal liability for removing guards from powerful machinery where the manufacturer has designed the machine to have a protective guard while in operation." (*Ceja v. J.R. Wood, Inc.* (1987) 196 Cal.App.3d 1372, 1377 [242 Cal.Rptr. 531], internal citation omitted.)

- "A cause of action under section 4558 includes the following elements: (a) that the injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press; and (b) that this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death." (*Saldana v. Globe-Weis Systems Co.* (1991) 233 Cal.App.3d 1505, 1516 [285 Cal.Rptr. 385].)

- "From the plain language of section 4558, it is clear that an exception to the exclusivity of workers' compensation only arises for a power press injury where the employer has been expressly informed by the manufacturer that a point of operation guard is required, where the employer then affirmatively removes or fails to install such guard, and where the employer does so under conditions known by the employer to create a probability of serious injury or death. Absent facts which would establish the employer's knowledge or action regarding the absence of a point of operation guard on a power press, the incident would not come within the exception of section 4558, and an employee would not be entitled to bring 'an action at law for damages' arising from the power press injury. If such action cannot be brought on its own where the facts fail to establish all the elements of the power press exception under section 4558, it follows that individual causes of action against an employer which do not meet the requirements of section 4558 cannot be bootstrapped onto a civil action for damages which is properly brought under section 4558." (*Award Metals, Inc. v. Superior Court* (1991) 228 Cal.App.3d 1128, 1134 [279 Cal.Rptr. 459].)

- "This statutory definition embraces four elements. 'The power press itself is a machine. It is a machine that forms materials. The formation of materials is effectuated with a die. Finally, the materials being formed with the die are being formed in the manufacture of other products.' " (*McCoy v. Zahniser Graphics, Inc.* (1995) 39 Cal.App.4th 107, 110 [45 Cal.Rptr.2d 871], internal citation omitted.)

- "In all its pertinent uses, then, the term 'die' refers to a tool that imparts shape to material by pressing or impacting against or through the material, that is, by punching, stamping or extruding; in none of its uses does the term refer to a tool that imparts shape by cutting along the material in the manner of a blade." (*Rosales v. Depuy Ace Medical Co.* (2000) 22 Cal.4th 279, 285 [92 Cal.Rptr.2d 465, 991 P.2d 1256].)

- "[U]nder subdivisions (a)(2) and (c), liability for 'failure to install' a point of operation guard under section 4558 must be predicated upon evidence that the 'manufacturer' either provided or required such a device, which was not installed by the employer." (*Flowmaster, Inc. v. Superior Court* (1993) 16 Cal.App.4th 1019, 1027 [20 Cal.Rptr.2d 666].)

- "We find that the term guard, as used in section 4558, is meant to include the myriad apparatus which are available to accomplish the purpose of keeping the hands of workers outside the point of operation whenever the ram is capable of descending. Because we find that the term guard is not a specific legal term of art, we hold that the trial court properly provided the jury with a dictionary definition of the term guard to explain its meaning under section 4558." (*Bingham v. CTS Corp.* (1991) 231 Cal.App.3d 56, 65 [282 Cal.Rptr. 161], internal citation omitted; cf. *Gonzalez v. Seal Methods, Inc.* (2014) 223 Cal.App.4th 405, 410 [166 Cal.Rptr.3d 895] [point of operation guard does not include unattached device, such as a safety block, that the worker moves into and out of the point of operation].)

- "Physical removal, for the purpose of liability under section 4558, means to render a safeguarding apparatus, whether a device or point of operation guard, dysfunctional or unavailable for use by the operator for the particular task assigned." (*Bingham, supra*, 231 Cal.App.3d at p. 68.)

- "Nothing in the language, history or objectives underlying section 4558 convinces us that the Legislature intended that section 4558 would immunize employers who design, manufacture and install their own power presses without point of operation guards. A manufacturer is defined broadly in section 4558 as a 'designer, fabricator, or assembler of a power press.' An 'employer' is not excluded from the definition of a manufacturer, nor would doing so promote the objectives of the statute." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at pp. 1029–1030, internal citation omitted.)

- "The element of knowledge requires 'actual awareness' by the employer-rather than merely constructive knowledge-that a point of operation guard has either been provided for or is required to prevent the probability of serious injury or death." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at pp. 1031-1032, internal citation and footnote omitted.)

- "Liability under section 4558 can only be imposed if the employer fails to use or removes a safety device required by the manufacturer of the press. Essentially, the culpable conduct is the employer's ignoring of the manufacturer's safety directive ... . 'From the plain language of section 4558, it is clear that an exception to the exclusivity of workers' compensation only arises for a power press injury where the employer has been expressly informed by the manufacturer that a point of operation guard is required, where the employer then affirmatively removes or fails to install such guard, and where the employer does so under conditions known by the employer to create a probability of serious injury or death.' " (*Aguilera v. Henry Soss & Co.* (1996) 42 Cal.App.4th 1724, 1730 [50 Cal.Rptr.2d 477], internal citation omitted.)

- "As defined in the statute, 'specifically authorized' requires an 'affirmative instruction' by the employer, as distinguished from mere acquiescence in or ratification of an act or omission." (*Mora v. Hollywood Bed & Spring* (2008) 164 Cal.App.4th 1061, 1068 [79 Cal.Rptr.3d 640].)

- "Specific authorization demands evidence of an affirmative instruction or other wilful acts on the part of the employer despite actual knowledge of the probability of serious harm." (*Flowmaster, Inc., supra*, 16 Cal.App.4th at p. 1032, internal citation and footnote omitted.)

- "[I]mputation solely because of an agency relationship cannot bring an employer within the reach of section 4558. Only an employer who directly authorized by an affirmative instruction the removal or

failure to install a guard may be sued at law under section 4558." (*Watters Associates v. Superior Court* (1990) 218 Cal.App.3d 1322, 1325 [267 Cal.Rptr. 696].)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 49–51, 102

Chin et al., California Practice Guide: Employment Litigation, Ch. 13-I, *Collateral (Non-OSH) Actions Relating To Occupational Safety And Health*, ¶ 13:953 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 15-F, *California Workers' Compensation Act Preemption*, ¶ 15:572 (The Rutter Group)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.20 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.12[1][e] (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.11[1][f] (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.314[5] (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

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

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

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

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

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

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

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

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

Directions for Use

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

In element 3, a constitutional violation is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involving failure to provide a prisoner with proper medical care require "deliberate indifference." (See *Hudson v. McMillian* (1992) 503 U.S. 1, 5 [112 S.Ct. 995, 117 L.Ed.2d 156].) And Fourth Amendment claims require an "unreasonable" search or seizure. (See *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834.)

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

Sources and Authority

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

- Local governmental entities " 'can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted. ...' " Local governmental entities also can be sued " 'for constitutional deprivations visited pursuant to governmental "custom." ' " In addition, " '[t]he plaintiff must ... demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1147 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)

- "Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy. This was the situation in *Monell,* where there was an explicit policy requiring pregnant government employees to take unpaid leaves of absence before such leaves were medically required. ... Alternatively, the municipality may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)

- " '[I]n order to successfully maintain an action under 42 United States Code section 1983 against governmental defendants for the tortious conduct of employees under federal law, it is necessary to establish that the conduct occurred in execution of a government's policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1564 [266 Cal.Rptr. 682], internal citations omitted.)

- "Under *Monell*, a local government body can be held liable under § 1983 for policies of inaction as well as policies of action. A policy of action is one in which the government body itself violates someone's constitutional rights, or instructs its employees to do so; a policy of inaction is based on a government body's 'failure to implement procedural safeguards to prevent constitutional violations.' " (*Jackson v. Barnes* (9th Cir. 2014) 749 F.3d 755, 763], internal citations omitted.)

- "Normally, the question of whether a policy or custom exists would be a jury question. However, when there are no genuine issues of material fact and the plaintiff has failed to establish a prima facie case, disposition by summary judgment is appropriate." (*Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911, 920.)

- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate, supra,* 86 Cal.App.4th at p. 328.)

- "Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]'s injuries. [Plaintiff]'s recovery, if any, based upon a *Monell* claim would be limited to nominal damages." (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)

- "Local governmental bodies such as cities and counties are considered 'persons' subject to suit under section 1983. States and their instrumentalities, on the other hand, are not." (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1101 [100 Cal.Rptr.2d 289], internal citations omitted.)

- "A local governmental unit cannot be liable under this section for acts of its employees based solely on a respondeat superior theory. A local governmental unit is liable only if the alleged deprivation of rights 'implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers,' or when the injury is in 'execution of a [local] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1171 [80 Cal.Rptr.2d 860], internal citations omitted.)

- "A municipality's policy or custom resulting in constitutional injury may be actionable even though the individual public servants are shielded by good faith immunity." (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 568 [195 Cal.Rptr. 268], internal citations omitted.)

- "No punitive damages can be awarded against a public entity." (*Choate, supra,* 86 Cal.App.4th at p. 328, internal citation omitted.)

- "[T]he requirements of *Monell* do apply to suits against private entities under § 1983. … [W]e see no basis in the reasoning underlying *Monell* to distinguish between municipalities and private entities acting under color of state law." (*Tsao v. Desert Palace, Inc.* (9th Cir. 2012) 698 F.3d 1128, 1139, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

17A Moore's Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

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

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

3003. Local Government Liability—Failure to Train—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [he/she] was deprived of [his/her] civil rights as a result of [***name of local governmental entity***]'s failure to train its [officers/employees]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of local governmental entity***]'s training program was not adequate to train its [officers/employees];**

2. **That [***name of local governmental entity***] knew because of a pattern of similar violations[, or it should have been obvious to it,] that the inadequate training program was likely to result in a deprivation of the right [***specify right violated***];**

3. **That [***name of officer or employee***] violated [***name of plaintiff***]'s right [***specify right***]; and**

4. **That the failure to provide adequate training was the cause of the deprivation of [***name of plaintiff***]'s right [***specify right***].**

New September 2003; Revised December 2010, December 2011; Renumbered from CACI No. 3009 December 2012

Directions for Use

Give this instruction if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the entity's failure to adequately train its officers or employees. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements,* and the instructions on the particular constitutional violation alleged.

The inadequate training must amount to a deliberate indifference to constitutional rights. (*Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1249.) Element 2 expresses this deliberate-indifference standard. Deliberate indifference requires proof of a pattern of violations in all but a few very rare situations in which the unconstitutional consequences of failing to train are patently obvious. (See *Connick v. Thompson* (2011) – U.S. --, -- [131 S.Ct. 1350, 1361, 179 L.Ed.2d 417].) Delete the bracketed language in element 2 unless the facts present the possibility of liability based on patently obvious violations.

For other theories of liability against a local governmental entity, see CACI No. 3001, *Local Government Liability—Policy or Custom—Essential Factual Elements,* and CACI No. 3004, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983. ~~provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ... ."~~

- "We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell* and *Polk County v. Dodson*, that a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.' Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." (*City of Canton v. Harris* (1989) 489 U.S. 378, 388–389 [109 S.Ct. 1197, 103 L.Ed.2d 412], internal citations and footnote omitted.)

- "In *Canton,* the Court left open the possibility that, 'in a narrow range of circumstances,' a pattern of similar violations might not be necessary to show deliberate indifference. The Court posed the hypothetical example of a city that arms its police force with firearms and deploys the armed officers into the public to capture fleeing felons without training the officers in the constitutional limitation on the use of deadly force. Given the known frequency with which police attempt to arrest fleeing felons and the 'predictability that an officer lacking specific tools to handle that situation will violate citizens' rights,' the Court theorized that a city's decision not to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the 'highly predictable consequence,' namely, violations of constitutional rights. The Court sought not to foreclose the possibility, however rare, that the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." (*Connick, supra,* 131 S.Ct. at p. 1361], internal citations omitted.)

- "To impose liability on a local government for failure to adequately train its employees, the government's omission must amount to 'deliberate indifference' to a constitutional right. This standard is met when 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.' For example, if police activities in arresting fleeing felons 'so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers,' then the city's failure to train may constitute 'deliberate indifference.' " (*Clouthier, supra,* 591 F.3d at p. 1249, internal citations omitted.)

- "It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective." (*Farmer v. Brennan* (1994) 511 U.S. 825, 841 [114 S.Ct. 1970, 128 L.Ed.2d 811].)

- "To prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation." (*Gibson v. County of Washoe* (2002) 290 F.3d 1175, 1186, internal citation omitted.)

- " 'The issue in a case like this one ... is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." ' Furthermore, the inadequacy in the city's training program must be closely related to the 'ultimate injury,' such that the injury would have been avoided had the employee been trained under a program that was not deficient in the identified respect." (*Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 526 [27 Cal.Rptr.2d 433], internal citations omitted.)

- "Where the proper response . . . is obvious to all without training or supervision, then the failure to train or supervise is generally not 'so likely' to produce a wrong decision as to support an inference of deliberate indifference by city policymakers to the need to train or supervise." (*Flores v. County of L.A.* (9th Cir. 2014) 758 F.3d 1154, -- {no need to train officers not to sexually assault persons with whom they come in contact].)

- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)

- "Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]'s injuries. [Plaintiff]'s recovery, if any, based upon a *Monell* claim would be limited to nominal damages." (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 822

17A Moore's Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[3] (Matthew Bender)

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

3004. Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [he/she] was deprived of [his/her] civil rights as a result of [***specify alleged unconstitutional conduct, e.g., being denied a parade permit because of the political message of the parade***]. [***Name of official***] is the person responsible for establishing final policy with respect to [***specify subject matter, e.g., granting parade permits***] for [***name of local governmental entity***].**

To establish that [*name of local governmental entity***] is responsible for this deprivation, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***]'s right [***specify right violated***] was violated;**

2. **That [***name of official***] was the person who [either] [actually [made the decision/committed the acts]/ [or] later personally ratified the [decision/acts]] that led to the deprivation of [***name of plaintiff***]'s civil rights;**

3. **That [***name of official***]'s [acts/decision] [was/were] a conscious and deliberate choice to follow a course of action from among various alternatives; and**

4. **That [***name of official***] [[made the decision/committed the acts]/ [or] approved the [decision/acts]] with knowledge of [***specify facts constituting the alleged unlawful conduct***].**

[[*Name of official***] "ratified" the decision if [he/she] knew the unlawful reason for the decision and personally approved it after it had been made.]**

New December 2010; Renumbered from CACI No. 3010 December 2012

Directions for Use

Give this instruction if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the acts of an official with final policymaking authority. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements,* and the instructions on the particular constitutional violation alleged.

Liability may be based on either the official's personal acts or policy decision that led to the violation or the official's subsequent ratification of the acts or decision of another. (See *Gillette v. Delmore* (9th Cir. 1992) 979 F.2d 1342, 1346–1347.) If both theories are alleged in the alternative, include "either" in element 1. Include the last paragraph if ratification is alleged.

For other theories of liability against a local governmental entity, see CACI No. 3001, *Local Government Liability—Policy or Custom—Essential Factual Elements,* and CACI No. 3003, *Local Government Liability—Failure to Train—Essential Factual Elements.*

The court determines whether a person is an official policymaker under state law. (See *Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 737 [109 S.Ct. 2702, 105 L.Ed.2d 598].)

Sources and Authority

- "[A] local government may be held liable under § 1983 when 'the individual who committed the constitutional tort was an official with final policy-making authority' or such an official 'ratified a subordinate's unconstitutional decision or action and the basis for it.' 'If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.' 'There must, however, be evidence of a conscious, affirmative choice' on the part of the authorized policymaker. A local government can be held liable under § 1983 'only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." ' " (*Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1250, internal citations omitted.)

- "Two terms ago, … we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. … First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered.' Second, only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability. Third, whether a particular official has 'final policymaking authority' is a question of state law. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." (*St. Louis v. Praprotnik* (1988) 485 U.S. 112, 123 [108 S.Ct. 915, 99 L.Ed.2d 107], internal citations omitted.)

- "A municipality can be liable even for an isolated constitutional violation … when the person causing the violation has final policymaking authority." (*Webb v. Sloan* (9th Cir. 2003) 330 F.3d 1158, 1164.)

- "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." (*Jett, supra,* 491 U.S. at p. 737, original italics.)

- "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him." (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73 [104 Cal.Rptr. 57, 500 P.2d 1401].)

- "~~To show ratification, a plaintiff must prove that the 'authorized policymakers approve a subordinate's decision and the basis for it.' Accordingly, r~~[R]atification requires, among other things, knowledge of the alleged constitutional violation." (*Christie v. Iopa* (9th Cir. 1999) 176 F.3d 1231, 1239, internal citations omitted.)

- "[A] policymaker's mere refusal to overrule a subordinate's completed act does not constitute approval." (*Christie, supra,* 176 F.3d at p. 1239.)

- "[Plaintiff] contends that the city ratified the officers' conduct by not disciplining them. Ratification, however, generally requires more than acquiescence. There is no evidence in the record that policymakers 'made a deliberate choice to endorse' the officers' actions. The mere failure to discipline [the officers] does not amount to ratification of their allegedly unconstitutional actions." (*Sheehan v. City & County of San Francisco* (9th Cir. 2014) 743 F.3d 1211, 1231, internal citations omitted.)

- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)

- "Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]'s injuries. [Plaintiff]'s recovery, if any, based upon a *Monell* claim would be limited to nominal damages." (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 830

17A Moore's Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

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

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.12 (Matthew Bender)

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]. 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] 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.**

Force is not excessive if it is reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine what force a reasonable law enforcement officer would have used under the same or similar circumstances. You should consider, among other factors, 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; and

(c) Whether [*name of plaintiff***] was actively [resisting [arrest/detention]/ [or] attempting to avoid [arrest/detention] by flight].**

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any 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 three factors listed 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) 661 F.3d 460, 467–468.) Additional factors may be added if appropriate to the facts of the case.

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.)

- "[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.)

- "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,* 661 F.3d at p. 467, internal citations omitted.)

- "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.)

- "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 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* (2013) 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.)

- "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.)

- "[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.)

- "[O]fficers may be held liable for an otherwise lawful defensive use of deadly force when they intentionally or recklessly provoke a violent confrontation by actions that rise to the level of an independent Fourth Amendment violation." (*Sheehan v. City & County of San Francisco* (9th Cir. 2014) 743 F.3d 1211, 1216~~Officers may use a reasonable level of force to gain compliance from a resisting suspect who poses a minor threat." (*Gonzalez v. City of Anaheim* (9th Cir. 2013) 715 F.3d 766, 770~~.)

- "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.)

- "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,* 661 F.3d at p. 468.)

- "[W]e have stated that if the police were summoned to the scene to protect a mentally ill offender from himself, the government has less interest in using force. 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.)

- "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.)

- "[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.)

- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir.1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

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)

3021. Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] wrongfully arrested [him/her] because [he/she] did not have a warrant. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] arrested [*name of plaintiff*] without a warrant and without probable cause;**

2. **That [*name of defendant*] was acting or purporting to act in the performance of [his/her] official duties;**

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

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

New April 2009; Revised December 2009; Renumbered from CACI No. 3014 December 2012

Directions for Use

Give this instruction in a false arrest case brought under title 42 United States Code section 1983. For an instruction for false arrest under California law, see CACI No. 1401, *Essential Factual Elements—False Arrest Without Warrant by Peace Officer*.

The "official duties" referred to in element 2 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 2.

Sources and Authority

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)

- " 'A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification.'. 'Probable cause exists if the arresting officers "had knowledge and reasonably trustworthy information of facts and circumstances sufficient to lead a prudent person to believe that [the arrestee] had committed or was committing a crime." ' " (*Gravelet-Blondin v. Shelton* (9th Cir. 2013) 728 F.3d 1086, 1097−1098.)

- "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.)

- "Although the plaintiff bears the burden of proof on the issue of unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant." (*Dubner v. City & County of San Francisco* (9th Cir. 2001) 266 F.3d 959, 965.)

- "There is no bright-line rule to establish whether an investigatory stop has risen to the level of an arrest. Instead, this difference is ascertained in light of the ' "totality of the circumstances." ' This is a highly fact-specific inquiry that considers the intrusiveness of the methods used in light of whether these methods were 'reasonable *given the specific circumstances*.' " (*Green v. City & County of San Francisco* (9th Cir. 2014) 751 F.3d 1039, 1047, original italics, internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 181

5 Levy et al., California Torts, Ch. 60, *Principles of Liability and Immunity of Public Entities and Employees*, § 60.06 (Matthew Bender)

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

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.36A (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Institutional and Individual Immunity*, § 2.03 (Matthew Bender)

3026. Affirmative Defense—Exigent Circumstances

[*Name of defendant***] claims that a search warrant was not required. To succeed, [***name of defendant***] must prove both of the following:**

1. **That a reasonable officer would have believed that, under the circumstances, there was not enough time to get a search warrant because entry or search was necessary to prevent [***insert one of the following:***]**

   [physical harm to the officer or other persons;]

   [the destruction or concealment of evidence;]

   [the escape of a suspect;] and

2. **That the search was reasonable under the circumstances.**

In deciding whether the search was reasonable, you should consider, among other factors, the following:

(a) The extent of the particular intrusion;

(b) The place in which the search was conducted; [and]

(c) The manner in which the search was conducted; [and]

(d) [*Insert other applicable factor***].**

New September 2003; Renumbered from CACI No. 3006 December 2012

Sources and Authority

- "Absent consent, exigent circumstances must exist for a warrantless entry into a home, despite probable cause to believe that a crime has been committed or that incriminating evidence may be found inside. Such circumstances are 'few in number and carefully delineated.' 'Exigent circumstances' means 'an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 172 [52 Cal.Rptr.2d 777], internal citation omitted.)

- "Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 750 [104 S.Ct. 2091, 80 L.Ed.2d 732].)~~The burden to show exigent circumstances rests on the~~

~~officer, who must 'point[] to some real immediate and serious consequences if he postponed action to get a warrant.'~~

- " 'There are two general exceptions to the warrant requirement for home searches: exigency and emergency.' These exceptions are 'narrow' and their boundaries are 'rigorously guarded' to prevent any expansion that would unduly interfere with the sanctity of the home. In general, the difference between the two exceptions is this: The 'emergency' exception stems from the police officers' 'community caretaking function' and allows them 'to respond to emergency situations' that threaten life or limb; this exception does '*not* [derive from] police officers' function as criminal investigators.' By contrast, the 'exigency' exception does derive from the police officers' investigatory function; it allows them to enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is 'necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.' (*Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3d 752, 763, original italics, internal citations omitted ~~We have recognized circumstances that justify a warrantless entry to prevent 'the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.' " (*Sims v. Stanton* (9th Cir. 2012) 706 F.3d 954, 961, internal citation omitted~~.)

- "[D]etermining whether an official had 'reasonable cause to believe exigent circumstances existed in a given situation … [is a] "question[] of fact to be determined by a jury." [Citation.]' " (*Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1475 [150 Cal.Rptr.3d 735].)

- "There is no litmus test for determining whether exigent circumstances exist, and each case must be decided on the facts known to the officers at the time of the search or seizure. However, two primary considerations in making this determination are the gravity of the underlying offense and whether the delay in seeking a warrant would pose a threat to police or public safety." (*Conway, supra,* 45 Cal.App.4th at p. 172.)

- ~~" '[I]n situations where an officer is truly in hot pursuit and the underlying offense is a felony, the Fourth Amendment usually yields,' but 'in situations where the underlying offense is only a misdemeanor, law enforcement must yield to the Fourth Amendment in all but the "rarest" cases.' " (*Sims, supra,* 706 F.3d at p. 961.)~~

- "Finally, even where exigent circumstances exist, '[t]he search must be "strictly circumscribed by the exigencies which justify its initiation".' 'An exigent circumstance may justify a search without a warrant. However, after the emergency has passed, the [homeowner] regains his right to privacy, and ... a second entry [is unlawful].' " (*Conway, supra,* 45 Cal.App.4th at p. 173, internal citation omitted.)

- "A search or seizure conducted pursuant to either [the exigent circumstances or emergency] exceptions must be carried out in a reasonable manner. … [U]nder the exigent circumstances exception officers are required to use reasonable force in carrying out the search or seizure." (*Sheehan v. City & County of San Francisco* (9th Cir. 2014) 743 F.3d 1211, 1221, internal citations omitted.)

- " 'Exigent circumstances are those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay a search [] until a warrant could be obtained.' Mere speculation is not sufficient to show exigent circumstances. Rather, 'the government bears the burden of showing the existence of exigent circumstances by particularized evidence.' This is a heavy burden and can be satisfied 'only by demonstrating specific and articulable facts to justify the finding of exigent circumstances.' Furthermore, 'the presence of exigent circumstances necessarily implies that there is insufficient time to obtain a warrant; therefore, the government must show that a warrant could not have been obtained in time.' " (*U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1027−1028, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

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

3027. Affirmative Defense—Emergency

[*Name of defendant*] claims that a search warrant was not required. To succeed on this defense, [*name of defendant*] must prove that a peace officer, under the circumstances, would have reasonably believed that violence was imminent and that there was an immediate need to protect [[himself/herself]/ [or] another person] from serious harm.

New December 2013

Directions for Use

The emergency defense is similar to the exigent circumstances defense. (See CACI No. 3026, *Affirmative Defense—Exigent Circumstances*.) Emergency requires imminent violence and a need to protect from harm. In contrast, exigent circumstances is broader, reaching such things as a need to prevent escape or the destruction of evidence. (See *Hopkins v. Bonvicino* (9th Cir. 2009) 573 F.3d 752, 763~~*Sims v. Stanton* (9th Cir. 2013) 706 F.3d 954, 960~~.)

Sources and Authority

- " 'There are two general exceptions to the warrant requirement for home searches: exigency and emergency.' These exceptions are 'narrow' and their boundaries are 'rigorously guarded' to prevent any expansion that would unduly interfere with the sanctity of the home. In general, the difference between the two exceptions is this: The 'emergency' exception stems from the police officers' 'community caretaking function' and allows them 'to respond to emergency situations' that threaten life or limb; this exception does '*not* [derive from] police officers' function as criminal investigators.' By contrast, the 'exigency' exception does derive from the police officers' investigatory function; it allows them to enter a home without a warrant if they have both probable cause to believe that a crime has been or is being committed and a reasonable belief that their entry is 'necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.' (*Hopkins*, *supra*, 573 F.3d at p. 763, original italics, internal citations omitted~~When the warrantless search is to home or curtilage, we recognize two exceptions to the warrant requirement: exigency and emergency. 'These exceptions are narrow and their boundaries are rigorously guarded to prevent any expansion that would unduly interfere with the sanctity of the home.' The exigency exception assists officers in the performance of their law enforcement function. It permits police to commit a warrantless entry where 'necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.' The emergency exception, in contrast, seeks to ensure that officers can carry out their duties safely while at the same time ensuring the safety of members of the public. It applies when officers 'have an objectively reasonable basis for concluding that there is an immediate need to protect others or themselves from serious harm.' " (*Sims*, *supra*, 706 F.3d at p. 960, internal citations omitted~~.)

- "The emergency aid exception applies when: '(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate

need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need.' " (*Sheehan v. City & County of San Francisco* (9th Cir. 2014) 743 F.3d 1211, 1221.)

- "The two prongs of the emergency aid exception address distinct Fourth Amendment requirements. The first prong — whether law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm — addresses whether the officers proceeded lawfully by acting without a warrant. The second prong — whether the search's scope and manner were reasonable to meet the need — addresses whether, even if a warrant was not required, the officers carried out the search or seizure in an unreasonable manner. A search or seizure comports with the Fourth Amendment only if both prongs are satisfied." (*Sheehan*, *supra*, 743 F.3d at p. 1224, fn 6.)

- "The testimony that a reasonable officer would have perceived an immediate threat to his safety is, at a minimum, contradicted by certain portions of the record. The facts matter, and here, there are triable issues of fact as to whether 'violence was imminent,' and whether [defendant]'s warrantless entry was justified under the emergency exception." (*Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F.3d 1154, 1165, internal citation omitted.)

- "In sum, reasonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted them to enter the … residence if there was an objectively reasonable basis for fearing that violence was imminent." (*Ryburn v. Huff* (2012) – U.S. --, -- [132 S.Ct. 987, 992, 181 L.Ed.2d 966].)

- "[O]fficer safety may also fall under the emergency rubric." (*Sandoval, supra*, 756 F.3d at p. 1163.)

- ~~"[Defendant] asserts that he pursued [suspect] into [plaintiff]'s curtilage because he feared for his own safety. To establish that the circumstances gave rise to an emergency situation, [defendant] must show an 'objectively reasonable basis for fearing that violence was imminent.' As in the case of an exigency exception, an 'officer['s] assertion of a potential threat to [his] safety must be viewed in the context of the underlying offense.' Where the threat is to the officer's safety, we observe that '[o]ne suspected of committing a minor offense would not likely resort to desperate measures to avoid arrest and prosecution.' " (*Sims, supra*, 706 F.3d at p. 962, internal citations omitted.)~~

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)

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

3210. Breach of Implied Warranty of Merchantability—Essential Factual Elements

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[*Name of plaintiff***] claims that the [***consumer good***] did not have the quality that a buyer would reasonably expect. This is known as "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] bought a[n] [***consumer good***] [from/manufactured by] [***name of defendant***];**

2. **That at the time of purchase [***name of defendant***] was in the business of [selling [***consumer goods***] to retail buyers/[ ]manufacturing [***consumer goods***]]; and**

3. **That the [***consumer good***] [***insert one or more of the following:***]**

   [was not of the same quality as those generally acceptable in the trade;] [or]

   [was not fit for the ordinary purposes for which ~~such~~ the goods are used;] [or]

   [was not adequately contained, packaged, and labeled;] [or]

   [did not measure up to the promises or facts stated on the container or label.]

New September 2003; Revised December 2005, December 2014

Directions for Use

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

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] did not have the quality that a buyer would reasonably expect;

See also CACI No. 1243, *Notification/Reasonable Time*. Instructions on damages and causation may be necessary in actions brought under the Commercial Code.

~~Delete element 2 if the defendant is the manufacturer of the consumer good in question or if it is uncontested that the defendant was a retail seller within the meaning of the act.~~

~~If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [consumer good]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)~~

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

Sources and Authority

- Buyer's Action for Breach of Implied Warranties. Civil Code section 1794(a). ~~provides: "Any buyer of consumer goods who is damaged by a failure to comply with any obligation ... under an implied ... warranty ... may bring an action for the recovery of damages and other legal and equitable relief."~~

- Damages. Civil Code section 1794(b). ~~provides in part:~~

  ~~The measure of the buyer's damages in an action under this section shall include ... the following:~~

  ~~(1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.~~

  ~~(2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.~~

- Implied Warranties. Civil Code section 1791.1(a). ~~provides:~~

  ~~"Implied warranty of merchantability" ... means that the consumer goods meet each of the following:~~

  ~~(1) Pass without objection in the trade under the contract description.~~

  ~~(2) Are fit for the ordinary purposes for which such goods are used.~~

  ~~(3) Are adequately contained, packaged, and labeled.~~

  ~~(4) Conform to the promises or affirmations of fact made on the container or label.~~

- Duration of Implied Warranties. Civil Code section 1791.1(c). ~~provides: "The duration of the implied warranty of merchantability ... shall be coextensive in duration with an express warranty which accompanies the consumer goods, provided the duration of the express warranty is reasonable; but in no event shall such implied warranty have a duration of less than 60 days nor more than one year following the sale of new consumer goods to a retail buyer. Where no duration for an express warranty is stated with respect to consumer goods, or parts thereof, the duration of the implied warranty shall be the maximum period prescribed above."~~

- Remedies. Civil Code section 1791.1(d). ~~provides in part: "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability ... has the remedies provided in Chapter 6~~

~~(commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, [Civil Code] Section 1794 ... shall apply."~~

- Implied Warranty of Merchantability. Civil Code section 1792. ~~provides, in part: "Unless disclaimed in the manner prescribed by [the act], every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable. The retail seller shall have a right of indemnity against the manufacturer in the amount of any liability under this section."~~

- Damages for Breach; Accepted Goods. Commercial Code section 2714. ~~(1) provides: "Where the buyer has accepted goods and given notification (subdivision (3) of Section 2607) he or she may recover, as damages for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable."~~

- ~~Commercial Code section 2714(2) provides: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."~~

- "As defined in the Song-Beverly Consumer Warranty Act, 'an implied warranty of merchantability guarantees that 'consumer goods meet each of the following: [¶] (1) Pass without objection in the trade under the contract description. [¶] (2) Are fit for the ordinary purposes for which such goods are used. [¶] (3) Are adequately contained, packaged, and labeled. [¶] (4) Conform to the promises or affirmations of fact made on the container or label.' Unlike an express warranty, 'the implied warranty of merchantability arises by operation of law' and 'provides for a minimum level of quality.' 'The California Uniform Commercial Code separates implied warranties into two categories. An implied warranty that the goods "shall be merchantable" and "fit for the ordinary purpose" is contained in California Uniform Commercial Code section 2314. Whereas an implied warranty that the goods shall be fit for a particular purpose is contained in section 2315. [¶] Thus, there exists in every contract for the sale of goods by a merchant a warranty that the goods shall be merchantable. The core test of merchantability is fitness for the ordinary purpose for which such goods are used. (§ 2314.)' " (*Isip v. Mercedes-Benz USA, LLC* (2007) 155 Cal.App.4th 19, 26–27 [65 Cal.Rptr.3d 695], internal citations omitted.)

- "Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)

- The implied warranty of merchantability "does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The [Song Beverly] act provides for both express and implied warranties, and while under a manufacturer's express warranty the buyer must allow for a reasonable number of repair attempts

within 30 days before seeking rescission, that is not the case for the implied warranty of merchantability's bulwark against fundamental defects." (*Brand v. Hyundai Motor America* (2014) 226 Cal.App.4th 1538, 1545 [173 Cal.Rptr.3d 454]~~The question of reimbursement or replacement is relevant only under [Civil Code] section 1793.2. ... [T]his section applies only when goods cannot be made to conform to the 'applicable express warranties.' It has no relevance to the implied warranty of merchantability." (*Music Acceptance Corp., supra*, 32 Cal.App.4th at p. 620~~.)

- "The Song-Beverly Act incorporates the provisions of [Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp., supra,* 37 Cal.App.4th at p. 1295, fn. 2, internal citation omitted.)

- "The implied warranty of merchantability may be breached by a latent defect undiscoverable at the time of sale. Indeed, '[u]ndisclosed latent defects … are the very evil that the implied warranty of merchantability was designed to remedy.' In the case of a latent defect, a product is rendered unmerchantable, and the warranty of merchantability is breached, by the existence of the unseen defect, not by its subsequent discovery." (*Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1304–1305 [95 Cal.Rptr.3d 285], internal citations omitted.)

- "[Defendant] suggests 'the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation.' As the trial court correctly recognized, however, a merchantable vehicle under the statute requires more than the mere capability of 'just getting from point "A" to point "B." ' " (*Brand, supra*, 226 Cal.App.4th at p. 1546.)

- "The notice requirement of [former Civil Code] section 1769 ... is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. 'As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897], internal citations omitted.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, §§ 70, 71

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.21–3.23, 3.25–3.26

2 California UCC Sales & Leases (Cont.Ed.Bar) Leasing of Goods, §§ 19.31–19.32

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.31[2][a] (Matthew Bender)

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

20 California Points and Authorities, Ch. 206, *Sales*, § 206.42 (Matthew Bender)

5 California Civil Practice ~~(Thomson West)~~ Business Litigation, §§ 53:5–53:7 (Thomson Reuters)

3600. Conspiracy—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of coconspirator***]'s [***insert tort theory***] and that [***name of defendant***] is responsible for the harm because [he/she] was part of a conspiracy to commit [***insert tort theory***]. A conspiracy is an agreement by two or more persons to commit a wrongful act. Such an agreement may be made orally or in writing or may be implied by the conduct of the parties.**

If you find that [*name of coconspirator***] committed [a/an] [***insert tort theory***] that harmed [***name of plaintiff***], then you must determine whether [***name of defendant***] is also responsible for the harm. [***Name of defendant***] is responsible if [***name of plaintiff***] proves both of the following:**

1. **That [***name of defendant***] was aware that [***name of coconspirator***] [and others] planned to [***insert wrongful act***]; and**

2. **That [***name of defendant***] agreed with [***name of coconspirator***] [and others] and intended that the [***insert wrongful act***] be committed.**

Mere knowledge of a wrongful act without cooperation or an agreement to cooperate is insufficient to make [*name of defendant***] responsible for the harm.**

A conspiracy may be inferred from circumstances, including the nature of the acts done, the relationships between the parties, and the interests of the alleged coconspirators. [*Name of plaintiff***] is not required to prove that [***name of defendant***] personally committed a wrongful act or that [he/she] knew all the details of the agreement or the identities of all the other participants.**

New September 2003

Sources and Authority

- "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 510−511 [28 Cal.Rptr.2d 475, 869 P.2d 454], internal citations omitted.)

- "While criminal conspiracies involve distinct substantive wrongs, civil conspiracies do not involve separate torts. The doctrine provides a remedial measure for affixing liability to all persons who have 'agreed to a common design to commit a wrong.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 333 [103 Cal.Rptr.2d 339], internal citation omitted.)

- "As long as two or more persons agree to perform a wrongful act, the law places civil liability for the resulting damages on all of them, regardless of whether they actually commit the tort themselves. 'The effect of charging ... conspiratorial conduct is to implicate all ... who agree to the plan to commit the wrong as well as those who actually carry it out.' " (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 784 [157 Cal.Rptr. 392, 598 P.2d 45], internal citations omitted.)

- "To support a conspiracy claim, a plaintiff must allege the following elements: '(1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages arising from the wrongful conduct.' " (*AREI II Cases* (2013) 216 Cal.App.4th 1004, 1022 [157 Cal.Rptr.3d 368].)

- " '[T]he major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.' " (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 511, internal citations omitted.)

- "A complaint for civil conspiracy states a cause of action only when it alleges the commission of a civil wrong that causes damage. Though conspiracy may render additional parties liable for the wrong, the conspiracy itself is not actionable without a wrong." (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 454 [175 Cal.Rptr. 157, 629 P.2d 1369].)

- "Defendants seem to argue that an action for conspiracy must be based exclusively on tort principles, not on a statutory violation that provides civil penalties. No authority is cited for that proposition, and we cannot conceive of a basis for limiting conspiracy claims in that manner. It is sufficient that a conspiracy is based on an agreement to engage in unlawful conduct regardless of whether the conspiracy violates a duty imposed by tort law or a statute." (*Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136, 1158 [151 Cal.Rptr.3d 683].)

- "Because civil conspiracy is so easy to allege, plaintiffs have a weighty burden to prove it. They must show that each member of the conspiracy acted in concert and came to a mutual understanding to accomplish a common and unlawful plan, and that one or more of them committed an overt act to further it. It is not enough that the conspiring officers knew of an intended wrongful act, they had to agree-expressly or tacitly-to achieve it. Unless there is such a meeting of the minds, 'the independent acts of two or more wrongdoers do not amount to a conspiracy.' " (*Choate, supra,* 86 Cal.App.4th at p. 333, internal citations omitted.)

- "Conspiracies are typically proved by circumstantial evidence. '[S]ince such participation, cooperation or unity of action is difficult to prove by direct evidence, it can be inferred from the nature of the act done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.' " (*Rickley, supra,* 212 Cal.App.4th at p. 1166, internal citation omitted.)

- "A cause of action for civil conspiracy may not arise ... if the alleged conspirator, though a participant in the agreement underlying the injury, was not personally bound by the duty violated by the wrongdoing ... ." (*Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44 [260 Cal.Rptr. 183, 775 P.2d 508], internal citation omitted.)

- "Conspiracy is not an independent tort; it cannot create a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles." (*Applied Equipment Corp., supra,* 7 Cal.4th at p. 514, internal citations omitted.)

- "A conspiracy cannot be alleged as a tort separate from the underlying wrong it is organized to achieve. As long as the underlying wrongs are subject to privilege, defendants cannot be held liable for a conspiracy to commit those wrongs. Acting in concert with others does not destroy the immunity of defendants." (*McMartin v. Children's Institute International* (1989) 212 Cal.App.3d 1393, 1406 [261 Cal.Rptr. 437], internal citations omitted.)

- "We agree ... that the general rule is that a party who is not personally bound by the duty violated may not be held liable for civil conspiracy even though it may have participated in the agreement underlying the injury. However, an exception to this rule exists when the participant acts in furtherance of its own financial gain." (*Mosier v. Southern California Physicians Insurance Exchange* (1998) 63 Cal.App.4th 1022, 1048 [74 Cal.Rptr.2d 550]~~, *supra*, 63 Cal.App.4th at p. 1048~~, internal citations omitted.)

- " 'The basis of a civil conspiracy is the formation of a group of two or more persons who have agreed to a common plan or design to commit a tortious act.' The conspiring defendants must also have actual knowledge that a tort is planned and concur in the tortious scheme with knowledge of its unlawful purpose." (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1582 [47 Cal.Rptr.2d 752], internal citations omitted.)

- "Liability as a co-conspirator depends upon projected joint action. 'The mere knowledge, acquiescence, or approval of the act, without co-operation or agreement to cooperate is not enough ... .' But once the plan for joint action is shown, 'a defendant may be held liable who in fact committed no overt act and gained no benefit therefrom.' " (*Wetherton v. Growers Farm Labor Assn.* (1969) 275 Cal.App.2d 168, 176 [79 Cal.Rptr. 543], internal citations omitted, disapproved on another ground in *Applied Equipment Corp., supra,* 7 Cal.4th at p. 521, fn. 10.)

- "Furthermore, the requisite concurrence and knowledge 'may be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators, and other circumstances.' Tacit consent as well as express approval will suffice to hold a person liable as a coconspirator." (*Wyatt, supra,* 24 Cal.3d at p. 785, internal citations omitted.)

- "[A]ctual knowledge of the planned tort, without more, is insufficient to serve as the basis for a conspiracy claim. Knowledge of the planned tort must be combined with intent to aid in its commission. 'The sine qua non of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful objective and their intent to aid in achieving that objective.' 'This rule derives from the principle that a person is generally under no duty to take affirmative action to aid or protect others.' " (*Kidron, supra,* 40 Cal.App.4th at p. 1583, internal citations omitted.)

- "While knowledge and intent 'may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances,' '[c]onspiracies cannot be

established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense.' An inference must flow logically from other facts established in the action." (*Kidron, supra*, 40 Cal.App.4th at p. 1583, internal citations omitted.)

- "[A] nonfiduciary cannot conspire to breach a duty owed only by a fiduciary." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1474 [171 Cal.Rptr.3d 548].)

Secondary Sources

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability*, § 9.03 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 126, *Conspiracy*, § 126.11 (Matthew Bender)

4 California Points and Authorities, Ch. 46, *Conspiracy*, § 46.20 et seq. (Matthew Bender)

3610. Aiding and Abetting Tort—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of actor***]'s [***insert tort theory, e.g., assault and battery***] and that [***name of defendant***] is responsible for the harm because [he/she] aided and abetted [***name of actor***] in committing the [***e.g., assault and battery***].**

If you find that [*name of actor***] committed [a/an] [***e.g., assault and battery***] that harmed [***name of plaintiff***], then you must determine whether [***name of defendant***] is also responsible for the harm. [***Name of defendant***] is responsible as an aider and abetter if [***name of plaintiff***] proves all of the following:**

1. That [*name of defendant***] knew that [a/an] [***e.g., assault and battery***] was [being/going to be] committed by [***name of actor***] against [***name of plaintiff***];**

2. That [*name of defendant***] gave substantial assistance or encouragement to [***name of actor***]; and**

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

Mere knowledge that [a/an] [*e.g., assault and battery***] was [being/going to be] committed and the failure to prevent it do not constitute aiding and abetting.**

New April 2008

Directions for Use

Give this instruction if the plaintiff seeks to hold a defendant responsible for the tort of another on a theory of aiding and abetting, whether or not the active tortfeasor is also a defendant.

Some cases seem to hold that in addition to the elements of knowledge and substantial assistance, a complaint must allege the aider and abettor had the specific intent to facilitate the wrongful conduct. (See *Schulz v. Neovi Data Corp.* (2007) 152 Cal.App.4th 86, 95 [60 Cal.Rptr.3d 810].)

Sources and Authority

- "The jury was also instructed on aiding and abetting, as follows: 'A person aids and abets the commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and

abetting." (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1140–1141 [69 Cal.Rptr.3d 445].)

- "[C]ausation is an essential element of an aiding and abetting claim, i.e., plaintiff must show that the aider and abettor provided assistance that was a substantial factor in causing the harm suffered." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1476 [171 Cal.Rptr.3d 548].)

- "The fact the instruction [CACI No. 3610] does not use the word 'intent' is not determinative. 'California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. … "The words 'aid and abet' as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation *with knowledge of the object to be attained*." [Citation.]' A defendant who acts with actual knowledge of the intentional wrong to be committed and provides substantial assistance to the primary wrongdoer is not an accidental participant in the enterprise." (*Upasani v. State Farm General Ins. Co.* (2014) 227 Cal.App.4th 509, 519 [173 Cal.Rptr.3d 784], original italics, internal citations omitted.)

- "[W]e consider whether the complaint states a claim based upon 'concert of action' among defendants. The elements of this doctrine are prescribed in section 876 of the Restatement Second of Torts. The section provides, 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.' With respect to this doctrine, Prosser states that 'those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt his acts done for their benefit, are equally liable with him. [para.] Express agreement is not necessary, and all that is required is that there be a tacit understanding . . . .' " (*Sindell v. Abbott Laboratories* (1980) 26 Cal.3d 588, 604 [163 Cal.Rptr. 132, 607 P.2d 924], internal citations omitted.)

- "Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." (*American Master Lease LLC, supra*, 225 Cal.App.4th at p. 1475.)

- "~~' "Liability may … be imposed on one who aids and abets the commission of an intentional tort if the person … knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act … ." [Citations.]' This is consistent with~~ Restatement Second of Torts …~~, which~~ recognizes a cause of action for aiding and abetting in a civil action when it provides: 'For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he [¶] … [¶] (b) knows that the other's conduct constitutes a

breach of duty and gives substantial assistance or encouragement to the other so to conduct himself … .' 'Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance. … It likewise applies to a person who knowingly gives substantial aid to another who, as he knows, intends to do a tortious act.' " (*Schulz, supra,* 152 Cal.App.4th at pp. 93–94, internal citations omitted.)

- "California courts have long held that liability for aiding and abetting depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted. … 'The words "aid and abet" as thus used have a well understood meaning, and may fairly be construed to imply an intentional participation *with knowledge of the object to be attained*.' " (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145–1146 [26 Cal.Rptr.3d 401], original italics, internal citations omitted.)

- " 'Mere knowledge that a tort is being committed and the failure to prevent it does not constitute aiding and abetting. "As a general rule, one owes no duty to control the conduct of another . . . ." More specifically, a supervisor is not liable to third parties for the acts of his or her subordinates.' " (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 879 [57 Cal.Rptr.3d 454], internal citations omitted.)

- " 'In the civil arena, an aider and abettor is called a cotortfeasor. To be held liable as a cotortfeasor, a defendant must have knowledge and intent. … A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted *with the intent of facilitating the commission of that tort*.' Of course, a defendant can only aid and abet another's tort if the defendant knows what 'that tort' is. … [T]he defendant must have acted to aid the primary tortfeasor 'with knowledge of the object to be attained.' " (*Casey, supra,* 127 Cal.App.4th at p. 1146, original italics, internal citations omitted.)

- " 'Despite some conceptual similarities, civil liability for aiding and abetting the commission of a tort, which has no overlaid requirement of an independent duty, differs fundamentally from liability based on conspiracy to commit a tort. [Citations.] " '[A]iding-abetting focuses on whether a defendant knowingly gave "substantial assistance" to someone who performed wrongful conduct, not on whether the defendant agreed to join the wrongful conduct.' " ' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 324 [166 Cal.Rptr.3d 116].)

- " '[W]hile aiding and abetting may not require a defendant to agree to join the wrongful conduct, it necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. …' [Citation.] The aider and abetter's conduct need not, as 'separately considered,' constitute a breach of duty." (*American Master Lease LLC, supra,* 225 Cal.App.4th at pp. 1475−1476.)

- It appears that one may be liable as an aider and abetter of a negligent act. (See *Orser v. George* (1967) 252 Cal.App.2d 660, 668 [60 Cal.Rptr. 708] ["James too must be held as a defendant because, although he did not fire the fatal bullet, there is evidence (*which may or may not be sufficient to prove him liable at the trial*) creating a question for the trier of fact. This evidence indicates he was firing alternately with Vierra at the same mudhen, in the same line of fire and

possibly tortiously. In other words (to paraphrase the Restatement …), the record permits a possibility James knew Vierra's conduct constituted a breach of duty owed Orser and that James was giving Vierra substantial 'assistance or encouragement'; also that this was substantial assistance to Vierra in a tortious result with James' own conduct, 'separately considered, constituting a breach of duty to' Orser."], original italics; see also Rest. 2d Torts, § 876, Com. on Clause (b), Illustration 6.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 44

1 Levy et al., California Torts, Ch. 9, *Civil Conspiracy, Concerted Action, and Related Theories of Joint Liability,* §§ 9.01, 9.02 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 126, *Conspiracy*, §§ 126.10, 126.11 (Matthew Bender)

4 California Points and Authorities, Ch. 46, *Conspiracy*, § 46.04 (Matthew Bender)

3704. Existence of "Employee" Status Disputed

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

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. It does not matter whether [***name of defendant***] exercised the right to control.**

In addition to the right of control, you must also consider all of the circumstances in deciding whether [*name of agent***] was [***name of defendant***]'s employee. The following factors, if true, may show that [***name of agent***] was the employee of [***name of defendant***]:**

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

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

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

(d) **[***Name of defendant***] had an unlimited right to end the relationship with [***name of agent***];**

(e) **The work being done by [***name of agent***] was [his/her] only occupation or business;**

(f) **The kind of work performed by [***name of agent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

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

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

(i) **[***Name of defendant***] and [***name of agent***] acted as if they had an employer-employee relationship.**

New September 2003; Revised December 2010

Directions for Use

This instruction is primarily intended for employer-employee relationships. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency"*

Relationship Disputed.

Secondary factors (a)–(i) come from the Restatement Second of Agency, section 220. They have been phrased in a way to suggest whether or not they point toward an employment relationship. Omit any that are not supported by the evidence. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399].)

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295. ~~provides: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency."~~

- "Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 528 [173 Cal.Rptr.3d 332, 327 P.3d 165].)

- "~~Following common law tradition, California decisions … declare that '[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired … .' [¶]~~ However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 350, internal citations omitted.)

- "While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' " (*Ayala, supra*, 59 Cal.4th at p. 532.)

- ~~Additional factors have been derived principally from the Restatement Second of Agency. These include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work~~

~~is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.~~ “ ‘Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.’ ” (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 351, internal citations omitted.)

- “[T]he Restatement guidelines heretofore approved in our state remain a useful reference.” (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 354.)

- “We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the ‘right to control the work,’ the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law.” (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- “Whether a person is an independent contractor or an employee is a question of fact if dependent upon the resolution of disputed evidence or inferences.” (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 297, fn. 4 [111 Cal.Rptr.3d 787].)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- “The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.” (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 342.)

- “It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship.” (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- “Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because ‘[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.’ ” (*Ayala, supra,* 59 Cal.4th at p. 531.)

- “The worker's corresponding right to leave is similarly relevant: ‘ “An employee may quit, but an independent contractor is legally obligated to complete his contract.” ’ ” (*Ayala, supra,* 59 Cal.4th at p. 531 fn. 2.)

- “In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. … [¶] … [T]he rights spelled out in a

contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala, supra,* 59 Cal.4th at p. 535.)

- When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- " '[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], … the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor … .' " (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)

- "Agency and independent contractorship are not necessarily mutually exclusive legal categories as independent contractor and servant or employee are. ... One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*City of Los Angeles v. Meyers Brothers Parking System* (1975) 54 Cal.App.3d 135, 138 [126 Cal.Rptr. 545], internal citations omitted; accord *Mottola v. R. L. Kautz & Co.* (1988) 199 Cal.App.3d 98, 108 [244 Cal.Rptr. 737].)

- "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)

- "[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra,* 202 Cal.App.4th at p. 589.)

- Restatement Second of Agency, section 220, provides:

  (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

  (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

  (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

  (b) whether or not the one employed is engaged in a distinct occupation or business;

  (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 2–42

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

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.22, 248.51 (Matthew Bender)

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

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior,* § 100A.41 et seq. (Matthew Bender)

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

3707. Special Employment—Joint Responsibility

If you decide that [*name of worker***] was the temporary employee of [***name of defendant second employer***], but that [***name of defendant first employer***] partially controlled [***name of worker***]'s activities along with [***name of defendant second employer***], then you must conclude that both [***name of defendant first employer***] and [***name of defendant second employer***] are responsible for the conduct of [***name of worker***].**

New September 2003

Sources and Authority

- " ' "Where an employer sends an employee to do work for another person, and both have the right to exercise certain powers of control over the employee, that employee may be held to have two employers—his original or 'general' employer and a second, the 'special' employer." ' A general employer is absolved of respondeat superior liability when it has relinquished total control to the special employer. During this period of transferred control, the special employer becomes solely liable under the doctrine of respondeat superior for the employee's job-related torts." (*Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th 1515, 1520 [168 Cal.Rptr.3d 123], internal citations omitted.)

- "Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the partial control of the original employer. Where general and special employers share control of an employee's work, a 'dual employment' arises, and the general employer remains concurrently and simultaneously, jointly and severally liable for the employee's torts." (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 494-495 [162 Cal.Rptr. 320, 606 P.2d 355], internal citations omitted.)

- "This is especially true where the loaned employee performs work of interest to both the general and special employers." (*Societa per Azioni de Navigazione Italia v. City of Los Angeles* (1982) 31 Cal.3d 446, 460 [183 Cal.Rptr. 51, 645 P.2d 102], internal citation omitted.) If the loaned employee performs work of interest to both the general and special employers, "there is a presumption that the [employee] remained in his general employment. (*Ibid*.) The [general employer] can avoid liability only if it can [prove] that it gave up ... 'authoritative direction and control' [over the employee]." (*Ibid*.)

- " 'Authoritative direction and control' is more than the power to suggest details or the necessary cooperation." (*Societa per Azioni de Navigazione Italia, supra*, 31 Cal.3d at p. 460, internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 169–172

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

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

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 3:26–3:27 (Thomson Reuters)

3722. Scope of Employment—Unauthorized Acts

An employee's unauthorized conduct may be within the scope of [employment/authorization] if [the conduct was committed in the course of a series of acts authorized by the employer] [or] [the conduct arose from a risk inherent in or created by the enterprise].

[An employee's wrongful or criminal conduct may be within the scope of employment even if it breaks a company rule or does not benefit the employer.]

New September 2003

Sources and Authority

- ~~An~~ "[T]he employer's liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise." (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 968 [227 Cal.Rptr. 106, 719 P.2d 676].)

- "The fact that an employee is not engaged in the ultimate object of his employment at the time of his wrongful act does not preclude attribution of liability to an employer. ... [T]he proper inquiry is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 219 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citations omitted.)

- "Tortious conduct that violates an employee's official duties or disregards the employer's express orders may nonetheless be within the scope of employment. So may acts that do not benefit the employer, or are willful or malicious in nature." (*Mary M., supra*, 54 Cal.3d at p. 209, internal citations omitted.)

- ~~It is~~ "Equally well established, if somewhat surprising on first encounter, ... that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296-297 [48 Cal.Rptr.2d 510, 907 P.2d 358], internal citations omitted.)

- "California no longer follows the traditional rule that an employee's actions are within the scope of employment only if motivated, in whole or part, by a desire to serve the employer's interests. … [¶] '*It is sufficient … if the injury resulted from a dispute arising out of the employment. … "It is not necessary that the assault should have been made 'as a means, or for the purpose of performing the work he (the employee) was employed to do.*' " ' " (*Lisa M., supra,* 12 Cal.4th at p. 297, original italics, internal citations omitted.)

- "Although an employee's willful, malicious, and even criminal torts may fall within the scope of employment, 'an employer is not strictly liable for all actions of its employees during working hours.' For the employer to be liable for an intentional tort, the employee's act must have a 'causal nexus to

the employee's work.' Courts have used various terms to describe this causal nexus: the incident leading to the injury must be an ' "outgrowth" ' of the employment; the risk of tortious injury must be ' " 'inherent in the working environment' " '; the risk must be ' " 'typical' " ' or ' " 'broadly incidental' " ' to the employer's business; the tort was ' "a generally foreseeable consequence" ' of the employer's business." (*Montague v. AMN Healthcare, Inc.* (2014) 223 Cal.App.4th 1515, 1521 [168 Cal.Rptr.3d 123], internal citations omitted.)

- "The question, then, is whether an employee's physical eruption, stemming from his interaction with a customer, is a predictable risk of retail employment. Our Supreme Court has suggested it may well be: 'Flare-ups, frustrations, and disagreements among employees are commonplace in the workplace and may lead to "physical act[s] of aggression." In bringing [people] together, work brings [personal] qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flareup. … These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.' " (*Flores v. AutoZone West, Inc.* (2008) 161 Cal.App.4th 373, 381 [74 Cal.Rptr.3d 178], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 185–190

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3][d], [f] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

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

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 3:11–3:12 (Thomson Reuters)

4100. "Fiduciary Duty" Explained

[A/An] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[*insert other fiduciary relationship***]] owes what is known as a fiduciary duty to [his/her/its] [principal/client/corporation/partner/[***insert other fiduciary relationship***]]. A fiduciary duty imposes on [a/an] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]] a duty to act with the utmost good faith in the best interests of [his/her/its] [principal/client/corporation/partner/[***insert other fiduciary relationship***]].**

New June 2006; Revised December 2010

Directions for Use

This instruction may be modified if other concepts involving fiduciary duty are relevant to the jury's understanding of the case. For instructions on damages resulting from misrepresentation by a fiduciary, see CACI No. 1923, *Damages—"Out of Pocket" Rule*, and CACI No. 1924, *Damages—"Benefit of the Bargain" Rule*.

Sources and Authority

- "A fiduciary relationship is ' " ' any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent. …' " ' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal.Rptr.2d 860], internal citations omitted.)

- "The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." (*Knox v. Dean* (2012) 205 Cal.App.4th 417, 432-433 [140 Cal.Rptr.3d 569].)

- " ' " [B]efore a person can be charged with a fiduciary obligation, he must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship which imposes that undertaking as a matter of law." [Citation.]' " (*Cleveland v. Johnson* (2012) 209 Cal.App.4th 1315, 1338 [147 Cal.Rptr.3d 772].)

- "[E]xamples of relationships that impose a fiduciary obligation to act on behalf of and for the benefit of another are 'a joint venture, a partnership, or an agency.' But, '[t]hose categories are merely illustrative of fiduciary relationships in which fiduciary duties are imposed by law.' " (*Cleveland, supra,* 209 Cal.App.4th at p. 1339, internal citation omitted.)

- "Any persons who subscribe for stock have a right to do so upon the assumption that the promoters are using their knowledge, skill, and ability for the benefit of the company. It is, therefore, clear on

principle that promoters, under the circumstances just stated, do occupy a position of trust and confidence, and it devolves upon them to make full disclosure." (*Cleveland, supra,* 209 Cal.App.4th at p. 1339.)

- "[I]t is unclear whether a fiduciary relationship exists between an insurance broker and an insured." (*Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 585 [169 Cal.Rptr.3d 39].)

- "[A] third party who knowingly assists a trustee in breaching his or her fiduciary duty may, dependent upon the circumstances, be held liable along with that trustee for participating in the breach of trust." (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 325 [166 Cal.Rptr.3d 116].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 58

Greenwald et al., California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶ 2:158 et seq. (The Rutter Group)

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶ 6:425 et seq. (The Rutter Group)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31[1] (Matthew Bender)

14 California Forms of Pleading and Practice, Ch. 167, *Corporations*: *Directors and Management*, § 167.53 et seq. (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.12, 427.23 (Matthew Bender)

5 California Points and Authorities, Ch. 52, *Corporations*, § 52.112 et seq. (Matthew Bender)

6 California Legal Forms, Ch. 12C, *Limited Liability Companies*, § 12C.24[6] (Matthew Bender)

4109. Duty of Disclosure by Seller's Real Estate Broker to Buyer

A real estate broker for the seller of property must disclose to the buyer all facts known to the broker regarding the property or relating to the transaction that materially affect the value or desirability of the property. A broker must disclose these facts if he or she knows or should know that the buyer is not aware of them and cannot reasonably be expected to discover them through diligent attention and observation. The broker does not, however, have to disclose facts that the buyer already knows or could have learned with diligent attention and observation.

New December 2013

Directions for Use

This instruction should be read after CACI No. 400, *Negligence—Essential Factual Elements,* if a seller's real estate broker's breach of duty of disclosure to the buyer is at issue. A broker's failure to disclose known material facts to the buyer may constitute a breach of duty for purposes of a claim for negligence. Causation and damages must still be proved. This instruction may also be used with instructions in the Fraud and Deceit series (CACI No. 1900 et seq.) for a cause of action for misrepresentation or concealment. (See *Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1528 [116 Cal.Rptr.3d 419].)

For an instruction on the fiduciary duty of a real estate broker to his or her own client, see CACI No. 4107, *Duty of Disclosure of Real Estate Broker to Client*. For an instruction on the duty of the seller's real estate broker under Civil Code section 2079 to conduct a visual inspection of the property and disclose to the buyer all facts materially affecting the value or desirability of the property that an investigation would reveal, see CACI No. 4108, *Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements*.

Sources and Authority

- " '[W]here the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]' When the seller's real estate agent or broker is also aware of such facts, 'he [or she] is under the same duty of disclosure.' A real estate agent or broker may be liable 'for mere nondisclosure since his [or her] conduct in the transaction *amounts to a representation of the nonexistence of the facts which he has failed to disclose* [citation].' " (*Holmes, supra,* 188 Cal.App.4th at pp. 1518–1519, original italics, internal citations omitted.)

- "The real estate agent or broker representing the seller is a party to the business transaction. In most instances he has a personal interest in it and derives a profit from it. Where such agent or broker possesses, along with the seller, the requisite knowledge … , whether he acquires it from, or independently of, his principal, he is under the same duty of disclosure. He is a party connected with the fraud and if no disclosure is made at all to the buyer by the other parties to the transaction, such agent or broker becomes jointly and severally liable with the seller for the full amount of the damages." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736 [29 Cal.Rptr. 201], footnote omitted.)

- "A breach of the duty to disclose gives rise to a cause of action for rescission or damages." (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1383 [89 Cal.Rptr.3d 659].)

- "The 'elements of a simple negligence action [are] whether [the defendant] owed a legal duty to [the plaintiff] to use due care, whether this legal duty was breached, and finally whether the breach was a proximate cause of [the plaintiff's] injury. [Citations.]' We have already stated that the buyers alleged facts sufficient to impose a legal duty on the brokers. Furthermore, they have alleged facts sufficient to show a breach of that duty. Finally, the buyers alleged that the breach caused them harm. In short, the buyers stated facts sufficient to constitute a cause of action on a negligence theory. Our cursory analysis of this one theory is enough to demonstrate that the trial court erred in sustaining the brokers' demurrer without leave to amend, but is not meant to preclude the buyers' pursuit of their other [fraud] theories." (*Holmes, supra,* 188 Cal.App.4th at p. 1528, internal citation omitted.)

- "Despite the absence of privity of contract, a real estate agent is clearly under a duty to exercise reasonable care to protect those persons whom the agent is attempting to induce into entering a real estate transaction for the purpose of earning a commission." (*Holmes, supra,* 188 Cal.App.4th at p. 1519.)

- "[A] seller's agent has no affirmative duty to disclose latent defects unless the agent '*also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer*.' " (*Peake v. Underwood* (2014) 227 Cal.App.4th 428, 445 [173 Cal.Rptr.3d 624], original italics.)

- "[W]hen a real estate agent or broker is aware that the amount of existing monetary liens and encumbrances exceeds the sales price of a residential property, so as to require either the cooperation of the lender in a short sale or the ability of the seller to put a substantial amount of cash into the escrow in order to obtain the release of the monetary liens and encumbrances affecting title, the agent or broker has a duty to disclose this state of affairs to the buyer, so that the buyer can inquire further and evaluate whether to risk entering into a transaction with a substantial risk of failure." (*Holmes, supra,* 188 Cal.App.4th at pp. 1522–1523.)

- "[W]e do not convert the seller's fiduciary into the buyer's fiduciary. The seller's agent under a listing agreement owes the seller '[a] fiduciary duty of utmost care, integrity, honesty, and loyalty … .' Although the seller's agent does not generally owe a fiduciary duty to the buyer, he or she nonetheless owes the buyer the affirmative duties of care, honesty, good faith, fair dealing and disclosure, as reflected in Civil Code section 2079.16, as well as such other nonfiduciary duties as are otherwise imposed by law." (*Holmes, supra,* 188 Cal.App.4th at p. 1528, internal citation omitted.)

- "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 164 [11 Cal.Rptr.3d 564].)

- "In enacting section 2079 [see CACI No. 4108], the Legislature did not intend to preclude a real estate agent's liability for fraud. However, because a seller's agent has no fiduciary relationship with a

buyer, the courts have strictly limited the scope of an agent's disclosure duties under a fraudulent concealment theory." (*Peake*, *supra*, 227 Cal.App.4th at p. 444, intenral citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 794

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, § 473

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's Relationship And Obligations To Principal And Third Parties*, ¶¶ 2:164, 2:172 (The Rutter Group)

California Real Property Sales Transactions (Cont.Ed.Bar 4th ed.) §§ 2.132–2.136

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, §§ 63.20–63.22 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

4120. Affirmative Defense—Statute of Limitations

[*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit was not filed within the time set by law. To succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*]'s claimed harm occurred before [*insert date four years before complaint was filed*] unless [*name of plaintiff*] proves that before [*insert date four years before complaint was filed*], [he/she/it] did not discover, and did not know of facts that would have caused a reasonable person to suspect, [*name of defendant*]'s wrongful act or omission.

New April 2007; Renumbered from CACI No. 4106 December 2007; Revised December 2012

Directions for Use

Read this instruction only for a cause of action for breach of fiduciary duty. For a statute-of-limitations defense to a cause of action for personal injury or wrongful death due to wrongful or negligent conduct, see CACI No. 454, *Affirmative Defense—Statute of Limitations*, and CACI No. 455, *Statute of Limitations—Delayed Discovery*.

This instruction assumes that the four-year "catch-all" statute of limitations of Code of Civil Procedure section 343 applies to claims for breach of fiduciary duty. (See *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230 [282 Cal.Rptr. 43].) There is, however, language in several cases supporting the proposition that if the breach can be characterized as constructive fraud, the three-year limitation period of Code of Civil Procedure section 338(d) applies. (See *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 [139 Cal.Rptr.3d 670].) If the court determines that the claim is actually for constructive fraud, a date three years before the complaint was filed may be used instead of a four-year date. It is not clear, however, when a breach of fiduciary duty might constitute constructive fraud for purposes of the applicable statute of limitations. (Compare *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607 [129 Cal.Rptr.3d 525] [suggesting that breach of fiduciary duty founded on concealment of facts would be subject to three-year statute] with *Stalberg, supra,* 230 Cal.App.3d at p. 1230 [applying four-year statute to breach of fiduciary duty based on concealment of facts].)

Do not use this instruction in an action against an attorney. For a statute-of-limitations defense to a cause of action, other than actual fraud, against an attorney acting in the capacity of an attorney, see CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*. One cannot avoid a shorter limitation period for attorney malpractice (see Code Civ. Proc., § 340.6) by pleading the facts as a breach of fiduciary duty. (*Stoll v. Superior Court* (1992) 9 Cal.App.4th 1362, 1368 [12 Cal.Rptr.2d 354].)

Sources and Authority

- Four-Year Statute of Limitations. Code of Civil Procedure section 343. ~~provides: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."~~

- "The statute of limitations for breach of fiduciary duty is four years. (§ 343.)" (*Stalberg, supra,* 230 Cal.App.3d at p. 1230, internal citation omitted.)

- " '[W]here the gravamen of the complaint is that defendant's acts constituted actual or constructive fraud, the applicable statute of limitations is the [Code of Civil Procedure section 338, subdivision (d) three-year] limitations period,' governing fraud even though the cause of action is designated by the plaintiff as a claim for breach of fiduciary duty." (*Thomson, supra,* 198 Cal.App.4th at p. 607.)

- "Defendants argue on appeal that the gravamen of plaintiff's complaint is that defendants' acts constituted actual or constructive fraud, and thus should be governed by the fraud statute of limitations. We disagree. Plaintiff's claim is not founded upon the concealment of facts but upon defendants' alleged failure to draft documents necessary to the real estate transaction in which they represented plaintiff. The allegation is an allegation of breach of fiduciary duty, not fraud." (*Thomson, supra,* 198 Cal.App.4th at p. 607.)

- "Breach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of Code of Civil Procedure section 343 … . Fraud is subject to the three-year statute of limitations under Code of Civil Procedure section 338. … [¶][¶] However, a breach of a fiduciary duty usually constitutes constructive fraud." (*William L. Lyon & Associates, Inc., supra,* 204 Cal.App.4th at pp. 1312, 1313.)

- "The statute of limitations for breach of fiduciary duty is three years or four years, depending on whether the breach is fraudulent or nonfraudulent." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1479 [171 Cal.Rptr.3d 548].)

- "A breach of fiduciary duty claim is based on concealment of facts, and the statute begins to run when plaintiffs discovered, or in the exercise of reasonable diligence could have discovered, that facts had been concealed." (*Stalberg, supra,* 230 Cal.App.3d at p. 1230, internal citation omitted.)

- "We also are not persuaded by [defendant]'s contention breach of fiduciary duty can only be characterized as constructive fraud (which does not include fraudulent intent as an element). This simply is not true: 'A misrepresentation that constitutes a breach of a fiduciary or confidential a [*sic*] relationship may, depending on whether an intent to deceive is present, constitute either actual or constructive fraud. However, the issue is usually discussed in terms of whether the misrepresentation constitutes constructive fraud, because actual fraud can exist independently of a fiduciary or confidential relationship, while the existence of such a relationship is usually crucial to a finding of constructive fraud.' " (*Worthington v. Davi* (2012) 208 Cal.App.4th 263, 283 [145 Cal.Rptr.3d 389].)

- "Where a fiduciary relationship exists, facts which ordinarily require investigation may not incite suspicion and do not give rise to a duty of inquiry. Where there is a fiduciary relationship, the usual duty of diligence to discover facts does not exist." (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202 [210 Cal.Rptr. 387], internal citations omitted.)

- "[A] plaintiff need not establish that she exercised due diligence to discover the facts within the limitations period unless she is under a duty to inquire and the circumstances are such that failure to

inquire would be negligent. Where the plaintiff is not under such duty to inquire, the limitations period does not begin to run until she *actually* discovers the facts constituting the cause of action, even though the means for obtaining the information are available." (*Hobbs, supra,* 164 Cal.App.3d at p. 202, original italics, internal citations omitted.)

- "The distinction between the rules excusing a late discovery of fraud and those allowing late discovery in cases in the confidential relationship category is that in the latter situation, the duty to investigate may arise later because the plaintiff is entitled to rely upon the assumption that his fiduciary is acting on his behalf. However, once a plaintiff becomes *aware* of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation." (*Hobbs, supra,* 164 Cal.App.3d at p. 202, original italics, internal citations omitted.)

- " '[R]esolution of the statute of limitations issue is normally a question of fact … .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)\

- "[T]he statute of limitations for aiding and abetting a breach of fiduciary duty is the same as the statute of limitations for breach of fiduciary duty." (*American Master Lease LLC, supra*, 225 Cal.App.4th at p. 1479].)

- " 'Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.' [Citation.] [¶] '[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. …' " (*Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 588 [169 Cal.Rptr.3d 39].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 677–679

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶ 6:425.4 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.170 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.19[4] (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.29 (Matthew Bender)

4320. Affirmative Defense—Implied Warranty of Habitability

[*Name of defendant***] claims that [he/she] does not owe [any/the full amount of] rent because [***name of plaintiff***] did not maintain the property in a habitable condition. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***] failed to provide one or more of the following:**

a. [effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors][./; or]

b. [plumbing or gas facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

c. [a water supply capable of producing hot and cold running water furnished to appropriate fixtures, and connected to a sewage disposal system][./; or]

d. [heating facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

e. [electrical lighting with wiring and electrical equipment that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

f. [building, grounds, and all areas under the landlord's control, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin][./; or]

g. [an adequate number of containers for garbage and rubbish, in clean condition and good repair][./; or]

h. [floors, stairways, and railings maintained in good repair][./; or]

i. [*Insert other applicable standard relating to habitability***.]**

[*Name of plaintiff***]'s failure to meet these requirements does not necessarily mean that the property was not habitable. The failure must be substantial. A condition that occurred only after [***name of defendant***] failed or refused to pay rent and was served with a notice to pay rent or ~~quit~~ vacate the property cannot be a defense to the previous nonpayment.**

[Even if [*name of defendant***] proves that [***name of plaintiff***] substantially failed to meet any of these requirements, [***name of defendant***]'s defense fails if [***name of plaintiff***] proves that [***name of defendant***] has done any of the following that contributed substantially to the condition or interfered substantially with [***name of plaintiff***]'s ability to make the necessary repairs:**

[substantially failed to keep [his/her] living area as clean and sanitary as the condition of the property permitted][./; or]

[substantially failed to dispose of all rubbish, garbage, and other waste in a clean and sanitary manner][./; or]

[substantially failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permitted][./; or]

[intentionally destroyed, defaced, damaged, impaired, or removed any part of the property, equipment, or accessories, or allowed others to do so][./; or]

[substantially failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property.]]

The fact that [*name of defendant***] has continued to occupy the property does not necessarily mean that the property is habitable.**

New August 2007; Revised June 2010, June 2013, December 2014

Directions for Use

This instruction applies only to residential tenancies. (See Code Civ. Proc., § 1174.2(a).)

The habitability standards included are those set forth in Civil Code section 1941.1. Use only those relevant to the case. Or insert other applicable standards as appropriate, for example, other statutory or regulatory requirements (*Knight v. Hallsthammar* (1981) 29 Cal.3d 46, 59, fn.10 [171 Cal.Rptr. 707, 623 P.2d 268]; see Health & Saf. Code, §§ 17920.3, 17920.10) or security measures. (See *Secretary of Housing & Urban Dev. v. Layfield* (1978) 88 Cal.App.3d Supp. 28, 30 [152 Cal.Rptr. 342].)

If the landlord alleges that the implied warranty of habitability does not apply because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (Civ. Code, § 1941.2(b).)

In a case not involving unlawful detainer and the failure to pay rent, the California Supreme Court has stated that the warranty of habitability extends only to conditions of which the landlord knew or should have discovered through reasonable inspections. (See *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1206 [43 Cal.Rptr.2d 836, 899 P.2d 905].)

Sources and Authority

- Landlord's Duty to Make Premises Habitable. Civil Code section 1941. ~~provides: "The lessor of a building intended for the occupation of human beings must, in the absence of an~~

~~agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in section nineteen hundred and twenty-nine."~~

- Breach of Warranty of Habitability. Code of Civil Procedure section 1174.2~~ provides:~~

  ~~(a) In an unlawful detainer proceeding involving residential premises after default in payment of rent and in which the tenant has raised as an affirmative defense a breach of the landlord's obligations under Section 1941 of the Civil Code or of any warranty of habitability, the court shall determine whether a substantial breach of these obligations has occurred. If the court finds that a substantial breach has occurred, the court (1) shall determine the reasonable rental value of the premises in its untenantable state to the date of trial, (2) shall deny possession to the landlord and adjudge the tenant to be the prevailing party, conditioned upon the payment by the tenant of the rent that has accrued to the date of the trial as adjusted pursuant to this subdivision within a reasonable period of time not exceeding five days, from the date of the court's judgment or, if service of the court's judgment is made by mail, the payment shall be made within the time set forth in Section 1013, (3) may order the landlord to make repairs and correct the conditions which constitute a breach of the landlord's obligations, (4) shall order that the monthly rent be limited to the reasonable rental value of the premises as determined pursuant to this subdivision until repairs are completed, and (5) except as otherwise provided in subdivision (b), shall award the tenant costs and attorneys' fees if provided by, and pursuant to, any statute or the contract of the parties. If the court orders repairs or corrections, or both, pursuant to paragraph (3), the court's jurisdiction continues over the matter for the purpose of ensuring compliance. The court shall, however, award possession of the premises to the landlord if the tenant fails to pay all rent accrued to the date of trial, as determined due in the judgment, within the period prescribed by the court pursuant to this subdivision. The tenant shall, however, retain any rights conferred by Section 1174.~~

  ~~(b) If the court determines that there has been no substantial breach of Section 1941 of the Civil Code or of any warranty of habitability by the landlord or if the tenant fails to pay all rent accrued to the date of trial, as required by the court pursuant to subdivision (a), then judgment shall be entered in favor of the landlord, and the landlord shall be the prevailing party for the purposes of awarding costs or attorneys' fees pursuant to any statute or the contract of the parties.~~

  ~~(c) As used in this section, "substantial breach" means the failure of the landlord to comply with applicable building and housing code standards which materially affect health and safety.~~

  ~~(d) Nothing in this section is intended to deny the tenant the right to a trial by jury. Nothing in this section shall limit or supersede any provision of Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1 of the Government Code.~~

- Untenantable Dwelling. Civil Code section 1941.1(a)~~ provides:~~.

~~A dwelling shall be deemed untenantable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics or is a residential unit described in Section 17920.3 or 17920.10 of the Health and Safety Code:~~

~~(1) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.~~
~~(2) Plumbing or gas facilities that conformed to applicable law in effect at the time of installation, maintained in good working order.~~
~~(3) A water supply approved under applicable law that is under the control of the tenant, capable of producing hot and cold running water, or a system that is under the control of the landlord, that produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.~~
~~(4) Heating facilities that conformed with applicable law at the time of installation, maintained in good working order.~~
~~(5) Electrical lighting, with wiring and electrical equipment that conformed with applicable law at the time of installation, maintained in good working order.~~
~~(6) Building, grounds, and appurtenances at the time of the commencement of the lease or rental agreement, and all areas under control of the landlord, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.~~
~~(7) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter and being responsible for the clean condition and good repair of the receptacles under his or her control.~~
~~(8) Floors, stairways, and railings maintained in good repair.~~

- Effect of Tenant's Violations. Civil Code section 1941.2 ~~provides:~~.

~~(a) No duty on the part of the landlord to repair a dilapidation shall arise under Section 1941 or 1942 if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the existence of the dilapidation or interferes substantially with the landlord's obligation under Section 1941 to effect the necessary repairs:~~

~~(1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.~~
~~(2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.~~
~~(3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.~~
~~(4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.~~

~~(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.~~

~~(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the landlord has expressly agreed in writing to perform the act or acts mentioned therein.~~

- Liability of Landlord Demanding Rent for Uninhabitable Property. Civil Code section 1942.4(a) ~~provides:~~.

~~(a) A landlord of a dwelling may not demand rent, collect rent, issue a notice of a rent increase, or issue a three-day notice to pay rent or quit pursuant to subdivision (2) of Section 1161 of the Code of Civil Procedure, if all of the following conditions exist prior to the landlord's demand or notice:~~

~~(1) The dwelling substantially lacks any of the affirmative standard characteristics listed in Section 1941.1 or violates Section 17920.10 of the Health and Safety Code, or is deemed and declared substandard as set forth in Section 17920.3 of the Health and Safety Code because conditions listed in that section exist to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants of the dwelling.~~

~~(2) A public officer or employee who is responsible for the enforcement of any housing law, after inspecting the premises, has notified the landlord or the landlord's agent in writing of his or her obligations to abate the nuisance or repair the substandard conditions.~~

~~(3) The conditions have existed and have not been abated 35 days beyond the date of service of the notice specified in paragraph (2) and the delay is without good cause. For purposes of this subdivision, service shall be complete at the time of deposit in the United States mail.~~

~~(4) The conditions were not caused by an act or omission of the tenant or lessee in violation of Section 1929 or 1941.2.~~

- "Once we recognize that the tenant's obligation to pay rent and the landlord's warranty of habitability are mutually dependent, it becomes clear that the landlord's breach of such warranty may be directly relevant to the issue of possession. If the tenant can prove such a breach by the landlord, he may demonstrate that his nonpayment of rent was justified and that no rent is in fact 'due and owing' to the landlord. Under such circumstances, of course, the landlord would not be entitled to possession of the premises." (*Green v. Superior Court* (1974) 10 Cal.3d 616, 635 [111 Cal.Rptr. 704, 517 P.2d 1168].)

- "We have concluded that a warranty of habitability is implied by law in residential leases in this state and that the breach of such a warranty may be raised as a defense in an unlawful detainer action. Under the implied warranty which we recognize, a residential landlord

covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease. This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability we now recognize." (*Green, supra,* 10 Cal.3d at p. 637, footnotes omitted.)

- "It follows that substantial noncompliance with applicable code standards could lead to a breach of the warranty of habitability." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1298, fn. 9 [173 Cal.Rptr.3d 159].)

- "[U]nder *Green,* a tenant may assert the habitability warranty as a defense in an unlawful detainer action. The plaintiff, of course, is not required to plead negative facts to anticipate a defense." (*De La Vara v. Municipal Court* (1979) 98 Cal.App.3d 638, 641 [159 Cal.Rptr. 648], internal citations omitted.)

- "[T]he fact that a tenant was or was not aware of specific defects is not determinative of the duty of a landlord to maintain premises which are habitable. The same reasons which imply the existence of the warranty of habitability—the inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection—also compel the conclusion that a tenant's lack of knowledge of defects is not a prerequisite to the landlord's breach of the warranty." (*Knight, supra,* 29 Cal.3d at p. 54.)

- "The implied warranty of habitability recognized in *Green* gives a tenant a reasonable expectation that the landlord has inspected the rental dwelling and corrected any defects disclosed by that inspection that would render the dwelling uninhabitable. The tenant further reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, of which the landlord has actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable. A tenant injured by a defect in the premises, therefore, may bring a negligence action if the landlord breached its duty to exercise reasonable care. But a tenant cannot reasonably expect that the landlord will have eliminated defects in a rented dwelling of which the landlord was unaware and which would not have been disclosed by a reasonable inspection." (*Peterson, supra,* 10 Cal.4th at pp. 1205–1206, footnotes omitted.)

- "At least in a situation where, as here, a landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves, a landlord's breach of the implied warranty of habitability exists whether or not he has had a 'reasonable' time to repair. Otherwise, the mutual dependence of a landlord's obligation to maintain habitable premises, and of a tenant's duty to pay rent, would make no sense." (*Knight, supra,* 29 Cal.3d at p. 55, footnote omitted.)

- "[A] tenant may defend an unlawful detainer action against a current owner, at least with respect to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner." (*Knight, supra*, 29 Cal.3d at p. 57.)

- "Without evaluating the propriety of instructing the jury on each item included in the defendants' requested instruction, it is clear that, where appropriate under the facts of a given case, tenants are entitled to instructions based upon relevant standards set forth in Civil Code section 1941.1 whether or not the 'repair and deduct' remedy has been used." (*Knight, supra*, 29 Cal.3d at p. 58.)

- "The defense of implied warranty of habitability is not applicable to unlawful detainer actions involving commercial tenancies." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174], internal citation omitted.)

- "In the event of a landlord's breach of the implied warranty of habitability, the tenant is not absolved of the obligation to pay rent; rather the tenant remains liable for the reasonable rental value as determined by the court for the period that the defective condition of the premises existed. " (*Erlach, supra*, 226 Cal.App.4th at p. 1297.)

- "In defending against a 30-day notice, the sole purpose of the [breach of the warranty of habitability] defense is to reduce the amount of daily damages for the period of time after the notice expires." (*N. 7th St. Assocs. v. Constante* (2001) 92 Cal.App.4th Supp. 7, 11, fn. 1 [111 Cal.Rptr.2d 815].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, § 625

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 3-A, *Warranty Of Habitability—In General*, ¶ 3:1 et seq. (The Rutter Group)

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.109-8.112

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.64, 12.36–12.37

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 15

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.64, 210.95A (Matthew Bender)

~~Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21~~

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.61 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

Miller & Starr, California Real Estate Ch. 19, *Landlord-Tenant*, § 19:224 (Thomson Reuters ~~West~~)

4400. Misappropriation of Trade Secrets—Introduction

[*Name of plaintiff***] claims that [he/she/it] [is/was] the [owner/licensee] of [***insert general description of alleged trade secret[s]***].**

[*Name of plaintiff***] claims that [this/these] [***select short term to describe, e.g., information***] [is/are] [a] trade secret[s] and that [***name of defendant***] misappropriated [it/them]. "Misappropriation" means the improper [acquisition/use/ [or] disclosure] of the trade secret[s].**

[*Name of plaintiff***] also claims that [***name of defendant***]'s misappropriation caused [[him/her/it] harm/ [or] [***name of defendant***] to be unjustly enriched].**

[*Name of defendant***] denies [***insert denial of any of the above claims***].**

[[*Name of defendant***] also claims [***insert affirmative defenses***].]**

New December 2007; Revised December 2010

Directions for Use

This instruction is designed to introduce the jury to the issues involved in a case involving the misappropriation of trade secrets under the California Uniform Trade Secrets Act. (See Civ. Code, § 3426.1 et seq.) It should be read before the instructions on the substantive law.

In the first sentence, provide only a general description of the alleged trade secrets. Then in the second sentence, select a short term to identify the items, such as "information," "customer lists," or "computer code." The items that are alleged to be trade secrets will be described with more specificity in CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*.

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

Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2) defines it as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should be instructed only on matters relevant to damage claims, do not select "acquiring" in the second paragraph unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

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

In the third paragraph, select the nature of the recovery sought, either damages for harm to the plaintiff or for the defendant's unjust enrichment, or both.

Include the last paragraph if the defendant asserts any affirmative defenses.

Sources and Authority

- Uniform Trade Secrets Act: Definitions. Civil Code section 3426.1. ~~provides:~~

  ~~As used in this title, unless the context requires otherwise:~~

  ~~(a) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means.~~

  ~~(b) "Misappropriation" means:~~

  ~~(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or~~

  ~~(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:~~

  ~~(A) Used improper means to acquire knowledge of the trade secret; or~~

  ~~(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:~~

  ~~(i) Derived from or through a person who had utilized improper means to acquire it;~~

  ~~(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or~~

  ~~(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or~~

  ~~(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.~~

  ~~(c) "Person" means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.~~

  ~~(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:~~

  ~~(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and~~

  ~~(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.~~

- "[W]e agree with the federal cases applying California law, which hold that section 3426.7, subdivision (b), preempts common law claims that are 'based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.' Depending on the particular facts pleaded, the

statute can operate to preempt the specific common claims asserted here: breach of confidence, interference with contract, and unfair competition." (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 958–959 [90 Cal.Rptr.3d 247], internal citation omitted.)

- " ' "Trade secret law promotes the sharing of knowledge, and the efficient operation of industry; it permits the individual inventor to reap the rewards of his labor by contracting with a company large enough to develop and exploit it." [Citation.]' 'Trade secret law also helps maintain "standards of commercial ethics … ." [Citation.] … By sanctioning the acquisition, use, and disclosure of another's valuable, proprietary information by improper means, trade secret law minimizes "the inevitable cost to the basic decency of society when one … steals from another." [Citation.] In doing so, it recognizes that " 'good faith and honest, fair dealing, is the very life and spirit of the commercial world.' " ' " (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 42 [171 Cal.Rptr.3d 714], internal citations omitted.)

- "[W]e find no support for [a current-ownership] rule in the text of the CUTSA, cases applying it, or legislative history. Nor do we find any evidence of such a rule in patent or copyright law, which defendants have cited by analogy. Defendants have offered no persuasive argument from policy for our adoption of such a rule." (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 986 [103 Cal.Rptr.3d 426].)

- "[T]he only California authority [defendant] cited for the asserted requirement [that a trade-secrets plaintiff must own the trade secret when the action is filed] was the official California pattern jury instructions—whose 'first element,' [defendant] asserted, 'requires the plaintiff to be either the owner or the licensee of the trade secret. See CACI Nos. 4400, 4401.' [Defendant] did not quote the cited instructions—for good reason. The most that can be said in favor of its reading is that the broader and less specific of the two instructions uses the present tense to refer to the requirement of ownership. That instruction, whose avowed purpose is 'to introduce the jury to the issues involved' in a trade secrets case (Directions for Use for CACI No. 4400), describes the plaintiff as claiming that he 'is' the owner/licensee of the trade secrets underlying the suit. (CACI No. 4400.) The second instruction, which enumerates the actual *elements* of the plaintiff's cause of action, dispels whatever weak whiff of relevance this use of the present tense might have. It requires the plaintiff to prove that he 'own*ed*' or '*was* a licensee of' the trade secrets at issue. (CACI No. 4401, italics added.) Given only these instructions to go on, one would suppose that *past* ownership—i.e., ownership at the time of the alleged misappropriation—is sufficient to establish this element." (*Jasmine Networks, Inc., supra* , 180 Cal.App.4th at p. 997, original italics.)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 81

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

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.50 et seq. (Matthew Bender)

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

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

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

4401. Misappropriation of Trade Secrets—Essential Factual Elements

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

1. **That [***name of plaintiff***] [owned/was a licensee of] [the following:][***describe each item claimed to be a trade secret that is subject to the misappropriation claim***];**

2. **That [this/these] [***select short term to describe, e.g., information***] [was/were] [a] trade secret[s] at the time of the misappropriation;**

3. **That [***name of defendant***] improperly [acquired/used/ [or] disclosed] the trade secret[s];**

4. **That [[***name of plaintiff***] was harmed/ [or] [***name of defendant***] was unjustly enriched]; and**

5. **That [***name of defendant***]'s [acquisition/use/ [or] disclosure] was a substantial factor in causing [[***name of plaintiff***]'s harm/ [or] [***name of defendant***] to be unjustly enriched].**

New December 2007; Revised December 2010

Directions for Use

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

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

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

Civil Code section 3426.1(b)(1) defines "misappropriation" as improper "[a]cquisition" of a trade secret, and subsection (b)(2) defines it as improper "[d]isclosure or use" of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should be instructed only on matters relevant to damage claims, do not select "acquired" in element 3 or "acquisition" in element 5 unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

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

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

Sources and Authority

- Uniform Trade Secrets Act: Definitions. Civil Code section 3426.1. ~~provides:~~

~~As used in this title, unless the context requires otherwise:~~

~~(a) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means.~~

~~(b) "Misappropriation" means:~~

~~(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or~~

~~(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:~~

~~(A) Used improper means to acquire knowledge of the trade secret; or~~

~~(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:~~

~~(i) Derived from or through a person who had utilized improper means to acquire it;~~

~~(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or~~

~~(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or~~

~~(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.~~

~~(c) "Person" means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.~~

~~(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:~~

~~(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and~~

~~(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.~~

- Trade Secrets Must Be Identified With Reasonable Particularity. Code of Civil Procedure section 2019.210.

- "A trade secret is misappropriated if a person (1) acquires a trade secret knowing or having reason to know that the trade secret has been acquired by 'improper means,' (2) discloses or uses a trade secret the person has acquired by 'improper means' or in violation of a nondisclosure obligation, (3) discloses or uses a trade secret the person knew or should have known was derived from another who had acquired it by improper means or who had a nondisclosure obligation or (4) discloses or uses a trade secret after learning that it is a trade secret but before a material change of position." (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66 [37 Cal.Rptr.3d 221].)

- "A cause of action for monetary relief under CUTSA may be said to consist of the following elements: (1) possession by the plaintiff of a trade secret; (2) the defendant's misappropriation of the trade secret, meaning its wrongful acquisition, disclosure, or use; and (3) resulting or threatened injury to the plaintiff. The first of these elements is typically the most important, in the sense that until the content and nature of the claimed secret is ascertained, it will likely be impossible to intelligibly analyze the remaining issues." (*Silvaco Data Systems v. Intel Corp*. (2010) 184 Cal.App.4th 210, 220 [109 Cal.Rptr.3d 27], internal citations omitted.)

- "It is critical to any [UTSA] cause of action—and any defense—that the information claimed to have been misappropriated be clearly identified. Accordingly, a California trade secrets plaintiff must, prior to commencing discovery, 'identify the trade secret with reasonable particularity.' " (*Altavion, Inc.*, *supra*, 226 Cal.App.4th at p. 43.)

- "We find the trade secret situation more analogous to employment discrimination cases. In those cases, as we have seen, information of the employer's intent is in the hands of the employer, but discovery affords the employee the means to present sufficient evidence to raise an inference of discriminatory intent. The burden of proof remains with the plaintiff, but the defendant must then bear the burden of producing evidence once a prima facie case for the plaintiff is made. [¶] We conclude that the trial court correctly refused the proposed instruction that would have shifted the burden of proof." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674 [3 Cal.Rptr.3d 279], internal citation omitted.)

- "[W]e find no support for [a current-ownership] rule in the text of the CUTSA, cases applying it, or legislative history. Nor do we find any evidence of such a rule in patent or copyright law, which defendants have cited by analogy. Defendants have offered no persuasive argument from policy for our adoption of such a rule." (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 986 [103 Cal.Rptr.3d 426].)

- "[T]he only California authority [defendant] cited for the asserted requirement [that a trade-secrets plaintiff must own the trade secret when the action is filed] was the official California pattern jury instructions—whose 'first element,' [defendant] asserted, 'requires the plaintiff to be either the owner or the licensee of the trade secret. See CACI Nos. 4400, 4401.' [Defendant] did not quote the cited instructions—for good reason. The most that can be said in favor of its reading is that the broader and less specific of the two instructions uses the present tense to refer to the requirement of ownership. That instruction, whose avowed purpose is 'to introduce the jury to the issues involved' in a trade secrets case (Directions for Use for CACI No. 4400), describes the plaintiff as claiming that he 'is' the owner/licensee of the trade secrets underlying the suit. (CACI No. 4400.) The second instruction, which enumerates the actual *elements* of the plaintiff's cause of action, dispels whatever weak whiff of relevance this use of the present tense might have. It requires the plaintiff to prove that he 'own*ed*'

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

Secondary Sources

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

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

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

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

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

4402. "Trade Secret" Defined

To prove that the [*select short term to describe, e.g., information***] [was/were] [a] trade secret[s], [***name of plaintiff***] must prove all of the following:**

1. **That the [***e.g., information***] [was/were] secret;**

2. **That the [***e.g., information***] had actual or potential independent economic value because [it was/they were] secret; and**

3. **That [***name of plaintiff***] made reasonable efforts to keep the [***e.g., information***] secret.**

New December 2007; Revised April 2008

Directions for Use

Give also CACI No. 4403, *Secrecy Requirement,* if more explanation of element 1 is needed. Give CACI No. 4412, *"Independent Economic Value" Explained,* if more explanation of element 2 is needed. Give CACI No. 4404, *Reasonable Efforts to Protect Secrecy*, if more explanation of element 3 is needed.

Sources and Authority

- "Trade Secret" Defined. Civil Code section 3426.1(d). ~~provides:~~

  ~~"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:~~

  ~~(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and~~

  ~~(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.~~

- " 'Trade secrets are a peculiar kind of property. Their only value consists in their being kept private.' Thus, 'the right to exclude others is central to the very definition of the property interest. Once the data that constitute a trade secret are disclosed to others, or others are allowed to use those data, the holder of the trade secret has lost his property interest in the data.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2003) 31 Cal.4th 864, 881 [4 Cal.Rptr.3d 69, 75 P.3d 1], internal citations omitted.)

- "[T]he test for a trade secret is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret. … [I]n order to qualify as a trade secret, the information 'must be secret, and must not be of public knowledge or of a general knowledge in the trade or business.' " (*DVD Copy Control Assn., Inc. v. Bunner* (2004) 116 Cal.App.4th 241, 251 [10 Cal.Rptr.3d 185], internal citations omitted.)

- "[A]ny information (such as price concessions, trade discounts and rebate incentives) disclosed to [cross-complainant's] customers cannot be considered trade secret or confidential." (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1455 [125 Cal.Rptr.2d 277].)

- " '[A] trade secret … has an intrinsic value which is based upon, or at least preserved by, being safeguarded from disclosure.' Public disclosure, that is the absence of secrecy, is fatal to the existence of a trade secret. 'If an individual discloses his trade secret to others who are under no obligation to protect the confidentiality of the information, or otherwise publicly discloses the secret, his property right is extinguished.' A person or entity claiming a trade secret is also required to make 'efforts that are reasonable under the circumstances to maintain its secrecy.' " (*In re Providian Credit Card Cases* (2002) 96 Cal.App.4th 292, 304 [116 Cal.Rptr.2d 8330, internal citations omitted.)

- "The requirement that a customer list must have economic value to qualify as a trade secret has been interpreted to mean that the secrecy of this information provides a business with a 'substantial business advantage.' In this respect, a customer list can be found to have economic value because its disclosure would allow a competitor to direct its sales efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to a list of people who only might be interested." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1522 [66 Cal.Rptr.2d 731], internal citations omitted.)

- "The sine qua non of a trade secret, then, is the plaintiff's possession of information of a type that can, at the possessor's option, be made known to others, or withheld from them, i.e., kept secret. This is the fundamental difference between a trade secret and a patent. A patent protects an *idea*, i.e., an invention, against appropriation by others. Trade secret law does not protect ideas as such. Indeed a trade secret may consist of something we would not ordinarily consider an *idea* (a conceptual datum) at all, but more a *fact* (an empirical datum), such as a customer's preferences, or the location of a mineral deposit. In either case, the trade secret is not the idea or fact itself, but *information* tending to communicate (disclose) the idea or fact to another. Trade secret law, in short, protects only *the right to control the dissemination of information*." (*Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 220–221 [109 Cal.Rptr.3d 27], original italics.)

- "[I]f a patentable idea is kept secret, the idea itself can constitute information protectable by trade secret law.In that situation, trade secret law protects the inventor's '*right to control the dissemination of information*'—the information being the idea itself—rather than the subsequent use of the novel technology, which is protected by patent law. In other words, trade secret law may be used to sanction the misappropriation of an idea the plaintiff kept secret. " (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 55−56 [171 Cal.Rptr.3d 714], original italics, internal citations omitted.)

- "[T]he doctrine has been established that a trade secret can include a system where the elements are in the public domain, but there has been accomplished an effective, successful and valuable integration of the public domain elements and the trade secret gave the claimant a competitive advantage which is protected from misappropriation." (*Altavion, Inc., supra*, 226 Cal.App.4th at p. 48.)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 87(4)

Trade Secrets Practice in California (Cont.Ed.Bar 2d ed.) §§ 4.8–4.10

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

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.52 (Matthew Bender)

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

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Ch. 1

4409. Remedies for Misappropriation of Trade Secret

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

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

New December 2007

Directions for Use

Give this instruction with CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements,* in all cases.

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

If neither actual loss nor unjust enrichment is provable, Civil Code section 3426.3(b) provides for a third, alternate remedy: a reasonable royalty for no longer than the period of time the use could have been prohibited. Both the statute and case law indicate that the question of a reasonable royalty should not be presented to the jury. (See Civ. Code, § 3426.3(b) [*the court* may order the payment of a reasonable royalty]; *Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 628 [12 Cal.Rptr.2d 741]; see also Civ. Code, § 3426.2(b) [court may issue an injunction that conditions future of a trade secret on payment of a reasonable royalty].) However, no reported California state court case has directly held that "reasonable royalty" issues should not be presented to the jury. (But see *Unilogic, Inc., supra,* 10 Cal.App.4th at p. 627.) Include the optional second paragraph if the court wants to advise the jury that even if it finds that the plaintiff suffered no actual loss and that the defendant was not unjustly enriched, the plaintiff may still be entitled to some recovery.

For simplicity, this instruction uses the term "damages" to refer to both actual loss and unjust enrichment, even though, strictly speaking, unjust enrichment may be considered a form of restitution rather than damages.

Sources and Authority

- Remedies for Misappropriation of Trade Secret. Civil Code section 3426.3~~ provides:~~

  ~~(a) A complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.~~

~~(b) If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.~~

~~(c) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b).~~

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

- "[B]ased on the plain language of the statute, the Court -- not the jury -- determines if and in what amount a royalty should be awarded. See Cal. Civ. Code section 3416.3(b) (`the Court may order payment of a reasonable royalty')." (*FAS Techs. v. Dainippon Screen Mfg.* (N.D. Cal. 2001) 2001 U.S. Dist. LEXIS 15444, **9–10.)

- "To adopt a reasonable royalty as the measure of damages is to adopt and interpret, as well as may be, the fiction that a license was to be granted at the time of beginning the infringement, and then to determine what the license price should have been. In effect, the court assumes the existence *ab initio* of, and declares the *equitable* terms of, a supposititious license, and does this *nunc pro tunc*; it creates and applies retrospectively a compulsory license." (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 68 [171 Cal.Rptr.3d 714], original italics.)

- "Nor was it necessary to submit the liability issue to the jury in order to allow the trial court thereafter to determine a reasonable royalty or to impose an injunction. Just as [cross complainant] presented no evidence of the degree of [cross defendant]'s enrichment, [cross complainant] likewise presented no evidence that would allow the court to determine what royalty, if any, would be reasonable under the circumstances." (*Unilogic, Inc. supra,* 10 Cal.App.4th at p. 628.)

- "It is settled that, in fashioning a pecuniary remedy under the CUTSA for past use of a misappropriated trade secret, the trial court may order a reasonable royalty only where 'neither actual damages to the holder of the trade secret nor unjust enrichment to the user is provable.' 'California law differs on this point from both the [Uniform Act] and Federal patent law, neither of which require[s] actual damages and unjust enrichment to be unprovable before a reasonable royalty may be imposed.' " (*Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1308 [115 Cal.Rptr.3d 168], internal citations omitted .)

- "[W]here a defendant has not realized a profit or other calculable benefit as a result of his or her misappropriation of a trade secret, unjust enrichment is not provable within the meaning of section 3426.3, subdivision (b), whether the lack of benefit is determined as a matter of law or as a matter of fact. To hold otherwise would place the risk of loss on the wronged plaintiff, thereby discouraging innovation and potentially encouraging corporate thievery where anticipated profits might be minimal but other valuable but nonmeasureable benefits could accrue." (*Ajaxo Inc., supra,* 187 Cal.App.4th at p. 1313 [jury's finding that defendant did not profit from its misappropriation of trade secrets means that unjust enrichment is not "provable" within the meaning of section 3426.3(b)].)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, §§ 83, 89–90

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

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

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

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

4410. Unjust Enrichment

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

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

New December 2007

Directions for Use

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

Sources and Authority

- Remedies for Misappropriation of Trade Secret. Civil Code section 3426.3. ~~provides:~~

  ~~(a) A complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.~~

  ~~(b) If neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.~~

  ~~(c) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subdivision (a) or (b).~~

- "In general, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.' (Rest., Restitution, § 1.) 'Ordinarily the benefit to the one and the loss to the other are co-extensive, and the result ... is to compel the one to surrender the benefit which he has received and thereby to make restitution to the other for the loss which he has suffered.' [¶] 'In other situations, a benefit has been received by the defendant but the plaintiff has not suffered a corresponding loss or, in some cases, any loss, but nevertheless the enrichment of the defendant would be unjust. In such cases, the defendant may be under a duty to give to the plaintiff the amount by which he has been enriched.' " (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 627–628 [12 Cal.Rptr.2d 741].)

- "A defendant's unjust enrichment is typically measured by the defendant's profits flowing from the misappropriation. A defendant's profits often represent profits the plaintiff would otherwise have

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

- "[W]here a defendant has not realized a profit or other calculable benefit as a result of his or her misappropriation of a trade secret, unjust enrichment is not provable within the meaning of section 3426.3, subdivision (b), whether the lack of benefit is determined as a matter of law or as a matter of fact." (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 66 [171 Cal.Rptr.3d 714].)

- "Another crucial point is that unjust enrichment, as the phrase is used here, is, in effect, synonymous with restitution. ' " 'The phrase "unjust enrichment" is used in law to characterize the result or effect of a failure to make restitution of or for property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor.' " ' " (*Ajaxo Inc., supra,* 187 Cal.App.4th at p. 1305, internal citations omitted.)

- Restatement of Restitution, section 1, comment a, states: "A person is enriched if he has received a benefit (see Comment b). A person is unjustly enriched if the retention of the benefit would be unjust (see Comment c)."

- Restatement of Restitution, section 1, comment b, states: "*What constitutes a benefit*. A person confers a benefit upon another if he gives to the other possession of or some other interest in money, land, chattels, or choses in action, performs services beneficial to or at the request of the other, satisfies a debt or a duty of the other, or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word 'benefit,' therefore, denotes any form of advantage. The advantage for which a person ordinarily must pay is pecuniary advantage; it is not, however, necessarily so limited, as where a physician attends an insensible person who is saved subsequent pain or who receives thereby a greater chance of living."

- Restatement of Restitution, section 1, comment c, states: "*Unjust retention of benefit*. Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. The mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor. Thus, one who improves his own land ordinarily benefits his neighbors to some extent, and one who makes a gift or voluntarily pays money which he knows he does not owe confers a benefit; in neither case is he entitled to restitution. The Restatement of this Subject states the rules by which it is determined whether or not it is considered to be just to require restitution."

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 90(1)(a)

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

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

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

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

4412. "Independent Economic Value" Explained

[*Select short term to describe, e.g., Information***] has independent economic value if it gives the owner an actual or potential business advantage over others who do not know the [***e.g., information***] and who could obtain economic value from its disclosure or use.**

In determining whether [*e.g., information***] had actual or potential independent economic value because it was secret, you may consider the following:**

(a) The extent to which [*name of plaintiff***] obtained or could obtain economic value from the [***e.g., information***] in keeping [it/them] secret;**

(b) The extent to which others could obtain economic value from the [*e.g., information***] if [it were/they were] not secret;**

(c) The amount of time, money, or labor that [*name of plaintiff***] expended in developing the [***e.g., information***];**

(d) The amount of time, money, or labor that [would be/was] saved by a competitor who used the [*e.g., information***];**

[(e) [*Insert other applicable factors***].]**

The presence or absence of any one or more of these factors is not necessarily determinative.

New April 2008

Directions for Use

Give this instruction to further explain element 2 of CACI No. 4402, *"Trade Secret" Defined.* Inapplicable factors may be omitted.

Sources and Authority

- "Trade Secret" Defined. Civil Code section 3426.1(d). ~~provides:~~

  ~~"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:~~

  ~~(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and~~

  ~~(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.~~

- "[I]t is not true that evidence of 'some' helpfulness or usefulness, if credited, would compel a finding of independent economic value. The Restatement defines trade secret as business or technical information 'that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.' (Rest.3d, Unfair Competition, § 39.) The advantage 'need not be great,' but must be 'more than trivial.' (Rest.3d, Unfair Competition, § 39, com. e, p. 430.) Merely stating that information was helpful or useful to another person in carrying out a specific activity, or that information of that type may save someone time, does not compel a factfinder to conclude that the particular information at issue was 'sufficiently valuable … to afford an … economic advantage over others.' (Rest.3d, Unfair Competition, § 39.) The factfinder is entitled to expect evidence from which it can form some solid sense of *how* useful the information is, e.g., *how much* time, money, or labor it would save, or at least that these savings would be 'more than trivial.' (Rest.3d., Unfair Competition, § 39, com. e.)" (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 564–565 [66 Cal.Rptr.3d 1], original italics.)

- "[T]he focus of the inquiry regarding the independent economic value element is 'on whether the information is generally known to or readily ascertainable by business competitors or others to whom the information would have some economic value. [Citations.] Information that is readily ascertainable by a business competitor derives no independent value from not being generally known. [Citation.]' " (*Altavion, Inc. v. Konica Minolta Systems Laboratory, Inc.* (2014) 226 Cal.App.4th 26, 62 [171 Cal.Rptr.3d 714].)

- "Moreover, it seems inherent in the requirement of value, as codified, that it is relevant to ask to *whom* the information may be valuable. The statute does not speak of value in the abstract, but of the value that is '[d]eriv[ed] … *from not being generally known to the public or to other persons who can obtain economic value* from its disclosure or use … .' In other words, the core inquiry is the value to the owner in *keeping the information secret* from persons who could *exploit it to the relative disadvantage of the original owner."* (*Yield Dynamics, Inc., supra,* 154 Cal.App.4th at p. 568, original italics, internal citation omitted.)

- " '[C]ourts are reluctant to protect customer lists to the extent they embody information which is "readily ascertainable" through public sources, such as business directories. …. On the other hand, where the employer has expended time and effort identifying customers with particular needs or characteristics, courts will prohibit former employees from using this information to capture a share of the market. Such lists are to be distinguished from mere identities and locations of customers where anyone could easily identify the entities as potential customers. …. As a general principle, the more difficult information is to obtain, and the more time and resources expended by an employer in gathering it, the more likely a court will find such information constitutes a trade secret.' " (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1539–1540 [67 Cal.Rptr.3d 54], internal citation omitted.)

- "The requirement that a customer list must have economic value to qualify as a trade secret has been interpreted to mean that the secrecy of this information provides a business with a 'substantial business advantage.' In this respect, a customer list can be found to have economic value because its disclosure would allow a competitor to direct its sales efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to a list of people who only might be interested." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514,

1522 [66 Cal.Rptr. 2d 731], internal citations omitted.)

- " 'The value of information claimed as a trade secret may be established by direct or circumstantial evidence. Direct evidence relating to the content of the secret and its impact on business operations is clearly relevant. Circumstantial evidence of value is also relevant, including the amount of resources invested by the plaintiff in the production of the information, the precautions taken by the plaintiff to protect the secrecy of the information … , and the willingness of others to pay for access to the information.' " (*Altavion, Inc., supra*, 226 Cal.App.4th at p. 62.)

Secondary Sources

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

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, §§ 565.103–565.105 (Matthew Bender)

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Ch. 1

4550. Affirmative Defense—Statute of Limitations—Patent Construction Defect (Code Civ. Proc., § 337.1)

[*Name of plaintiff***] claims that [his/her] harm was caused by a defect in the [design/specifications/surveying/planning/supervision/ [or] observation] of [a construction project/a survey of real property/[***specify project, e.g., the roof replacement***]]. [***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 both of the following:**

1. **That an average person during the course of a reasonable inspection would have discovered the defect; and**

2. **That the date on which the [construction project/survey of real property/[***specify project, e.g., roof replacement***]] was substantially complete was more than four years before [***insert date***], the date on which this action was filed.**

New December 2011

Directions for Use

Give this instruction if the defendant asserts the running of the statute of limitations in Code of Civil Procedure section 337.1 as a defense. This section provides a four-year limitation period from the date of substantial completion for harm caused by a patent construction defect. Do not give this instruction if the claim is for injuries to persons or property based on tort principles occurring in the fourth year after substantial completion. (See Code Civ. Proc., § 337.1(b).)

For discussion of substantial completion, see the Directions for Use to CACI No. 4532, *Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay*. See also CACI No. 4524, *Contractor's Claim for Compensation Due Under Contract—Substantial Performance.*

Sources and Authority

- Statute of Limitations for Patent Defects. Code of Civil Procedure section 337.1 ~~provides:~~.

  ~~(a) Except as otherwise provided in this section, no action shall be brought to recover damages from any person performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property more than four years after the substantial completion of such improvement for any of the following:~~

  ~~(1) Any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property;~~

~~(2) Injury to property, real or personal, arising out of any such patent deficiency; or~~

~~(3) Injury to the person or for wrongful death arising out of any such patent deficiency.~~

~~(b) If, by reason of such patent deficiency, an injury to property or the person or an injury causing wrongful death occurs during the fourth year after such substantial completion, an action in tort to recover damages for such an injury or wrongful death may be brought within one year after the date on which such injury occurred, irrespective of the date of death, but in no event may such an action be brought more than five years after the substantial completion of construction of such improvement.~~

~~(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.~~

~~(d) The limitation prescribed by this section shall not be asserted by way of defense by any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement at the time any deficiency in such an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.~~

~~(e) As used in this section, "patent deficiency" means a deficiency which is apparent by reasonable inspection.~~

~~(f) Subdivisions (a) and (b) shall not apply to any owner-occupied single-unit residence.~~

- "The statute of limitations in section 337.1 exists to 'provide a final point of termination, to protect some groups from extended liability.' " (*Delon Hampton & Associates, Chartered v. Superior Court* (2014) 227 Cal.App.4th 250, 254 [173 Cal.Rptr.3d 407].)

- "[A] patent defect is one that can be discovered by the kind of inspection made in the exercise of ordinary care and prudence. In contrast, a latent defect is hidden, and would not be discovered by a reasonably careful inspection." (*The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 35 [108 Cal.Rptr.3d 606].)

- "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment)." (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 256 [99 Cal.Rptr.3d 258], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1159

3 Witkin, California Procedure (5th ed. 2008) Actions, § 484

12 California Real Estate Law and Practice, Ch. 441, *Consumer's Remedies*, § 441.08 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.54, 104.267 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.248 (Matthew Bender)

RUPRO ACTION REQUEST FORM

RUPRO Meeting: November 5, 2014

RUPRO action requested:

Submit to Judicial Council

Title:	**Jury Instructions**:
Civil Jury Instructions: Recommend to Judicial Council That It Approve Publication of Legally Significant Additions and Revisions (Action Required)	**39 New, Revised, and Revoked Instructions and Verdict Forms**
Committee or other entity submitting the proposal: **Advisory Committee on Civil Jury Instructions**	Staff contact: **Bruce Greenlee, Legal Services Office** **415-865-7698** **bruce.greenlee@jud.ca.gov**

If requesting July 1 or out of cycle, explain:
Rules 2.1050(d) and 10.58(a) of the California Rules of Court 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. Civil jury instructions are currently revised in two regular releases each year and more often as necessary. Release 25 is the secnd CACI release for 2014. Release 24 was approved on June 28, 2014.

Additional Information for RUPRO: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary, including any substantial argument in opposition and any expected individual or organization likely to support or oppose the proposal.)

In addition to recommending approval of 39 new, revised, renumbered, and revoked *CACI* instructions and verdict forms to the council, the advisory committee also requests that RUPRO give final approval to 64 revised *CACI* instructions and verdict forms under the provisions of the guidelines adopted on December 19, 2006 regarding Jury Instructions Corrections and Technical and Minor Substantive Changes.

JUDICIAL COUNCIL OF CALIFORNIA

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

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on December 12, 2014

Title
Jury Instructions: New, Revised, Renumbered, and Revoked Civil Jury Instructions and Verdict Forms

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
December 12, 2014

Date of Report
October 29, 2014

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

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the civil jury instructions prepared by the committee. On Judicial Council approval, the instructions will be published in the official 2015 edition of the *Judicial Council of California Civil Jury Instructions*.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective December 12, 2014, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the instructions will be published in the official 2015 edition of the *Judicial Council of California Civil Jury Instructions*.

A table of contents and the proposed revised, new, and revoked civil jury instructions and verdict forms are attached at pages 9-136.

Previous Council Action

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

This is the 25th release of *CACI.* The council approved *CACI* release 24 at its June 2014 meeting.

Rationale for Recommendation

The committee recommends proposed additions and revisions to, and revocation of, the following 39 instructions and verdict forms: 314−320, 422, 456, 457, VF-406, 1010, VF-1001, 1123, 1124, 1244, VF-1201, VF-1202, 1620, 1621, 1622, 1623, 1803, 2336, 2407, 2431, 2432, 2442, 2443, 2540, 2547, 2730, 2732, 3040, 3041, 3070, 4342, 4510, and 5012. Of these, 29 are proposed to be revised, 7 are newly drafted, 1 is proposed to be revoked (VF-1202), 1 is proposed to be renumbered (1123 renumbered to 1124), and 1 that was temporarily revoked in the last release has been revised and is proposed to be restored (2730).

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 444 additional instructions under a delegation of authority from the council to RUPRO.[2]

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

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

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

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

The 444 instructions approved by RUPRO under this delegation include 380 for which verbatim language from statutes, rules of court, and regulations has been deleted from the Sources and Authority. The council approved this project in June. Further, under its delegation of authority from RUPRO, the advisory committee has made other nonsubstantive grammatical, typographical, and technical corrections.

New instructions

CACI has always included an instruction on loss of design immunity (currently CACI No. 1123, *Loss of Design Immunity (Cornette)*), but has not had an instruction on design immunity itself as an affirmative defense to public entity liability. The initial assumption of the CACI task force, as noted in the Directions for Use to No. 1123, was that design immunity would not likely involve an issue of fact for the jury. Recently, however, a superior court judge who was sitting on an appellate court by designation was working on an opinion involving design immunity, in which the jury was given the issue.[3] She suggested that there really should be a CACI instruction on design immunity. In response, the committee proposes new instruction CACI No. 1123, *Affirmative Defense—Design Immunity*. The committee also proposes renumbering current CACI No. 1123 to become CACI No. 1124 so that the exception follows the defense.

A member of the committee from Sacramento noted that cases by government employees against the state under the California Whistleblower Protection Act[4] were becoming common. She recommended that CACI propose instructions under this act. The committee now proposes new CACI No. 2442, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements,* and CACI No. 2443, *Affirmative Defense—Same Decision,* for use in cases under the act.

Rope v. Auto-Chlor System of Washington, Inc., a recent case on disability discrimination under the Fair Employment and Housing Act (FEHA), addressed a claim for "associational disability discrimination."[5] An employee who was not disabled claimed that he had been discriminated against because of his association with a disabled person. CACI has always recognized that discrimination based on one's association with a person from a protected category was actionable, and numerous FEHA instructions suggest in the Directions for Use that the instruction may be modified for use in an "association" case.[6] The court in *Rope* set forth specific standards for associational discrimination based on disability. The committee proposes new CACI No. 2547, *Disability-Based Associational Discrimination—Essential Factual Elements,* based on the elements and standards from *Rope*.

In the last release, the committee temporarily revoked CACI No. 2730, *Whistleblower Protection—Essential Factual Elements,* in the Labor Code Actions series. Labor Code section 1102.5, on which the instruction was based, was amended by the Legislature, making the instruction no longer complete.[7] The amended statute contained additional matters that the jury had to consider in applying it. The committee has now revised the instruction to conform to the statutory revisions and proposes restoring it as revised.

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[3] See *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364.

[4] Gov. Code, § 8547 et seq.

[5] *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655−660.

[6] See Gov. Code, § 12926(o).

[7] See Sen. Bill 666 (Stats. 2013, ch. 577), § 5; Assem. Bill 263 (Stats. 2013, ch. 732), § 6; and Sen. Bill 496 (Stats. 2013, ch. 781), § 4.1.

A new statute Labor Code section 1019 creates a cause of action for "retaliatory unfair immigration-related practices."[8] The statute provides workers with some protection should their employer contact immigration authorities in retaliation for asserting rights provided by the Labor Code, such as the right to minimum wage and overtime pay. The committee proposes new instruction CACI No. 2732, *Retaliatory Unfair Immigration-Related Practice—Essential Factual Elements* for use in claims under this statute.

The Disabled Persons Act (DPA) provides disabled persons with rights of access to public facilities.[9] However, the Construction-Related Accessibility Standards Act (CRASA) restricts the availability of statutory damages under the DPA with regard to access barriers to a public facility.[10] The committee proposes new instruction CACI No. 3070, *Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Essential Factual Elements,* for use in DPA and CRASA cases.

In an unlawful detainer case in which the jury finds a breach of the warranty of habitability, whether the amount of a partial rent reduction is to be decided by the jury or by the court is unclear. As explained in the Directions for Use to CACI No. VF-4301, *Termination Due to Failure to Pay Rent—Affirmative Defense—Breach of Implied Warranty of Habitability*, the controlling statute can be read to support either result.[11] The committee has heard from trial judges who are adamant on each side of the divide. Normally, the committee does not draft instructions for unsettled issues. However, judges who believe that the reduction is a jury question have requested a CACI instruction that gives the jury guidance in determining the reduction. In response, the committee has drafted proposed new instruction 4342, *Reduced Rent for Breach of Habitability*. The Directions for Use make it clear that the instruction is based on an unsettled legal principle.

Revoked verdict form

A trial judge requested that the two tests for product liability design defect (consumer expectation and risk-benefit) be combined into a single verdict form for use in cases in which both tests will be submitted to the jury. Currently, VF-1201 is for use for the consumer-expectation test, and VF-1202 is for use for the risk-benefit test. The Directions for Use to both verdict forms currently say that the two verdict forms should not be combined because it must be made clear to the jury that the two tests are alternative theories of liability and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer-expectation test.

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[8] Added by Assem. Bill 263 (Stats. 2013, ch. 732, § 4), effective January 1, 2014.

[9] Civ. Code, §§ 54, 54.1.

[10] Civ. Code, § 55.56.

[11] See Code Civ. Proc., § 1174.2.

In considering the judge's proposal to combine the two tests into a single verdict form, the committee has concluded that the warning in the Directions for Use is not compelled. To construct a verdict form that presents both tests to the jury without introducing any confusion over the burden-shifting of the risk-benefit test is, in fact, possible. Unlike the instructions, the verdict forms do not include language on the burden of proof. Therefore, the committee proposes modifying and renaming CACI No. VF-1201 as *Strict Products Liability—Design Defect—Affirmative Defense—Misuse or Modification,* for use in cases in which either or both of the tests are at issue. The committee proposes revoking CACI No. VF-1202, *Strict Products Liability—Design Defect—Risk-Benefit Test.*

Contract interpretation: role of jury (CACI Nos. 314−320)

CACI has seven instructions that ask the jury to interpret a contract.[12] Nowhere is it explained when it is appropriate for a jury to interpret a contract. Most of the instructions have no Directions for Use at all.

In fact, interpretation of a contract is often a matter of law for the court.[13] It is a question of fact for the jury only if ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence.[14]

The committee decided to make CACI No. 314, *Interpretation—Disputed Words,* an introductory instruction for use in all cases in which the jury will be asked to interpret the contract. The Directions for Use were expanded to set forth the proper roles of court and jury. The other six instructions then can be given with 314 if they are relevant to the jury's task. Directions for Use to these instructions have been added or revised to cross refer back to No. 314 for the rule as to when contract interpretation is a jury matter.

Product liability: sophisticated user defense (CACI No. 1244)

In the recent case of *Buckner v. Milwaukee Electric Tool Corp.,* the court found that the jury had been inadequately instructed on the affirmative defense of sophisticated user.[15] The jury was given CACI No. 1244, which requires that "[*plaintiff*] because of [his/her] particular position, training, experience, knowledge, or skill, knew or should have known of the [*product*]'s risk, harm, or danger." The court found this language to be inadequately general because it did not define the relevant "risk, harm, or danger." The court held that to prove the sophisticated user defense, the defendant had to show that "[t]he sophisticated user must know or be deemed to know not only the bare hazard posed by the product, but also the severity of the potential

[12] See CACI Nos. 314, *Interpretation—Disputed Words;* 315, *Interpretation—Meaning of Ordinary Words;* 316, *Interpretation—Meaning of Technical Words;* 317, *Interpretation—Construction of Contract as a Whole;* 318, *Interpretation—Construction by Conduct;* 319, *Interpretation—Reasonable Time;* and 320, *Interpretation—Construction Against Drafter*.

[13] *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.

[14] *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.

[15] *Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522.

consequences, and any mitigation techniques of which the manufacturer is aware. All are necessary in order for the potential user to make an informed decision regarding whether and how to use the product."[16]

The committee seriously debated whether *Buckner* compelled an expansion of the language in CACI No. 1244 to state that the plaintiff knew or should have known the particular risk and consequences involved, and all mitigation techniques known to the defendant. Some members were dubious that *Buckner* stated a rule that would be applicable in all cases. But the majority decided that the court's language was mandatory and that CACI No. 1244 needed to be expanded.

On posting for public comment, the committee received comments from the defense bar opposing the proposed changes to CACI No. 1244. Different reasons were given, many of which were that the commentators essentially disagreed with the result in *Buckner*.

However, the comment that caused the committee to rethink its position was the following, submitted by Horvitz and Levy LLP:

> The proposed revisions would require trial courts to make decisions that are properly left to the jury. The trial court would fill in the bracketed material by describing the risks of the product and the severity of potential consequences. In many cases the parties dispute these issues—what risks the product poses (if any), and what the possible consequences of those risks may be (if any). In existing practice, the parties present evidence and argument to the jury on these issues, and the jury then decides what risks the products posed, how severe the consequences might be, and whether the plaintiff was aware of those particular risks.

The committee agreed that the requirement to specify the particular risk and consequences in the instruction would only be appropriate if those matters are uncontested. But the sophisticated user is an affirmative defense to a claim for failure to warn. As noted in the comment, the risk and consequences may well be the major points in dispute as to whether there was a duty to warn at all. In such a case, the instruction on the affirmative defense cannot specifically identify the risk and consequences. Therefore, the committee has concluded that *Buckner's* seemingly mandatory expansion of No. 1244 cannot be applied in all cases. The committee now proposes stating the rule from *Buckner* in the Directions for Use, noting that it may apply in some cases.

[16] *Id*. at p. 537.

Emotional distress from negligence without physical injury (NIED)[17](CACI Nos. 1620–1623)

A 2010 case, *Wong v. Jing*, holds with little discussion or analysis that serious emotional distress from negligence without other injury (NIED) is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress (IIED).[18] CACI No. 1604 defines "severe emotional distress" for IIED as "so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it."[19] In contrast, CACI instructions say that for distress from NIED, "serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it." This language comes from the California Supreme Court in *Molien v. Kaiser Foundation Hospitals*.[20] While perhaps a linguist would be able to construct an argument that the two descriptions can be reconciled, a jury would likely require more distress to meet the first test than the second.[21]

The committee considered revising NIED instructions CACI Nos. 1620−1623, based on *Wong*, to replace the definition of *serious emotional distress* with the language used for IIED in CACI No. 1604. But ultimately the committee rejected this revision. The committee was not ready to accept *Wong* as the definitive statement of the proper definition. The court in *Wong* did not consider *Molien*, nor did it provide any real analysis of the issue. It simply concluded that the two tests were the same. The committee opted instead to simply point out in the Directions for Use that *Wong* could be read as requiring a different iteration of serious emotional distress.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from July 21 to August 29, 2014. Comments were received from 15 different commentators. The committee evaluated all comments and revised some of the instructions as a result. A chart with summaries of all comments received and the committee's responses is attached at pages 137-174.

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

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[17] The committee no longer refers to this doctrine as "negligent infliction of emotional distress." However, the commonly used acronym "NIED" remains a useful tool in discussing it.

[18] *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378.

[19] *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.

[20] See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 927−928.

[21] Perhaps a "reasonable person in a civilized society" is the same as an "ordinary, reasonable person." And perhaps not being "expected to bear it" is the same as "unable to cope."

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish a 2015 edition 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 HotDocs document assembly software. With respect to commercial publishers, the Judicial Council will register the copyright of this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the Judicial Council provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Full text of new and revised *CACI* instructions, at pages 12–136
2. Charts of comments, at pages 137-174

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314. Interpretation—Disputed WordsTerm

[*Name of plaintiff***] and [***name of defendant***] dispute the meaning of the following wordsterm contained in their contract: [***insert text of termdisputed language***].**

[*Name of plaintiff***] claims that the wordsterm means [***insert plaintiff's interpretation of the term***].**
[*Name of defendant***] claims that the words term means [***insert defendant's interpretation of the term***].**
[*Name of plaintiff***] must prove that [his/her/its] interpretation of the term is correct.**

In deciding what the wordsterms of a contract mean, you must decide what the parties intended at the time the contract was created. You may consider the usual and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract.

[The following instructions may also help you interpret the wordsterms of the contract:]

New September 2003; Revised December 2014

Directions for Use

Give this instruction if there is conflicting extrinsic evidence as to what the parties intended the language of their contract to mean. While interpretation of a contract can be a matter of law for the court (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839]), it is a question of fact for the jury if ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Read any of the following instructions (as appropriate) on tools for interpretation (CACI Nos. 315 through 320) after reading the last bracketed sentence.

Sources and Authority

- Section 200 of the Restatement Second of Contracts provides: "Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning."

- Contract Interpretation: Intent. Civil Code section 1636. provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

- Contracts Explained by Circumstances. Civil Code section 1647. provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

- "Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no

conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. But when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." (*City of Hope National Medical Center*, *supra*, ~~*v. Genentech, Inc.* (2008)~~ 43 Cal.4th at p.~~375,~~ 395 ~~[75 Cal.Rptr.3d 333, 181 P.3d 142]~~, footnote and internal citations omitted.)

- "This rule—that the jury may interpret an agreement when construction turns on the credibility of extrinsic evidence—is well established in our case law. California's jury instructions reflect this (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 314) … , as do authoritative secondary sources." (*City of Hope National Medical Center*, *supra*, 43 Cal.4th at pp. 395−396.)

- "The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.' " (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710 [50 Cal.Rptr.2d 323].)

- ~~California courts apply an objective test to determine the intent of the parties:~~ "In interpreting a contract, the objective intent, as evidenced by the words of the contract is controlling. We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (*Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198 [32 Cal.Rptr.2d 144], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 741–743

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.04[2][b], 21.14[2]

315. Interpretation—Meaning of Ordinary Words

You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words.* See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Words to Be Understood in Usual Sense. Civil Code section 1644. ~~provides: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."~~

- ~~"Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract. The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage,' controls judicial interpretation. Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 71 Cal.Rptr.2d 830, 951 P.2d 399], internal citations omitted.)~~

- "Generally speaking, words in a contract are to be construed according to their plain, ordinary, popular or legal meaning, as the case may be. However, particular expressions may, by trade usage, acquire a different meaning in reference to the subject matter of a contract. If both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage and parol evidence is admissible to establish the trade usage even though the words in their ordinary or legal meaning are entirely unambiguous. [Citation.]" (*Hayter Trucking Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 15 [22 Cal.Rptr.2d 229].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 745

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, §

75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.20

316. Interpretation—Meaning of Technical Words

You should assume that the parties intended technical words used in the contract to have the meaning that is usually given to them by people who work in that technical field, unless you decide that the parties clearly used the words in a different sense.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words.* See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Technical Words. Civil Code section 1645 ~~provides: "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.".~~

- "The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation."~~A court will look beyond the terms of the writing where it appears that the parties intended to ascribe a technical meaning to the terms used.~~ (*Cooper Companies, Inc. v. Transcontinental Insurance Co.* (1995) 31 Cal.App.4th 1094, 1101 [37 Cal.Rptr.2d 508].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 745

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.22

317. Interpretation—Construction of Contract as a Whole

In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words.* See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Effect to Be Given to Every Part of Contract. Civil Code section 1641. ~~provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."~~

- "[T]he contract must be construed as a whole and the intention of the parties must be ascertained from the consideration of the entire contract, not some isolated portion." (*County of Marin v. Assessment Appeals Bd. of Marin County* (1976) 64 Cal.App.3d 319, 324-325 [134 Cal.Rptr. 349].)

- "Any contract must be construed as a whole, with the various individual provisions interpreted together so as to give effect to all, if reasonably possible or practicable." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 473 [80 Cal.Rptr.2d 329].)

- ~~Contracts should be construed as a whole, with each clause lending meaning to the others.~~ "[W]e should interpret contractual language in a manner which ~~Contractual language should be interpreted in a manner that~~ gives force and effect to every clause rather than to one ~~that~~ which renders clauses nugatory.~~", inoperative, or meaningless. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 473 [80 Cal.Rptr.2d 329];~~ (*Titan Corp. v. Aetna Casualty and Surety Co.* (1994) 22 Cal.App.4th 457, 473-474 [27 Cal.Rptr.2d 476].)

- "Nor are we persuaded by [defendant]'s related claim that it was improper for [plaintiff]'s counsel to tell the jurors, during closing argument, that in resolving witness credibility issues they should consider the 'big picture' and not get lost in the minutiae of the contractual language." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 394 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 746–747

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.19

318. Interpretation—Construction by Conduct

In deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created but before any disagreement between the parties arose.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words.* See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- "In construing contract terms, the construction given the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy arises as to its meaning, is relevant on the issue of the parties' intent." (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242 [88 Cal.Rptr.2d 777].)

- ~~This instruction covers the "rule of practical construction." "~~This rule of practical construction ~~"~~is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754 [8 Cal.Rptr. 427, 356 P.2d 171].)

- "The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions." (*Kennecott Corp. v. Union Oil Co. of California* (1987) 196 Cal.App.3d 1179, 1189 [242 Cal.Rptr. 403].)

- "[T]his rule is not limited to the joint conduct of the parties in the course of performance of the contract. As stated in Corbin on Contracts, 'The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no knowledge of those words or acts when they occurred and did not concur in them. In the litigation that has ensued, one who is maintaining the same interpretation that is evidenced by the other party's earlier words, and acts, can introduce them to support his contention.' We emphasize the conduct of one party to the contract is by no means conclusive evidence as to the meaning of the contract. It is relevant, however, to show the contract is reasonably susceptible to the meaning evidenced by that party's conduct." (*Southern California Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851 [44 Cal.Rptr.2d 227], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 749

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.51

319. Interpretation—Reasonable Time

If a contract does not state a specific time in which the parties are to meet the requirements of the contract, then the parties must meet them within a reasonable time. What is a reasonable time depends on the facts of each case, including the subject matter of the contract, the reasons each party entered into the contract, and the intentions of the parties at the time they entered the contract.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words.* See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Time of Performance of Contract. Civil Code section 1657. ~~provides: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly as, for example, if it consists in the payment of money only it must be performed immediately upon the thing to be done being exactly ascertained."~~

- "[A]s the contract was silent as to the time of delivery a reasonable time for performance must be implied." ~~This rule of construction applies where the contract is silent as to the time of performance.~~ (~~See~~ *Palmquist v. Palmquist* (1963) 212 Cal.App.2d 322, 331 [27 Cal.Rptr. 744].)

- "The question of what constituted a reasonable time was of course one of fact." ~~The reasonableness of time for performance is a question of fact that depends on the circumstances of the particular case.~~ (*Lyon v. Goss* (1942) 19 Cal.2d 659, 673 [123 P.2d 11].~~); *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 381 [11 Cal.Rptr.2d 524].)~~

- "[W]hat constitutes a reasonable time is a question of fact, depending upon ~~These circumstances include~~ the situation of the parties, the nature of the transaction, and the facts of the particular case." (*Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, 836 [52 Cal.Rptr. 1, 415 P.2d 816].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 762–764

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.41 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.49

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.30

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.46

320. Interpretation—Construction Against Drafter

In determining the meaning of ~~a term~~the words of the contract, you must first consider all of the other instructions that I have given you. If, after considering these instructions, you still cannot agree on the meaning of the ~~term~~words, then you should interpret the contract ~~term~~ against [the party that drafted the ~~term~~ disputed words/~~]~~ ~~[~~the party that caused the uncertainty].

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words.* See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.~~This instruction should be given only to a deadlocked jury, so as to avoid giving them this tool to resolve the case before they have truly exhausted the other avenues of approach.~~

Sources and Authority

- Language Interpreted Against Party Causing Uncertainty. Civil Code section 1654. ~~provides: "In case of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."~~

- "[T]his [Civil Code 1654] canon applies only as a tie breaker, when other canons fail to dispel ~~Section 1654 states the general rule, but this canon does not operate to the exclusion of all other rules of contract interpretation. It is used only when none of the canons of construction succeed in dispelling the~~ uncertainty." (*Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 596 [19 Cal.Rptr.2d 295], disapproved on other grounds in *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376-377 [36 Cal.Rptr.2d 581, 885 P.2d 994].)

- "The trial court's instruction … embodies a general rule of contract interpretation that was applicable to the negotiated agreement between [the parties]. It may well be that in a particular situation the discussions and exchanges between the parties in the negotiation process may make it difficult or even impossible for the jury to determine which party caused a particular contractual ambiguity to exist, but this added complexity does not make the underlying rule irrelevant or inappropriate for a jury instruction. We conclude, accordingly, that the trial court here did not err in instructing the jury on Civil Code section 1654's general rule of contract interpretation." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 398 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

- "[I]f the uncertainty is not removed by application of the other rules of interpretation, a contract must be interpreted most strongly against the party who prepared it. This last rule is applied with particular force ~~This rule is applied more strongly~~ in the case of adhesion contracts." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 801 [79 Cal.Rptr.2d 273].) ~~It also applies with~~

- "The doctrine of contra proferentem (construing ambiguous agreements against the drafter) applies

with even ~~It also applies with~~ greater force when the person who prepared the writing is a lawyer." (*Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1370 [62 Cal.Rptr.2d 27].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 757

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.15

422. ~~Sale of~~Providing Alcoholic Beverages to Obviously Intoxicated Minors (Bus. & Prof. Code, § 25602.1)

[*Name of plaintiff***] claims [***name of defendant***] is responsible for [his/her] harm because [***name of defendant***] [sold/~~ or~~ gave] alcoholic beverages to [***name of alleged minor***], a minor who was already obviously intoxicated.**

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

1. **[That [***name of defendant***] was [required to be] licensed~~/authorized/required to be licensed or authorized]~~ to sell alcoholic beverages;]**

   [*or***]**

   [That [*name of defendant***] was authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave;]**

2. **[That [***name of defendant***] [sold/~~ or~~ gave] alcoholic beverages to [***name of alleged minor***];]**

   [or]

   [That [*name of defendant***] caused alcoholic beverages to be [sold/given away] to [***name of alleged minor***];]**

3. **That [***name of alleged minor***] was less than 21 years old at the time;**

4. **That when [***name of defendant***] provided the alcoholic beverages, [***name of alleged minor***] displayed symptoms that would lead a reasonable person to conclude that [he/she] was obviously intoxicated;**

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

6. **That [***name of defendant***]'s [selling/~~ or~~ giving] alcoholic beverages to [***name of alleged minor***] was a substantial factor in causing [***name of plaintiff***~~?~~]'s harm.**

In deciding whether [*name of alleged minor***] was obviously intoxicated, you may consider whether [he/she] displayed one or more of the following symptoms to [***name of defendant***] before the alcoholic beverages were provided: impaired judgment; alcoholic breath; incoherent or slurred speech; poor muscular coordination; staggering or unsteady walk or loss of balance; loud, boisterous, or argumentative conduct; flushed face; or other symptoms of intoxication. The mere fact that [***name of alleged minor***] had been drinking is not enough.**

New September 2003; Revised December 2009, June 2014, December 2014

Directions for Use

Business and Professions Code section 25602.1 imposes potential liability on those who have or are required to have a liquor license for the selling, furnishing, or giving away of alcoholic beverages to an obviously intoxicated minor. It also imposes potential liability on a person who is not required to be licensed who sells alcohol to an obviously intoxicated minor. (See *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 711 [168 Cal.Rptr.3d 440, 319 P.3d 201].) In this latter case, omit element 1, select "sold" in the opening paragraph and~~, delete "or gave"~~ in element 2, and select "selling"~~delete "or giving"~~ in element 6.

If the plaintiff is the minor who is suing for his or her own injuries (see *Chalup v. Aspen Mine Co.* (1985) 175 Cal.App.3d 973, 974 [221 Cal.Rptr. 97]), modify the instruction by substituting the appropriate pronoun for "[*name of alleged minor*]" throughout.

For purposes of this instruction, a "minor" is someone under the age of 21. (*Rogers v. Alvas* (1984) 160 Cal.App.3d 997, 1004 [207 Cal.Rptr. 60].)

Sources and Authority

- Liability for Providing Alcohol to Minors. Business and Professions Code section 25602.1.
- Sales Under the Alcoholic Beverage Control Act. Business and Professions Code section 23025.
- "In sum, if a plaintiff can establish the defendant provided alcohol to an obviously intoxicated minor, and that such action was the proximate cause of the plaintiff's injuries or death, section 25602.1--the applicable statute in this case--permits liability in two circumstances: (1) the defendant was either licensed to sell alcohol, required to be licensed, or federally authorized to sell alcoholic beverages in certain places, and the defendant sold, furnished, or gave the minor alcohol or caused alcohol to be sold, furnished, or given to the minor; or (2) the defendant was 'any other person' (i.e., neither licensed nor required to be licensed), and he or she sold alcohol to the minor or caused it to be sold. Whereas licensees (and those required to be licensed) may be liable if they merely furnish or give an alcoholic beverage away, a nonlicensee may be liable only if a *sale* occurs; that is, a nonlicensee, such as a social host, who merely furnishes or gives drinks away--even to an obviously intoxicated minor--retains his or her statutory immunity." (*Ennabe, supra,* 58 Cal.4th at pp. 709−710, original italics.)
- "[W]e conclude that the placement of section 25602.1 in the Business and Professions Code does not limit the scope of that provision to commercial enterprises. First, the structure of section 25602.1 suggests it applies to noncommercial providers of alcohol. The statute addresses four categories of persons and we assume those falling in the first three categories--those licensed by the Department of ABC, those without licenses but who are nevertheless required to be licensed, and those authorized to sell alcohol by the federal government--are for the most part engaged in some commercial enterprise. The final category of persons addressed by section 25602.1 is more of a catchall: 'any other person' who sells alcohol. Consistent with the plain meaning of the statutory language and the views of the Department of ABC, we find this final category includes private persons and ostensible social hosts who, for whatever reason, charge money for alcoholic drinks." (*Ennabe, supra,* 58 Cal.4th at p. 711.)

- "[Business and Professions Code] Section 23025's broad definition of a sale shows the Legislature intended the law to cover a wide range of transactions involving alcoholic beverages: a qualifying sale includes '*any* transaction' in which title to an alcoholic beverage is passed for '*any* consideration.' (Italics added.) Use of the term 'any' to modify the words 'transaction' and 'consideration' demonstrates the Legislature intended the law to have a broad sweep and thus include both indirect as well as direct transactions." (*Ennabe, supra*, 58 Cal.4th at p. 714, orginal italics.)

- In " 'The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are "plain" and "easily seen or discovered." If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.' " (*Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1140 [19 Cal.Rptr.2d 205], original italics.)

- "[T]he standard for determining 'obvious intoxication' is measured by that of a reasonable person." (*Schaffield, supra*, 15 Cal.App.4th at p. 1140.)

- "We shall make no effort to state definitively the meaning of the word 'furnishes' … . As used in a similar context the word 'furnish' has been said to mean: ' "To supply; to offer for use, to give, to hand." ' It has also been said the word 'furnish' is synonymous with the words 'supply' or 'provide.' In relation to a physical object or substance, the word 'furnish' connotes possession or control over the thing furnished by the one who furnishes it. The word 'furnish' implies some type of affirmative action on the part of the furnisher; failure to protest or attempt to stop another from imbibing an alcoholic beverage does not constitute 'furnishing.' " (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 904–905 [141 Cal.Rptr. 682], internal citations omitted.)

- "As instructed by the court, the jury was told to consider several outward manifestations of obvious intoxication, which included incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, or argumentative behavior. This instruction was correct." (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611], internal citation omitted.)

- "[S]ection 25602.1's phrase 'causes to be sold' requires an affirmative act directly related to the sale of alcohol which necessarily brings about the resultant action to which the statute is directed, i.e., the furnishing of alcohol to an obviously intoxicated minor." (*Hernandez v. Modesto Portuguese Pentecost Assn.* (1995) 40 Cal.App.4th 1274, 1276 [48 Cal.Rptr.2d 229].)

- "The undisputed evidence shows [defendant]'s checker sold beer to Spitzer and that Spitzer later gave some of that beer to Morse. As in *Salem* [*Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 600 [259 Cal.Rptr. 447]] , we conclude defendant cannot be held liable because the person to whom it sold alcohol was not the person whose negligence allegedly caused the injury at issue." (*Ruiz v. Safeway, Inc.* (2013) 209 Cal.App.4th 1455, 1462 [147 Cal.Rptr.3d 809].)

- "[O]bviously intoxicated minors who are served alcohol by a licensed purveyor of liquor, may bring a

cause of action for negligence against the purveyor for [their own] subsequent injuries." (*Chalup, supra,* 175 Cal.App.3d at p. 979.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1072

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.63

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-L, *Liability For Providing Alcoholic Beverages,* ¶ 2:2101 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach,* § 1.21 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability,* §§ 19.12, 19.52, 19.75 (Matthew Bender)

1 California Points and Authorities, Ch. 15A, *Alcoholic Beverages: Civil Liability for Furnishing,* § 15A.21 et seq. (Matthew Bender)

456. Defendant Estopped From Asserting Statute of Limitations Defense

[*Name of plaintiff***] claims that even if [his/her/its] lawsuit was not filed on time, [he/she/it] may still proceed because [***name of defendant***] did or said something that caused [***name of plaintiff***] to delay filing the lawsuit. In order to establish the right to proceed, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] said or did something that caused [***name of plaintiff***] to believe that it would not be necessary to file a lawsuit;**

2. **That [***name of plaintiff***] relied on [***name of defendant***]'s conduct and therefore did not file the lawsuit within the time otherwise required;**

3. **That a reasonable person in [***name of plaintiff***]'s position would have relied on [***name of defendant***]'s conduct;**

4. **That after the limitation period had expired, [***name of defendant***]'s representations by words or conduct proved to not be true; and**

5. **That [***name of plaintiff***] proceeded diligently to file suit once [he/she/it] discovered the actual facts.**

It is not necessary that [*name of defendant***] have acted in bad faith or intended to mislead [***name of plaintiff***].**

New October 2008; Revised December 2014

Directions for Use

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

There is perhaps a question as to whether all the elements of equitable estoppel must be proved in order to establish an estoppel to rely on a statute of limitations. These elements are (1) the party to be estopped must know the facts; (2) the party must intend that his or her conduct will be acted on, or must act in such a way that the party asserting the estoppel had the right to believe that the conduct was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) that party must rely upon the conduct to his or her detriment. (See *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766–767 [41 Cal.Rptr.3d 819]; see also *Olofsson v. Mission Linen Supply* (2012) 211 Cal.App.4th 1236, 1246 [150 Cal.Rptr.3d 446] [equitable estoppel to deny family leave under California Family Rights Act].)

Most cases do not frame the issue as one of equitable estoppel and its four elements. All that is required is that the defendant's conduct actually have misled the plaintiff, and that plaintiff reasonably have relied

on that conduct. Bad faith or an intent to mislead is not required. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384 [2 Cal.Rptr.3d 655, 73 P.3d 517]; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43 [21 Cal.Rptr.2d 110].) Nor does it appear that there is a requirement that the defendant specifically intended to induce the plaintiff to defer filing suit. Therefore, no specific intent element has been included.

Sources and Authority

- "As the name suggests, equitable estoppel is an equitable issue for court resolution." (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)

- "While the judge determines equitable causes of action, the judge may (in rare instances) empanel an advisory jury to make preliminary factual findings. The factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder. '[W]hile a jury may be used for advisory verdicts as to questions of fact [in equitable actions], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.' " (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337], internal citations omitted.)

- "[CACI No. 456 is] appropriate for use when a trial court 'empanel[s] an advisory jury to make preliminary factual findings,' with respect to equitable estoppel … ." (*Hopkins*, *supra*, 225 Cal.App.4th at p. 745.)

- "Equitable tolling and equitable estoppel are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. … Equitable estoppel, however, … comes into play only after the limitations period has run and addresses … the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life … from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' Thus, equitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling." (*Lantzy, supra*, 31 Cal.4th at pp. 383–384, internal citations omitted.)

- "Accordingly, (1) if one potentially liable for a construction defect represents, while the limitations period is still running, that all actionable damage has been or will be repaired, thus making it unnecessary to sue, (2) the plaintiff reasonably relies on this representation to refrain from bringing a timely action, (3) the representation proves false after the limitations period has expired, and (4) the plaintiff proceeds diligently once the truth is discovered, the defendant may be equitably estopped to assert the statute of limitations as a defense to the action." (*Lantzy, supra*, 31 Cal.4th at p. 384, internal citations omitted.)

- " 'An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. … To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss. … Where the delay in commencing action is

induced by the conduct of the defendant it cannot be availed of by him as a defense." ' " (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152–1153 [113 Cal.Rptr.2d 70, 33 P.3d 487].)

- " 'A defendant will be estopped to invoke the statute of limitations where there has been "some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action." It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.] "[W]hether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law." [Citations.]' " (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925–926 [73 Cal.Rptr.3d 216], internal citations omitted.)

- "It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act. Estoppel most commonly results from misleading statements about the need for or advisability of a claim; actual fraud or the intent to mislead is not essential. A fortiori, estoppel may certainly be invoked when there are acts of violence or intimidation that are intended to prevent the filing of a claim." (*John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 445 [256 Cal.Rptr. 766, 769 P.2d 948], internal citations omitted.)

- "It is well settled that the doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. Apropos to this rule are the following established principles: A person, by his conduct, may be estopped to rely on the statute; where the delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense; one cannot justly or equitably lull his adversary into a false sense of security and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought; actual fraud in the technical sense, bad faith or intent to mislead are not essential to the creation of an estoppel, but it is sufficient that the defendant made misrepresentations or so conducted himself that he misled a party, who acted thereon in good faith, to the extent that such party failed to commence the action within the statutory period; a party has a reasonable time in which to bring his action after the estoppel has expired, not exceeding the period of limitation imposed by the statute for commencing the action; and that whether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law. It is also an established principle that in cases of estoppel to plead the statute of limitations, the same rules are applicable, as in cases falling within subdivision 4 of section 338, in determining when the plaintiff discovered or should have discovered the facts giving rise to his cause of action." (*Estate of Pieper* (1964) 224 Cal.App.2d 670, 690–691 [37 Cal.Rptr. 46], internal citations omitted.)

- "Although 'ignorance of the identity of the defendant … will not *toll* the statute', 'a defendant may be *equitably estopped* from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity'." (*Vaca*

v. Wachovia Mortgage Corp. (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)

- "Settlement negotiations are relevant and admissible to prove an estoppel to assert the statute of limitations." (*Holdgrafer, supra,* 160 Cal.App.4th at p. 927.)

- "The estoppel issue in this case arises in a unique context. Defendants' wrongful conduct has given rise to separate causes of action for property damage and personal injury with separate statutes of limitation. Where the plaintiffs reasonably rely on defendants' promise to repair the property damage without a lawsuit, is a jury permitted to find that plaintiffs' decision to delay filing a personal injury lawsuit was also reasonable? We conclude such a finding is permissible on the facts of this case." (*Shaffer, supra,* 17 Cal.App.4th at p. 43, internal citation omitted.)

- "At the very least, [plaintiff] cannot establish the second element necessary for equitable estoppel. [Plaintiff] argues that [defendant] was estopped to rely on the time bar of section 340.9 by its continued reconsideration of her claim after December 31, 2001, had passed. But she cannot prove [defendant] intended its reconsideration of the claim to be relied upon, or acted in such a way that [plaintiff] had a right to believe it so intended." (*Ashou, supra,* 138 Cal.App.4th at p. 767.)

- " 'It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act.' Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when a plaintiff establishes by a preponderance of the evidence (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) the plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment." (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1239–1240 [92 Cal.Rptr.3d 1], internal citation omitted.)

- "A nondisclosure is a cause of injury if the plaintiff would have acted so as to avoid injury had the plaintiff known the concealed fact. The plaintiff's reliance on a nondisclosure was reasonable if the plaintiff's failure to discover the concealed fact was reasonable in light of the plaintiff's knowledge and experience. Whether the plaintiff's reliance was reasonable is a question of fact for the trier of fact unless reasonable minds could reach only one conclusion based on the evidence. The fact that a plaintiff was represented by counsel and the scope and timing of the representation are relevant to the question of the reasonableness of the plaintiff's reliance." (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 187–188 [104 Cal.Rptr.3d 508], internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 566–581

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

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

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions,* § 345.81 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions,* § 143.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions,* 4.42

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

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

1. **That [***name of defendant***] received timely notice that [***name of plaintiff***] was [***e.g., seeking workers' compensation***] instead of filing a lawsuit;**

2. **That the facts of the two claims were so similar that an investigation of the [***e.g., workers' compensation claim***] gave or would have given [***name of defendant***] the information needed to defend the lawsuit; and**

3. **That [***name of plaintiff***] was acting reasonably and in good faith by [***e.g., seeking workers' compensation***].**

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

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

New December 2009; Revised December 2014

Directions for Use

Equitable tolling, including any disputed issue of fact, is to be decided by the court, even if there are disputed issues of fact. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745 [170 Cal.Rptr.3d 551].) This instruction is for use if the court submits the issue to the jury for advisory findings. ~~The verdict form should ask the jury to find the period of time that the limitation period was tolled on account of the other proceeding. The court can then add the additional time to the limitation period and determine whether the action is timely.~~

Equitable tolling is not available for legal malpractice (see *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [statutory tolling provisions of Code Civ Proc., § 340.6 are exclusive for both one-year and four-year limitation periods]; see also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*) nor for medical malpractice with regard to the three-year limitation period of Code of Civil Procedure section 340.5. (See *Belton v. Bowers Ambulance*

Serv. (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [statutory tolling provisions of Code Civ. Proc., § 340.5 are exclusive only for three-year period; one-year period may be tolled on other grounds]; see also CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, and CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*.)

Sources and Authority

- "The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' " (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 [84 Cal.Rptr.3d 734, 194 P.3d 1026], internal citations omitted.)

- "While the case law is not entirely clear, it appears that the weight of authority supports our conclusion that whether a plaintiff has demonstrated the elements of equitable tolling presents a question of fact." (*Hopkins, supra*, 225 Cal.App.4th at p. 755.)

- "[E]quitable tolling, '[a]s the name suggests … is an equitable issue for court resolution.' " (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)

- "While the judge determines equitable causes of action, the judge may (in rare instances) empanel an advisory jury to make preliminary factual findings. The factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder. '[W]hile a jury may be used for advisory verdicts as to questions of fact [in equitable actions], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.' " (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337], internal citations omitted.)

- "[CACI No. 457 is] appropriate for use when a trial court 'empanel[s] an advisory jury to make preliminary factual findings,' with respect to equitable … tolling." (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)

- "The equitable tolling doctrine rests on the concept that a plaintiff should not be barred by a statute of limitations unless the defendant would be unfairly prejudiced if the plaintiff were allowed to proceed. '[T]he primary purpose of the statute of limitations is normally satisfied when the defendant receives timely notification of the first of two proceedings.' The doctrine has been applied 'where one action stands to lessen the harm that is the subject of the second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason.' " (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 598 [95 Cal.Rptr.3d 18], internal citations omitted.)

- "[T]he effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the

tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370–371 [2 Cal.Rptr.3d 655, 73 P.3d 517].)

- "A major reason for applying the doctrine is to avoid 'the hardship of compelling plaintiffs to pursue several duplicative actions simultaneously on the same set of facts.' '[D]isposition of a case filed in one forum may render proceedings in the second unnecessary or easier and less expensive to resolve.' " (*Guevara v. Ventura County Community College Dist.* (2008) 169 Cal.App.4th 167, 174 [87 Cal.Rptr.3d 50], internal citations omitted.)

- "[A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff. These elements seemingly are present here. As noted, the federal court, without prejudice, declined to assert jurisdiction over a timely filed state law cause of action and plaintiffs thereafter promptly asserted that cause in the proper state court. Unquestionably, the same set of facts may be the basis for claims under both federal and state law. We discern no reason of policy which would require plaintiffs to file simultaneously two separate actions based upon the same facts in both state and federal courts since 'duplicative proceedings are surely inefficient, awkward and laborious.' " (*Addison v. State* (1978) 21 Cal.3d 313, 319 [146 Cal.Rptr. 224, 578 P.2d 941], internal citations omitted.)

- " ' "The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore[,] the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this means that the defendant in the first claim is the same one being sued in the second." "The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him in a position to fairly defend the second." "The third prerequisite of good faith and reasonable conduct on the part of the plaintiff is less clearly defined in the cases. But in *Addison v. State of California, supra,* 21 Cal.3d 313[,] the Supreme Court did stress that the plaintiff filed his second claim a short time after tolling ended." ' " (*McDonald, supra,* 45 Cal.4th at p. 102, fn. 2, internal citations omitted.)

- "The third requirement of good faith and reasonable conduct may turn on whether 'a plaintiff delayed filing the second claim until the statute on that claim had nearly run …' or 'whether the plaintiff [took] affirmative actions which … misle[d] the defendant into believing the plaintiff was foregoing his second claim.' " (*Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1505 [92 Cal.Rptr.3d 131].)

- "Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic: 'It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding.' This rule prevents administrative exhaustion requirements from rendering illusory nonadministrative remedies contingent on exhaustion." (*McDonald, supra,* 45 Cal.4th at p. 101, internal citation

omitted.)

- "The trial court rejected equitable tolling on the apparent ground that tolling was unavailable where, as here, the plaintiff was advised the alternate administrative procedure he or she was pursuing was voluntary and need not be exhausted. In reversing summary judgment, the Court of Appeal implicitly concluded equitable tolling is in fact available in such circumstances and explicitly concluded equitable tolling is not foreclosed as a matter of law under the FEHA. The Court of Appeal was correct on each count." (*McDonald, supra,* 45 Cal.4th at p. 114.)

- "Equitable tolling and equitable estoppel [see CACI No. 456] are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. … Equitable estoppel, however, … comes into play only after the limitations period has run and addresses … the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life … from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' " (*Lantzy, supra,* 31 Cal.4th at pp. 383–384.)

- "[V]oluntary abandonment [of the first proceeding] does not categorically bar application of equitable tolling, but it may be relevant to whether a plaintiff can satisfy the three criteria for equitable tolling." (*McDonald, supra,* 45 Cal.4th at p. 111.)

- "The equitable tolling doctrine generally requires a showing that the plaintiff is seeking an alternate remedy in an established procedural context. Informal negotiations or discussions between an employer and employee do not toll a statute of limitations under the equitable tolling doctrine." (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1416 [159 Cal.Rptr.3d 749], internal citation omitted.)

- "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird, supra,* 2 Cal.4th at p. 618 [applying rule to one-year limitation period].)

- "We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language." (*Belton, supra,* 20 Cal.4th at p. 934 [rejecting application of rule to one-year limitation period].)

- "[E]quitable tolling has never been applied to allow a plaintiff to extend the time for pursuing an administrative remedy by filing a lawsuit. Despite broad language used by courts in employing the doctrine, equitable tolling has been applied almost exclusively to extend statutory deadlines for judicial actions, rather than deadlines for commencing administrative proceedings." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1109 [150 Cal.Rptr.3d 405].)

Secondary Sources

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

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

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

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

VF-406. Negligence—~~Sale of~~Providing Alcoholic Beverages to Obviously Intoxicated Minor

We answer the questions submitted to us as follows:

1. **[Was [*name of defendant*] [required to be] licensed~~] [authorized] [required to be licensed or authorized]~~ to sell alcoholic beverages?]**

[*or*]

[Was [*name of defendant*] authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave?]

____ Yes ____ No

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

2. **[Did [*name of defendant*] [sell/~~ or~~ give] alcoholic beverages to [*name of alleged minor*]?**

____ Yes ____ No]

[or]

[Did [*name of defendant*] cause alcoholic beverages to be [sold/given away] to [*name of alleged minor*]?]

____ Yes ____ No]

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

3. **Was [*name of alleged minor*] less than 21 years old at the time?**

____ 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. **When [*name of defendant*] provided the alcoholic beverages, ~~Did~~ did [*name of alleged minor*] display symptoms that would lead a reasonable person to conclude that [*name of alleged minor*] was obviously intoxicated?**

____ 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 alleged minor***] later harm [***name of plaintiff***]?**
____ Yes ____ No

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

6. Was [*name of defendant***]'s [selling/~~or~~ giving] alcoholic beverages to [***name of alleged minor***] a substantial factor in causing [***name of plaintiff***]'s harm?**
____ Yes ____ No

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

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

[a. Past economic loss

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

Total Past Economic Damages: $ _____]

[b. Future economic loss

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

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2009, December 2010, December 2014

Directions for Use

This verdict form is based on CACI No. 422, ~~*Sale of*~~*Providing Alcoholic Beverages to Obviously Intoxicated Minors.*

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.

Omit question 1 if the defendant is a person such as a social host who, though not required to be licensed, sells alcohol to an obviously intoxicated minor. (See *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 711 [168 Cal.Rptr.3d 440, 319 P.3d 201].) ~~This verdict form is based on CACI No. 422, *Sale of Alcoholic Beverages to Obviously Intoxicated Minors.*~~

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

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

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

If the comparative fault of the plaintiff is an issue, this form should be modified. See CACI No. VF-401, *Negligence—Single Defendant—Plaintiff's Negligence at Issue—Fault of Others Not at Issue*, for a model form involving the issue of comparative fault.

1010. Affirmative Defense—Recreation Immunity—Exceptions (Civ. Code, § 846)

[*Name of defendant***] is not responsible for [***name of plaintiff***]'s harm if [he/she] proves that [***name of plaintiff***]'s harm resulted from [his/her] entry on or use of [***name of defendant***]'s property for a recreational purpose~~.~~. However, [*name of defendant*] is still responsible for [*name of plaintiff*]'s harm if [*name of plaintiff*] proves that**

[*Choose one or more of the following three options*:]

[~~unless [*name of plaintiff*] proves~~ [*name of defendant*] willfully or maliciously failed to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property.~~all of the following:~~

~~1. That [*name of defendant*] knew or should have known of the [condition/use/structure/activity on the property] that created an unreasonable risk of serious injury;~~

~~2. That [*name of defendant*] knew or should have known that someone would probably be seriously injured by the dangerous [condition/use/structure/activity]; and~~

~~3. That [*name of defendant*] knowingly failed to protect others from the dangerous [condition/use/structure/activity].]~~

[**or**]

[~~unless [*name of plaintiff*] proves that~~ a charge or fee was paid to [*name of defendant***] to use the property.]**

[**or**]

[~~unless [*name of plaintiff*] proves that~~ [*name of defendant***] expressly invited [***name of plaintiff***] to use the property for the recreational purpose.]**

New September 2003; Revised October 2008, December 2014

Directions for Use

This instruction sets forth the statutory exceptions to recreational immunity. (See Civ. Code, § 846.) Choose one or more of the optional exceptions according to the facts. Depending on the facts, the court could instruct that the activity involved was a "recreational purpose" as a matter of law. For a comprehensive list of "recreational purposes," refer to Civil Code section 846.

Whether the term "willful or malicious failure" has a unique meaning under this statute is not entirely clear. One court construing this statute has said that three elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the

danger, and (3) conscious failure to act to avoid the peril. (See *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689−690 [217 Cal.Rptr. 522].)

Federal courts interpreting California law have addressed whether the "express invitation" must be personal to the user. The Ninth Circuit has held that invitations to the general public do not qualify as "express invitations" within the meaning of section 846. In *Ravell v. United States* (9th Cir. 1994) 22 F.3d 960, 963, the Ninth Circuit held that California law requires a personal invitation for a section 846 invitation, citing *Johnson v. Unocal Corp*. (1993) 21 Cal.App.4th 310, 317 [26 Cal.Rptr.2d 148]. However, the issue has not been definitively resolved by the California Supreme Court.

Sources and Authority

- Recreational Immunity. Civil Code section 846 ~~provides:~~.

  ~~An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.~~

  ~~A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.~~

  ~~An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.~~

  ~~This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.~~

  ~~Nothing in this section creates a duty of care or ground of liability for injury to person or property.~~

- "[A]n owner of ... real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous

condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099-1100 [17 Cal.Rptr.2d 594, 847 P.2d 560].)

- "Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the 'totality of the facts and circumstances, including ... the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose.' " (*Ornelas, supra,* 4 Cal.4th at p. 1102, internal citation omitted.)

- "The phrase 'interest in real property' should not be given a narrow or technical interpretation that would frustrate the Legislature's intention in passing and amending section 846." (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 196 [266 Cal.Rptr. 491, 785 P.2d 1183].)

- "[D]efendants' status as business invitees of the landowner does not satisfy the prerequisite that the party seeking to invoke the immunity provisions of section 846 be '[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory.' Although such invitee may be entitled to be present on the property during such time as the work is being performed, such presence does not convey any estate or interest in the property." (*Jenson v. Kenneth I. Mullen, Consulting Engineers, Inc.* (1989) 211 Cal.App.3d 653, 658 [259 Cal.Rptr. 552].)

- ~~"Three essential elements must be present to raise a negligent act to the level of wilful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689-690 [217 Cal.Rptr. 522].)~~

- "The concept of willful misconduct has a well-established, well-defined meaning in California law. 'Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results.' " (*New, supra,* 171 Cal.App.3d at p. 689, internal citations omitted.)

- "Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended." (*Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72 [166 Cal.Rptr. 192], disapproved of on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707 [190 Cal.Rptr. 494, 660 P.2d 1168].)

- "A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under section 846 comes into play." (*Johnson, supra,* 21 Cal.App.4th at p. 317.)

- "The purpose of section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. The trial court should therefore

construe the exceptions for consideration and express invitees narrowly. (*Johnson, supra,* 21 Cal.App.4th at p. 315.)

- "Civil Code section 846's liability shield does not extend to acts of vehicular negligence by a landowner or by the landowner's employee while acting within the course of the employment. We base this conclusion on section 846's plain language. The statutory phrase 'keep the premises safe' is an apt description of the property-based duties underlying premises liability, a liability category that does not include vehicular negligence. Furthermore, a broad construction of that statutory phrase would render superfluous another provision of section 846 shielding landowners from liability for failure to warn recreational users about hazardous conditions or activities on the land." (*Klein v. United States of America* (2010) 50 Cal.4th 68, 72 [112 Cal.Rptr.3d 722, 235 P.3d 42].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1103–1111

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.22 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.30 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.21 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.130 et seq. (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ § 16:34 (Thomson Reuters)

VF-1001. Premises Liability—Affirmative Defense —Recreation Immunity—Exceptions

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] [own/lease/occupy/control] the property?**
   ____ Yes ____ No

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

2. **Was [***name of defendant***] negligent in the [use/maintenance] of the property?**
   ____ Yes ____ No

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

3. **Was [***name of defendant***]'s negligence a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

4. **Did [***name of plaintiff***] enter on or use [***name of defendant***]'s property for a recreational purpose?**
   ____ Yes ____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, skip ~~the next three~~ question 5~~s~~ and answer question ~~8~~6.

5. **Did [***name of defendant***] willfully or maliciously fail to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property~~know or should [he/she/it] have known of a [condition/use/structure/activity on the property] that created an unreasonable risk of serious injury~~?**
   ____ 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*] know or should [he/she/it] have known that someone would probably be seriously injured by the dangerous [condition/use/structure/activity]?~~

~~_____ 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***] knowingly fail to protect others from the dangerous [condition/use/structure/activity]?**~~
~~_____ 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~~6. What are [*name of plaintiff***]'s damages?**

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, October 2008, December 2010, December 2014

Directions for Use

This verdict form is based on CACI No. 1000, *Premises Liability—Essential Factual Elements*, and CACI No. 1010, *Affirmative Defense—Recreation Immunity−Exceptions*.

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

~~This verdict form is based on CACI No. 1000, *Premises Liability—Essential Factual Elements*, and CACI No. 1010, *Affirmative Defense—Recreation Immunity*.~~

Question 5 should be modified if either of the other two exceptions to recreational immunity from Civil Code section 846 is at issue. (See CACI No. 1010.)

If specificity is not required, users do not have to itemize all the damages listed in question ~~8~~6. The breakdown is optional depending on the circumstances.

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

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

~~This verdict form should be modified (see CACI No. 1010, *Affirmative Defense—Recreation Immunity*) if either of the two other grounds for countering this defense is at issue.~~

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 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

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 only be resolved as issues of law 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.)

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 pp. 66-67.)

- "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.)

- "In many cases, the evidence of discretionary authority to approve a design decision is clear, or even undisputed. For example, '[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. [Citation.]' 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.)

- "[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." (*Martinez, supra,* 225 Cal.App.4th at p. 373.)

Secondary Sources

5 Witkin, Summary of California Law (10th Ed. 2005), Torts §§ 229, 280 et seq.

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)

~~1123~~1124. Loss of Design Immunity (*Cornette*)

[*Name of defendant***] is ~~not~~ responsible for harm ~~caused~~ to [***name of plaintiff***] ~~based on~~caused by the plan or design of the [***insert type of property, e.g., "highway"***] ~~unless~~ if [***name of plaintiff***] proves all of the following:**

1. **That the [***insert type of property, e.g., "highway"***]'s plan[s] or design[s] had become dangerous because of a change in physical conditions;**

2. **That [***name of defendant***] had notice of the dangerous condition created because of the change in physical conditions; and**

3. **[That [***name of defendant***] had a reasonable time to obtain the funds and carry out the necessary corrective work to conform the property to a reasonable design or plan;]**

   [or]

   [That [*name of defendant***] was unable to correct the condition due to practical impossibility or lack of funds but did not reasonably attempt to provide adequate warnings of the dangerous condition.]**

New September 2003; Revised June 2010; Renumbered from CACI No. 1123 and Revised December 2014

Directions for Use

Give this instruction if the plaintiff claims that the public entity defendant ~~is entitled to~~has lost its design immunity ~~unless~~ because of~~the~~ changed ~~-~~conditions since the design or plan was originally adopted~~exception can be established~~. Read either or both options for element 3 depending on the facts of the case.

If the applicability of design immunity in the first instance is disputed, give CACI No. 1123, *Affirmative Defense—Design Immunity*. Also in this case, the introductory paragraph might begin with "Even if [*name of defendant*] proves both of these elements" (from No. 1123).

~~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 third element, substantial evidence of reasonableness, must be tried by the court, not the jury. (*Id.* at pp. 66-67; see Gov. Code, § 830.6.) The first two elements, causation and discretionary approval, are issues of fact for the jury to decide. (*Cornette*, *supra*, 26 Cal.4th 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 only be resolved as issues of law if facts are undisputed].) But, as a practical matter, these elements are usually stipulated to or otherwise established~~

~~so they seldom become issues for the jury.~~

Users should include CACI No. 1102, *Definition of "Dangerous Condition,"* and CACI No. 1103, *Notice*, to define ~~"notice" and~~ "dangerous condition" and "notice" in connection with this instruction. Additionally, the meaning and legal requirements for a "change of physical condition" have been the subject of numerous decisions involving specific contexts. Appropriate additional instructions to account for these decisions may be necessary.

Sources and Authority

- Design Immunity. Government Code section 830.6. ~~provides: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement 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, if the trial or appellate court determines that 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. Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. However, where a person fails to heed such warning or occupies public property despite such warning, such failure or occupation shall not in itself constitute an assumption of the risk of the danger indicated by the warning."~~

- "[W]here a plan or design of a construction of, or improvement to, public property, although shown to have been reasonably approved in advance or prepared in conformity with standards previously so approved, as being safe, nevertheless in its actual operation under *changed physical conditions* produces a dangerous condition of public property and causes injury, the public entity does not retain the statutory immunity from liability conferred on it by section 830.6." (*Dammann v. Golden Gate Bridge, Highway & Transportation Dist.* (2012) 212 Cal.App.4th 335, 343 [150 Cal.Rptr.3d 829], quoting *Baldwin v. State* (1972) 6 Cal.3d 424, 438 [99 Cal.Rptr. 145, 491 P.2d 1121], original italics.)

- " "Design immunity does not necessarily continue in perpetuity. To demonstrate loss of design immunity a plaintiff must also establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the

funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings." (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332]~~, *supra*, 26 Cal.4th at p. 66~~ ___, internal citations omitted.)

- "The rationale for 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." (*Cornette, supra*, 26 Cal.4th at p. 69, internal citation 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.' The question presented by this case is whether the Legislature intended that the three issues involved in determining whether a public entity has lost its design immunity should also be tried by the court. Our examination of the text of section 830.6, the legislative history of that section, and our prior decisions leads us to the conclusion that, where triable issues of material fact are presented, as they were here, a plaintiff has a right to a jury trial as to the issues involved in loss of design immunity." (*Cornette, supra,* 26 Cal.4th at pp. 66-67.)

- "[T]echnological advances … do not constitute the 'changed physical conditions' necessary to defeat the [defendant]'s defense of design immunity under *Baldwin* and *Cornette*." (*Dammann, supra,* 22 Cal.App.4th at p. 351.)

Secondary Sources

5 Witkin, Summary of California Law (10th Ed. 2005), Torts § 284

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, Liability For "Dangerous Conditions" Of Public Property, ¶ 2:2865 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[3][b] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act*, § 464.85 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.12 (Matthew Bender)

1244. Affirmative Defense—Sophisticated User

[*Name of defendant*] claims that [he/she/it] is not responsible for any harm to [*name of plaintiff*] based on a failure to warn because [*name of plaintiff*] is a sophisticated user of the [*product*]. To succeed on this defense, [*name of defendant*] must prove that, at the time of the injury, [*name of plaintiff*], because of [his/her] particular position, training, experience, knowledge, or skill, knew or should have known of the [*product*]'s risk, harm, or danger.

New October 2008; Revised December 2014

Directions for Use

Give this instruction as a defense to CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*, or CACI No. 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements*.

In some cases, it may be necessary to expand this instruction to state that the plaintiff knew or should have known of the particular risk posed by the product, of the severity of the potential consequences, and how to use the product to reduce or avoid the risks, to the extent that information was known to the defendant. (See *Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522, 536 [166 Cal.Rptr.3d 202].)

Sources and Authority

- "A manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 71 [74 Cal.Rptr.3d 108, 179 P.3d 905].)

- "The sophisticated user defense exempts manufacturers from their typical obligation to provide product users with warnings about the products' potential hazards. The defense is considered an exception to the manufacturer's general duty to warn consumers, and therefore, in most jurisdictions, if successfully argued, acts as an affirmative defense to negate the manufacturer's duty to warn." (*Johnson, supra,* 43 Cal.4th at p. 65, internal citation omitted.)

- "Under the sophisticated user defense, sophisticated users need not be warned about dangers of which they are already aware or should be aware. Because these sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause. The rationale supporting the defense is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers.' This is because the user's knowledge of the dangers is the equivalent of prior notice." (*Johnson, supra,* 43 Cal.4th at p. 65, internal citations omitted.)

- "[T]he defense applies equally to strict liability and negligent failure to warn cases. The duty to

warn is measured by what is generally known or should have been known to the class of sophisticated users, rather than by the individual plaintiff's subjective knowledge." (*Johnson, supra,* 43 Cal.4th at pp. 65–66, internal citations omitted.)

- "[A] manufacturer is not liable to a sophisticated user for failure to warn, even if the failure to warn is a failure to provide a warning required by statute." (*Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549, 556 [101 Cal.Rptr.3d 726].)

- "The sophisticated user defense concerns warnings. Sophisticated users 'are charged with knowing the particular product's dangers.' 'The rationale supporting the defense is that "the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers." [Citation.]' [¶] [Plaintiff]'s design defect cause of action was not concerned with warnings. Instead, he alleged that respondents' design of their refrigerant was defective. We see no logical reason why a defense that is based on the need for warning should apply." (*Johnson, supra,* 179 Cal.App.4th at p. 559, internal citations omitted.)

- "The relevant time for determining user sophistication for purposes of this exception to a manufacturer's duty to warn is when the sophisticated user is injured and knew or should have known of the risk." (*Johnson, supra,* 43 Cal.4th at p. 73.)

- "*Johnson* did not impute an intermediary's knowledge to the plaintiff, or charge him with any knowledge except that which had been made available to him through his training and which, by reason of his profession and certification, he should have had. In contrast, [defendant]'s proposed instruction is not based on the theory that [plaintiff] had the opportunity to acquire any knowledge of the dangers of asbestos, let alone the obligation to do so. Instead, it contends that its customers … knew or should have known (from public sources) of the dangers of asbestos, and that its duty to warn [plaintiff] is measured by the knowledge [the customers] should have had. It is apparent that such a theory has nothing to do with *Johnson*." (*Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 28–29 [117 Cal.Rptr.3d 791].)

- "Thus, in actions by employees or servants, the critical issue concerns their knowledge (or potential knowledge), rather than an intermediary's sophistication. [¶] This conclusion flows directly from [Restatement Third of Torts] section 388 itself. Under section 388, a supplier of a dangerous item to users 'directly or through a third person' is subject to liability for a failure to warn, when the supplier 'has no reason to believe that those for whose use the [item] is supplied will realize its dangerous condition.' Accordingly, to avoid liability, there must be some basis for the supplier to believe that the ultimate user knows, or should know, of the item's hazards. In view of this requirement, the intermediary's sophistication is not, as matter of law, sufficient to avert liability; there must be a sufficient reason for believing that the intermediary's sophistication is likely to operate to protect the user, or that the user is likely to discover the hazards in some other manner. The fact that the user is an employee or servant of the sophisticated intermediary cannot plausibly be regarded as a sufficient reason, as a matter of law, to infer that the latter will protect the former. We therefore reject [defendant]' s contention that an intermediary's sophistication invariably shields suppliers from liability to the intermediary's employees or servants." (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1296−1297 [164 Cal.Rptr.3d 112].)

- "In order to establish the defense, a manufacturer must demonstrate that sophisticated users of the product know what the risks are, including the degree of danger involved (i.e., the severity of the potential injury), and how to use the product to reduce or avoid the risks, to the extent that information is known to the manufacturer." (*Buckner*, *supra*, ~~*v. Milwaukee Electric Tool Corp.* (2013)~~ 222 Cal.App.4th at p.~~522,~~ 536 ~~[166 Cal.Rptr.3d 202]~~.)

- "[S]peculation about a risk does not give rise to constructive knowledge of a risk under the 'should have known' test." (*Scott v. Ford Motor Co.* (2014) 224 Cal.App.4th 1492, 1501 [169 Cal.Rptr.3d 823].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467, 1537, 1541–1542

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶ 2:1277 (The Rutter Group)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.185 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.246 (Matthew Bender)

VF-1201. Strict Products Liability—Design Defect~~—Consumer Expectation Test~~—Affirmative Defense—Misuse or Modification

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We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?
____ 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 the [*product*] [misused/ [or] modified] after it left [*name of defendant*]'s possession in a way that was so highly extraordinary that it was not reasonably foreseeable to [him/her/it]?
____ Yes ____ No

If your answer to question 2 is yes, then answer question 3. If you answered no, skip question 3 and answer question 4.

3. Was the [misuse/ [or] modification] the sole cause of [*name of plaintiff*]'s harm?
____ Yes ____ No

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

[4. Is the [*product*] one about which an ordinary consumer can form reasonable minimum safety expectations?
____ Yes ____ No

If your answer to question 4 is yes, answer question 5. If your answer is no, skip question 5 and answer question 6.]

4[5. Did the [*product*] fail to perform as safely as an ordinary consumer would have expected when used or misused in an intended or reasonably foreseeable way?
____ Yes ____ No

Regardless of your answer to question 5, answer question 6~~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~~.]

[6. Did the risk of the [*product*]'s design outweigh the benefits of the design?
____ Yes ____ No

If your answer to either question 5 or question 6 is yes, answer question 7. If you

answered no to both questions 5 and 6, stop here, answer no further questions, and have the presiding juror sign and date this form.]

~~5~~7. Was the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question ~~5~~ 7 is yes, then answer question ~~6~~8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~6~~8. What are [*name of plaintiff*]'s damages?

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised October 2004, April 2007, April 2009, December 2010, June 2011, December 2011, December 2014

Directions for Use

This verdict form is based on CACI Nos. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements*, 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*, and 1245, *Affirmative Defense—Product Misuse or Modification*. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 9 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue*, may be added at the end.

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

This verdict form can be used in a case in which the jury will decide design defect under both the consumer expectation and the risk-benefit tests. If only the risk-benefit test is at issue, omit questions 4 and 5. If only the consumer expectation test is at issue, omit question 6. Modify the transitional language following questions 5 and 6 if only one test is at issue in the case. Include question 4 if the court has decided to give to the jury the preliminary question as to whether the consumer expectation test can be applied to the product at issue in the case. (See *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233–1234 [115 Cal.Rptr.3d 151].)~~This verdict form is based on CACI No. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements*, and CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 10 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue*, may be added at the end.~~

An additional question may be needed if the defendant claims that the plaintiff's injuries were caused by some product other than the defendant's.

If specificity is not required, users do not have to itemize all the damages listed in question ~~6~~8. The breakdown is optional depending on the circumstances.

~~If there are multiple causes of action, users may wish to combine the individual forms into one form. However, do not combine this verdict form with CACI No. VF-1202, *Strict Products Liability—Design Defect—Risk-Benefit Test*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431]) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer expectation test.~~ If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

VF-1202. Strict Products Liability—Design Defect—Risk-Benefit Test

Revoked December 2014; See CACI No. VF-1201

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?
____ 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 the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

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

3. Did the risks of the [*product*]'s design outweigh the benefits of the design?
____ Yes ____ No

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

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

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

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

[c. Past noneconomic loss, including [physical

~~pain/mental suffering:]~~

~~$ _____]~~

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

~~$ _____]~~

~~TOTAL $ _____~~

~~Signed: _____~~
~~Presiding Juror~~

~~Dated: _____~~

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

~~*New September 2003; Revised April 2007, April 2009, December 2010, June 2011*~~

~~Directions for Use~~

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

~~This verdict form is based on CACI No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*. If product misuse or modification is alleged as a complete defense (see CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*), questions 2 and 3 of CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification*, may be included after question 1. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 7 through 9 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue*, may be added at the end.~~

~~If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional depending on the circumstances.~~

~~If there are multiple causes of action, users may wish to combine the individual forms into one form. However, do not combine this verdict form with CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431]) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer-expectation test. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.~~

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

1620. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*]'s conduct caused [him/her] to suffer serious emotional distress. 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*] suffered serious emotional distress; and**

3. **That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s serious emotional distress.**

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 June 2014, December 2014

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 "direct victim" case is one in which the plaintiff's claim of emotional distress is based on the violation of a duty that the defendant owes directly to the plaintiff. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205 [147 Cal.Rptr.3d 41].) The California Supreme Court has allowed plaintiffs to recover damages as "direct victims" in only three types of factual situations: (1) the negligent mishandling of corpses (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 879 [2 Cal.Rptr.2d 79, 820 P.2d 181]); (2) the negligent misdiagnosis of a disease that could potentially harm another (*Molien, supra,* 27 Cal.3d at p. 923); and (3) the negligent breach of a duty arising out of a preexisting relationship (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1076 [9 Cal.Rptr.2d 615, 831 P.2d 1197]).

The judge will normally decide whether a duty was owed to the plaintiff as a direct victim. If the issue of whether the plaintiff is a direct victim is contested, a special instruction with the factual dispute laid out for the jury will need to be drafted.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

If the plaintiff witnesses the injury of another, use CACI No. 1621, *Negligence—Recovery of Damages*

for Emotional Distress—No Physical Injury—Bystander—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*.

Elements 1 and 3 of this instruction could be modified for use in a strict products liability case. A plaintiff may seek damages for the emotional shock of viewing the injuries of another when the incident is caused by defendant's defective product. (*Kately v. Wilkinson* (1983) 148 Cal.App.3d 576, 587 [195 Cal.Rptr. 902].)

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].)

Sources and Authority

- " '[The] negligent causing of emotional distress is not an independent tort but the tort of negligence ... .' 'The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability.' " (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588 [257 Cal.Rptr. 98, 770 P.2d 278], internal citations omitted.)

- " 'Direct victim' cases are cases in which the plaintiff's claim of emotional distress is not based upon witnessing an injury to someone else, but rather is based upon the violation of a duty owed directly to the plaintiff." (*Ragland, supra,* 209 Cal.App.4th at p. 205.)

- "[D]uty is found where the plaintiff is a 'direct victim,' in that the emotional distress damages result from a duty owed the plaintiff 'that is "assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two." ' " (*McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1510 [97 Cal.Rptr.3d 555].)

- "We agree that the unqualified requirement of physical injury is no longer justifiable." (*Molien, supra,* 27 Cal.3d at p. 928.)

- "[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, ~~v. Jing~~ ~~(2010)~~* 189 Cal.App.4th at p.~~1354,~~ 1378 ~~[117 Cal.Rptr.3d 747]~~.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1004

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:215 et seq. (The Rutter Group)

1 California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.03 (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. (Matthew Bender)

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

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[*Name of plaintiff***] claims that [he/she] 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

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.

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].)

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 v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 836 [151 Cal.Rptr.3d 320].)

- "[A] plaintiff need not contemporaneously understand the defendant's conduct as *negligent*, as opposed to *harmful*. But the court confused awareness of negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim." (*Bird v. Saenz* (2002) 28 Cal.4th 910, 920 [123 Cal.Rptr.2d 465, 51 P.3d 324].)

- "*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 v. Hom* (1992) 2 Cal.App.4th 1264, 1271 [3 Cal.Rptr.2d 803].)

- " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien, supra*, 27 Cal.3d at pp. 927–928.)

- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong, supra, ~~v. Jing~~ (~~2010~~)* 189 Cal.App.4th at p.~~1354,~~ 1378 ~~[117 Cal.Rptr.3d 747]~~.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1007–1021

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)

1622. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***]'s conduct caused [him/her] to suffer serious emotional distress by exposing [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was exposed to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] as a result of [***name of defendant***]'s negligence;**

2. **That [***name of plaintiff***] suffered serious emotional distress from a fear that [he/she] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure;**

3. **That reliable medical or scientific opinion confirms that it is more likely than not that [***name of plaintiff***] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure; and**

4. **That [***name of defendant***]'s negligence was a substantial factor in causing [***name of plaintiff***]'s serious emotional distress.**

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 June 2014

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 currently injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

Recovery for emotional distress without other current harm or injury is allowed for negligent exposure to a disease-causing substance, but only if the plaintiff can establish that it is more likely than not that the plaintiff will contract the disease. (See *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 997 [25 Cal.Rptr.2d 550, 863 P.2d 795.) There may be other harmful agents and medical conditions that could support this claim for damages.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

If plaintiff alleges that defendant's conduct constituted oppression, fraud, or malice, then 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, should be read.

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].)

Sources and Authority

- " '[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact ... .' " (*Potter, supra,* 6 Cal.4th at p. 986, internal citation omitted.)

- "[T]he way to avoid damage awards for unreasonable fear, i.e., in those cases where the feared cancer is at best only remotely possible, is to require a showing of the actual likelihood of the feared cancer to establish its significance." (*Potter, supra,* 6 Cal.4th at p. 990.)

- "[D]amages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure." (*Potter, supra,* 6 Cal.4th at p. 997.)

- " '[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, ~~v. Jing~~ ~~(2010)~~* 189 Cal.App.4th at p.~~1354,~~ 1378 ~~[117 Cal.Rptr.3d 747]~~.)

- "[W]e hold that the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable." (*Potter, supra,* 6 Cal.4th at p. 1009.)

- "All of the policy concerns expressed in *Potter* apply with equal force in the fear of AIDS context." (*Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1074 [33 Cal.Rptr.2d 172].)

- "[Plaintiff parent] claims the likelihood of actual injury to [child] is immaterial and that, in short, the rule announced in *Potter* regarding fear of cancer should not be applied to a case involving fear of AIDS. We disagree." (*Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 786

[31 Cal.Rptr.2d 709].)

- "[W]hen a defendant demonstrates that a plaintiff's smoking is negligent and that a portion of the plaintiff's fear of developing cancer is attributable to the smoking, comparative fault principles may be applied in determining the extent to which the plaintiff's emotional distress damages for such fear should be reduced to reflect the proportion of such damages for which the plaintiff should properly bear the responsibility." (*Potter, supra,* 6 Cal.4th at pp. 965, 1011.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1036

Haning, et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages,* ¶ 3:218.6 (The Rutter Group)

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress,* § 5.02 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress,* § 362.11[3][c] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress,* § 153.38 (Matthew Bender)

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

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[*Name of plaintiff***] claims that [***name of defendant***] acted with [malice/oppression/fraudulent intent] in exposing [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] and that this conduct caused [***name of plaintiff***] to suffer serious emotional distress. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was exposed to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] as a result of [***name of defendant***]'s negligent conduct;**

2. **That [***name of defendant***] acted with [malice/oppression/fraudulent intent] because [***insert one or more of the following, as applicable***]:**

   [[*Name of defendant***] intended to cause injury to [***name of plaintiff***];] [or]**

   [[*Name of defendant***]'s conduct was despicable and was carried out with a willful or conscious disregard of [***name of plaintiff***]'s rights or safety;] [or]**

   [[*Name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in conscious disregard of [***name of plaintiff***]'s rights;] [or]**

   [[*Name of defendant***] intentionally misrepresented or concealed a material fact known to [***name of defendant***], intending to cause [***name of plaintiff***] harm;]**

3. **That [***name of plaintiff***] suffered serious emotional distress from a fear that [he/she] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure;**

4. **That reliable medical or scientific opinion confirms that [***name of plaintiff***]'s risk of developing [***insert applicable cancer, HIV, or AIDS***] was significantly increased by the exposure and has resulted in an actual risk that is significant; and**

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

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.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

New September 2003; Revised June 2014, December 2014

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. There is no separate tort or cause of action for "negligent infliction of emotional distress." The doctrine is one that allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise currently injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

Recovery for emotional distress without other current harm or injury is allowed for negligent exposure to a disease-causing substance. If the plaintiff can prove oppression, fraud, or malice, it is not necessary to establish that it is more likely than not that the plaintiff will contract the disease. (See *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 998 [25 Cal.Rptr.2d 550, 863 P.2d 795.) Use CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*, if plaintiff alleges exposure without oppression, fraud, or malice.

This instruction should be read in conjunction with either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.

"Oppression, fraud, or malice" is used here as defined by Civil Code section 3294, except that the higher "clear and convincing" burden of proof is not required in this context. (See *Potter, supra*, 6 Cal.4th at p. 1000.)

In some cases the judge should make clear that the defendant does not need to have known of the individual plaintiff where there is a broad exposure and plaintiff is a member of the class that was exposed.

The explanation in the next-to-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].)

Sources and Authority

- Punitive Damages: Malice, Oppression, and Fraud Defined. Civil Code section 3294(c).
- " '[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact ... .' " (*Potter, supra*, 6 Cal.4th at p. 986.)
- "[A] toxic exposure plaintiff need not meet the more likely than not threshold for fear of cancer recovery in a negligence action if the plaintiff pleads and proves that the defendant's conduct in causing the exposure amounts to 'oppression, fraud, or malice' as defined in Civil Code section 3294." (*Potter, supra*, 6 Cal.4th at p. 998.)
- " '[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.)

- "[D]amages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure." (*Potter, supra*, 6 Cal.4th at p. 997.)

- "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, ~~v. Jing~~ ~~(2010)~~* 189 Cal.App.4th at p.~~1354,~~ 1378 ~~[117 Cal.Rptr.3d 747]~~.)

- "All of the policy concerns expressed in ***Potter*** apply with equal force in the fear of AIDS context." (*Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1074 [33 Cal.Rptr.2d 172].)

- "[Plaintiff parent] claims the likelihood of actual injury to [child] is immaterial and that, in short, the rule announced in *Potter* regarding fear of cancer should not be applied to a case involving fear of AIDS. We disagree." (*Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 786 [31 Cal.Rptr.2d 709].)

- "Despicable conduct is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." (*Mock v. Mich. Millers Mut. Ins. Co.* (1992) 4 Cal.App.4th 306, 331 [5 Cal.Rptr.2d 594].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' " (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- ~~[Although]~~ "Civil Code section 3294 requires a plaintiff to prove oppression, fraud, or malice by 'clear and convincing evidence' for purposes of punitive damages~~,~~ recovery. We decline to impose this stringent burden of proof for recovery of fear of cancer damages in negligence cases for two reasons. First, we have already adopted strict limitations on the availability of damages for negligently inflicted fear of cancer; an additional hurdle at this point is unnecessary for public policy purposes. Second, to recover compensatory damages in an action for intentional infliction of emotional distress, a plaintiff need only prove the fact that a defendant intentionally inflicted such distress by a preponderance of the evidence. It is therefore both logical and consistent to utilize the same burden of proof for recovery of compensatory damages when a defendant has acted with 'oppression, fraud or malice' to negligently inflict emotional distress." ~~this higher burden of proof has not been applied to fear-of-cancer cases.~~ (*Potter, supra*, 6 Cal.4th at p. 1000, fn. 20.)

- "[W]hen a defendant demonstrates that a plaintiff's smoking is negligent and that a portion of the plaintiff's fear of developing cancer is attributable to the smoking, comparative fault principles may

be applied in determining the extent to which the plaintiff's emotional distress damages for such fear should be reduced to reflect the proportion of such damages for which the plaintiff should properly bear the responsibility." (*Potter, supra,* 6 Cal.4th at p. 1011.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1036

Haning, et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages,* ¶ 3:218.6 (The Rutter Group)

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32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress,* § 362.11[3][c] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress,* § 153.38 (Matthew Bender)

1803. Appropriation of Name or Likeness—Essential Factual Elements

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

1. **That [***name of defendant***] used [***name of plaintiff***]'s name, likeness, or identity without [his/her] permission;**

2. **That [***name of defendant***] gained a commercial benefit [or some other advantage] by using [***name of plaintiff***]'s name, likeness, or identity;**

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

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

~~**[5. That the privacy interests of [*name of plaintiff*] outweigh the public interest served by [*name of defendant*]'s use of [his/her] name, likeness, or identity.**~~

~~**In deciding whether [*name of plaintiff*]'s privacy interest outweighs the public's interest, you should consider where the information was used, the extent of the use, the public interest served by the use, and the seriousness of the interference with [*name of plaintiff*]'s privacy.]**~~

New September 2003; Revised December 2014

Directions for Use

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

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

If suing under both the common law and Civil Code section 3344, the judge may need to explain that a person's voice, for example, may qualify as "identity" if the voice is sufficient to cause listeners to identify the plaintiff. The two causes of action overlap, and the same conduct should be covered by both.

Even if the elements are established, the First Amendment may require that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information.~~The last bracketed element and the last bracketed paragraph are appropriate in cases that implicate a defendant's First Amendment right to freedom of expression and freedom of the press.~~ (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409~~–410~~ [114 Cal.Rptr.2d 307].) In a closely related right-of-publicity claim, the California Supreme Court has held that an artist who is faced

1803. Appropriation of Name or Likeness—Essential Factual Elements

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

1. **That [***name of defendant***] used [***name of plaintiff***]'s name, likeness, or identity without [his/her] permission;**

2. **That [***name of defendant***] gained a commercial benefit [or some other advantage] by using [***name of plaintiff***]'s name, likeness, or identity;**

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

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

~~**[5. That the privacy interests of [*name of plaintiff*] outweigh the public interest served by [*name of defendant*]'s use of [his/her] name, likeness, or identity.**~~

~~**In deciding whether [*name of plaintiff*]'s privacy interest outweighs the public's interest, you should consider where the information was used, the extent of the use, the public interest served by the use, and the seriousness of the interference with [*name of plaintiff*]'s privacy.]**~~

New September 2003; Revised December 2014

Directions for Use

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

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

If suing under both the common law and Civil Code section 3344, the judge may need to explain that a person's voice, for example, may qualify as "identity" if the voice is sufficient to cause listeners to identify the plaintiff. The two causes of action overlap, and the same conduct should be covered by both.

Even if the elements are established, the First Amendment may require that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information.~~The last bracketed element and the last bracketed paragraph are appropriate in cases that implicate a defendant's First Amendment right to freedom of expression and freedom of the press.~~ (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409~~–410~~ [114 Cal.Rptr.2d 307].) In a closely related right-of-publicity claim, the California Supreme Court has held that an artist who is faced

with a challenge to his or her work may raise as affirmative defense that the work is protected by the First Amendment because it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; see CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III).*) Therefore, if there is an issue of fact regarding a First Amendment balancing test, it most probably should be considered to be an affirmative defense. (Cf. *Gionfriddo, supra* ["Given the significant public interest in this sport, plaintiffs can only prevail if they demonstrate a substantial competing interest."].)

Sources and Authority

- "A common law cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417 [198 Cal.Rptr. 342], internal citations omitted.)

- "The common law cause of action may be stated by pleading the defendant's unauthorized use of the plaintiff's identity; the appropriation of the plaintiff's name, voice, likeness, signature, or photograph to the defendant's advantage, commercially or otherwise; and resulting injury." (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 684−685 [166 Cal.Rptr.3d 359].)~~Section 652C of the Restatement Second of Torts provides: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."~~

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)

- "[T]he appearance of an 'endorsement' is not the *sine qua non* of a claim for commercial appropriation." (*Eastwood, supra*, 149 Cal.App.3d at p. 419.)

- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)

- "The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278-279 [239 P.2d 630].)

- "Even if each of these elements is established, however, the common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to

be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409-410, internal citations and footnote omitted.)

- "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)

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

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 676–678

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

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

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

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

2336. Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements

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

1. **That [***name of plaintiff***] was insured under an insurance policy with [***name of defendant***];**

2. **That a lawsuit was brought against [***name of plaintiff***];**

3. **That [***name of plaintiff***] gave [***name of defendant***] timely notice that [he/she/it] had been sued;**

4. **That [***name of defendant***], unreasonably or without proper cause, failed to defend [***name of plaintiff***] against the lawsuit;**

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 October 2004; Revised December 2007, December 2014

Directions for Use

The instructions in this series assume that the plaintiff is an insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

~~This instruction also assumes that the judge~~The court will decide the issue of whether the claim was potentially covered by the policy. (See *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 52 [221 Cal.Rptr. 171].) If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute establishes a possibility of coverage and thus a duty to defend. (*North Counties Engineering, Inc. v. State Farm General Ins. Co.* (2014) 224 Cal.App.4th 902, 922 [169 Cal.Rptr.3d 726].) Therefore, the jury does not resolve factual disputes that determine coverage.~~If there are factual disputes regarding this issue, a special interrogatory could be used.~~

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. Note that an excess insurer generally owes no duty to defend without exhaustion of the primary coverage by judgment or~~

~~settlement.~~

Sources and Authority

- "A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* 78 Cal.App.4th 847, 881 [93 Cal. Rptr. 2d 364], internal citations omitted.)

- "To prevail in an action seeking declaratory relief on the question of the duty to defend, 'the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.' The duty to defend exists if the insurer 'becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.' " (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 [97 Cal.Rptr.3d 298, 211 P.3d 1083], original italics, internal citation omitted.)

- " ' [A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. … This duty … is separate from and broader than the insurer's duty to indemnify. … ' ' "[F]or an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. … Hence, the duty 'may exist even where coverage is in doubt and ultimately does not develop.' … " … ' " (*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323 [78 Cal.Rptr.3d 828], internal citations omitted.)

- "If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1506 [86 Cal.Rptr.3d 515].)

- "In determining its duty to defend, the insurer must consider facts from any source—the complaint, the insured, and other sources. An insurer does not have a continuing duty to investigate the potential for coverage if it has made an informed decision on coverage at the time of tender. However, where the information available at the time of tender shows no coverage, but information available later shows otherwise, a duty to defend may then arise." (*American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 26 [102 Cal.Rptr.3d 591], internal citations omitted.)

- "The duty does not depend on the labels given to the causes of action in the underlying claims against the insured; 'instead it rests on whether the *alleged facts or known extrinsic facts* reveal a *possibility* that the claim may be covered by the policy.' " (*Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969, 976 [144 Cal.Rptr.3d 12], original italics,

disapproved on other grounds in *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

- "The obligation of the insurer to defend is of vital importance to the insured. 'In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.' 'The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.' " (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831–832 [61 Cal.Rptr.2d 909], internal citations omitted.)

- "An anomalous situation would be created if, on the one hand, an insured can sue for the tort of breach of the implied covenant if the insurer accepts the defense and later refuses a reasonable settlement offer, but, on the other hand, an insured is denied tort recovery if the insurer simply refuses to defend. ... This dichotomy could have the effect of encouraging an insurer to stonewall the insured at the outset by simply refusing to defend." (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319–1320 [52 Cal.Rptr.2d 385].)

- "[T]he mere existence of a legal dispute does not create a potential for coverage: 'However, we have made clear that where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance, and the insurer may properly deny a defense. *Moreover, the law governing the insurer's duty to defend need not be settled at the time the insurer makes its decision*.' " (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 209 [97 Cal.Rptr.3d 568], original italics.)

- "The trial court erroneously thought that because the case law was 'unsettled' when the insurer first turned down the claim, that unsettledness created a potential for a covered claim. … [I]f an insurance company's denial of coverage is reasonable, as shown by substantial case law in favor of its position, there can be no bad faith even though the insurance company's position is *later* rejected by our state Supreme Court." (*Griffin Dewatering Corp., supra,* 176 Cal.App.4th at p. 179, original italics.)

- "Unresolved factual disputes impacting insurance coverage do not absolve the insurer of its duty to defend. 'If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend.' " (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 520 [115 Cal.Rptr.3d 42].)

- ~~"A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364], internal citations omitted.)~~

- " 'If the insurer is obliged to take up the defense of its insured, it must do so as soon as possible, both to protect the interests of the insured, and to limit its own exposure to loss. . . . [T]he duty to defend

must be assessed at the outset of the case.' It follows that a belated offer to pay the costs of defense may mitigate damages but will not cure the initial breach of duty." (*Shade Foods, Inc.*, *supra,* 78 Cal.App.4th at p. 881, internal citations omitted.)

- "No tender of defense is required if the insurer has already denied coverage of the claim. In such cases, notice of suit and tender of the defense are excused because other insurer has already expressed its unwillingness to undertake the defense." (Croskey et al., California~~.~~ Practice Guide: Insurance Litigation~~, (The Rutter Group)~~ ¶ 7:614 (The Rutter Group).)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 297

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, Third Party Cases—Refusal To Defend Cases, ¶¶ 12:598–12:650.5 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Defend, §§ 25.1–26.38

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.10–82.16 (Matthew Bender)

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

2407. Affirmative Defense—Employee's Duty to Mitigate Damages

[*Name of defendant***] claims that if [***name of plaintiff***] is entitled to any damages, they should be reduced by the amount that [he/she] could have earned from other employment. To succeed, [***name of defendant***] must prove all of the following:**

1. **That employment substantially similar to [***name of plaintiff***]'s former job was available to [him/her];**

2. **That [***name of plaintiff***] failed to make reasonable efforts to seek [and retain] this employment; and**

3. **The amount that [***name of plaintiff***] could have earned from this employment.**

In deciding whether the employment was substantially similar, you should consider, among other factors, whether:

(a) The nature of the work was different from [*name of plaintiff***]'s employment with [***name of defendant***];**

(b) The new position was substantially inferior to [*name of plaintiff***]'s former position;**

(c) The salary, benefits, and hours of the job were similar to [*name of plaintiff***]'s former job;**

(d) The new position required similar skills, background, and experience;

(e) The job responsibilities were similar; [and]

(f) The job was in the same locality; [and]

(g) [*insert other relevant factor(s)***].**

[In deciding whether [*name of plaintiff***] failed to make reasonable efforts to retain comparable employment, you should consider whether [***name of plaintiff***] quit or was discharged from that employment for a reason within [his/her] control.]**

New September 2003; Revised February 2007, December 2014

Directions for Use

This instruction may be given when there is evidence that the employee's damages could have been mitigated. The bracketed language at the end of the instruction regarding plaintiff's

failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502-1503 [44 Cal.Rptr.2d 565].

In deciding whether the plaintiff could have obtained a substantially similar job, the trier of fact may consider several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (See *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250-255 [106 Cal.Rptr. 283].) Read only those factors that have been shown by the evidence.

This instruction should be given in all employment cases, not just in breach of contract cases. See Chin et al., Cal. ifornia Practice Guide: Employment Litigation, ~~(Rutter Group)~~ ¶ 17:492 (Rutter Group).

This instruction should not be used for wrongful demotion cases.

Sources and Authority

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see also *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98 [127 Cal.Rptr. 222] ["Plaintiff concedes that the trial court was entitled to deduct her actual earnings"]; but see *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432 [165 Cal.Rptr.3d 441] [wages actually earned from an inferior job may not be used to mitigate damages].)

- "The burden is on the employer to prove that substantially similar employment was available which the wrongfully discharged employee could have obtained with reasonable effort." (*Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 616 [46 Cal.Rptr.2d 459].)

- "[W]e conclude that the trial court should not have deducted from plaintiff's recovery against defendant the amount that the court found she might have earned in employment which was substantially inferior to her position with defendant." (*Rabago-Alvarez, supra, ~~v. Dart Industries, Inc.~~* ~~(1976)~~ 55 Cal.App.3d at p. ~~91,~~ 99 ~~[127 Cal.Rptr. 222]~~.)

- "[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have earned by retaining that employment should be deducted from the amount of damages

which otherwise would have been awarded to the employee under the terms of the original employment agreement." (*Stanchfield, supra*, 37 Cal.App.4th at pp. 1502-1503.)

- "The location of the new job is one of the factors to consider in determining whether the new job is inferior." (*Villacorta, supra*, 221 Cal.App.4th at p. 1432.)

- "There is some authority for the proposition that whether or not the other employment is comparable or substantially similar or equivalent to the prior position is a question of fact. On the other hand the issue of substantial similarity or inferiority of employment is one that has often been decided as a matter of law in California."~~In deciding whether a school bus driver could have obtained a substantially similar job in other nearby school districts, the court looked at several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system.~~ (*California School Employees Assn.*, *supra*, ~~*v. Personnel Commission* (1973)~~ 30 Cal.App.3d at pp. 253−254 ~~241, 250-255 [106 Cal.Rptr. 283]~~, internal citations omitted.)

- "[S]elf-employment is not unreasonable mitigation as long as the discharged employee applies sufficient effort trying to make the business successful, even if those efforts fail." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284–1285 [134 Cal.Rptr.3d 883].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-F, *Mitigation Of Damages (Avoidable Consequences Doctrine)*, ¶¶ 17:490, 17:495, 17:497, 17:499–17:501 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.40–8.41

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[4] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)

2431. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy

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[*Name of plaintiff***] claims that [he/she] was forced to resign rather than commit a violation of public policy. It is a violation of public policy [***specify claim in case, e.g. , for an employer to require that an employee engage in price fixing***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That~~,~~ [***name of defendant***] required [***name of plaintiff***] to [***specify alleged conduct in violation of public policy, e.g., "engage in price fixing"***];**

3. **That this requirement was so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

4. **That [***name of plaintiff***] resigned because of this requirement;**

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

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

New September 2003; Revised June 2014, December 2014

Directions for Use

This instruction should be given if a plaintiff claims that his or her constructive termination was wrongful because the defendant required the plaintiff to commit an act in violation of public policy. If the plaintiff alleges he or she was subjected to intolerable working conditions that violate public policy, see CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*.

This instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* See also CACI No. 2510, *"Constructive Discharge" Explained*.

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal. Rptr. 2d 874, 824 P.2d 680; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 80 fn. 6 [78 Cal. Rptr. 2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Sources and Authority

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy,

the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "[A]n employer's authority over its employees does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer." (*Tameny, supra,* 27 Cal.3d at p. 178.)

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

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

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 222

Chin et al., Cal~~.~~ifornia Practice Guide: Employment Litigation, Ch. 4-G, Constructive Discharge, ~~(The Rutter Group)~~ ¶¶ 4:405–406, 4:409–410, 4:421–422~~, 5:2, 5:45–47, 5:50, 5:70, 5:105, 5:115, 5:150–151, 5:170, 5:195, 5:220~~ (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, Wrongful Discharge In Violation Of Public Policy (Tameny Claims), ¶¶ 5:2, 5:45–5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–5.46

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

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline,* §§ 249.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and*

Discipline, §§ 100.31, 100.35–100.38 (Matthew Bender)

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

2432. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions ~~for Improper Purpose~~ That Violate~~s~~ Public Policy

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[*Name of plaintiff***] claims that [***name of defendant***] forced [him/her] to resign for reasons that violate public policy. It is a violation of public policy [***specify claim in case, e.g., for an employer to require an employee to work more than forty hours a week for less than minimum wage***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of plaintiff***] was subjected to working conditions that violated public policy, in that [***describe conditions imposed on the employee that constitute the violation, e.g., "[name of plaintiff] was treated ~~intolerably in retaliation for filing a workers' compensation claim~~required to work more than forty hours a week for less than minimum wage"***];**

3. **That [***name of defendant***] intentionally created or knowingly permitted these working conditions;**

4. **That these working conditions were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

5. **That [***name of plaintiff***] resigned because of these working conditions;**

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

7. **That the working conditions were a substantial factor in causing [***name of plaintiff***]'s harm.**

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff***]'s position.**

New September 2003; Revised December 2014

Directions for Use

This instruction should be given if plaintiff claims that his or her constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy. The instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* See also CACI No. 2510, *"Constructive Discharge" Explained.*

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal. Rptr. 2d 874, 824 P.2d 680; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66,

80 fn. 6 [78 Cal. Rptr. 2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Sources and Authority

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

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

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "Plaintiffs assert, in essence, that they were terminated for refusing to engage in conduct that violated fundamental public policy, to wit, nonconsensual sexual acts. They also assert, in effect, that they were discharged in retaliation for attempting to exercise a fundamental right -- the right to be free from sexual assault and harassment. Under either theory, plaintiffs, in short, should have been granted leave to amend to plead a cause of action for wrongful discharge in violation of public policy." (~~In~~ *Rojo v. Kliger* (1990) 52 Cal.3d 65, ~~88~~ 91 [276 Cal.Rptr. 130, 801 P.2d 373].~~), the court held that an employee terminated in retaliation for refusing her employer's sexual advances may state a wrongful termination cause of action in tort.~~

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner,*

supra, 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 222

Chin et al., Cal~~.~~ifornia Practice Guide: Employment Litigation, Ch. 4-G, Constructive Discharge, ~~(The Rutter Group)~~ ¶¶ 4:405–4:406, 4:409–4:411, 4:421–4:422~~, 5:2, 5:45–5:47~~ (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, Wrongful Discharge In Violation Of Public Policy (Tameny Claims), ¶¶ 5:2, 5:45–5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–5.46

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

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline,* §§ 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and*

Discipline, §§ 100.31, 100.32, 100.36–100.38 (Matthew Bender)

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

2442. Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements (Gov. Code, § 8547.8(c))

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

1. **That [***name of plaintiff***] [***specify protected disclosure, e.g., reported waste, fraud, abuse of authority, violation of law, threats to public health, bribery, misuse of government property***];**

2. **That [***name of plaintiff***]'s communication [disclosed/ [or] demonstrated an intention to disclose] evidence of [an improper governmental activity/ [or] a condition that could significantly threaten the health or safety of employees or the public];**

3. **That [***name of plaintiff***] made this communication in good faith [for the purpose of remediating the health or safety condition];**

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

5. **That [***name of plaintiff***]'s communication was a contributing factor in [***name of defendant***]'s decision to discharge [***name of plaintiff***];**

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

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

New December 2014

Directions for Use

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

While retaliatory discharge is clearly within the statute, adverse employment actions short of discharge are also prohibited. For adverse actions other than termination, replace "discharged" in the opening paragraph and in element 4, and "discharge" in element 5, with the applicable action. See CACI No. 2509, *"Adverse Employment Action" Explained*, and CACI No. 2510, *"Constructive Discharge" Explained*, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 2 alleges a protected disclosure. (See Gov. Code, § 8547.2(e) ["protected disclosure" defined].)

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

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

The statute addresses the possibility of a mixed-motive adverse action. If the plaintiff can establish that a protected disclosure was a "contributing factor" to the adverse action (see element 5), the employer may offer evidence to attempt to prove by clear and convincing evidence that it would have taken the same action for other permitted reasons. (Gov. Code, § 8547.8(e); see CACI No. 2443, *Affirmative Defense—Same Decision*.)

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

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Civil Action Under California Whistleblower Protection Act. Government Code section 8547.8(c).
- "Improper Governmental Activity" Defined. Government Code section 8547.2(c).
- "Person" Defined. Government Code section 8547.2(d).
- "Protected Disclosure" Defined. Government Code section 8547.2(e).
- Governmental Claims Act Not Applicable. Government Code section 905.2(h).
- "The [Whistleblower Protection Act] prohibits improper governmental activities, which include interference with or retaliation for reporting such activities." (*Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 939 [163 Cal.Rptr.3d 530].)
- "[Government Code] Section 8547.8 requires a state employee who is a victim of conduct

> prohibited by the [Whistleblower Protection] Act to file a written complaint with the Personnel Board within 12 months of the events at issue and instructs, 'any action for damages shall not be available to the injured party …' unless he or she has filed such a complaint. The Legislature could hardly have used stronger language to indicate its intent that compliance with the administrative procedure of sections 8547.8 and 19683 is to be regarded as a mandatory prerequisite to a suit for damages under the Act than to say a civil action is 'not … available' to persons who have not complied with the procedure." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1112−1113 [150 Cal.Rptr.3d 405], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005), Agency §§ 284 et seq.

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

2443. Affirmative Defense—Same Decision (Gov. Code, § 8547.8(e))

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

New December 2014

Directions for Use

Give this instruction in a so-called same-decision or mixed-motive case under the California Whistleblower Protection Act. (See Gov. Code, § 8547 et seq.; CACI No. 2442, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Gov. Code, § 8547.8(e).)

Select "refusing an illegal order" if the court has allowed the case to proceed based on that basis. The affirmative defense statute includes refusing an illegal order as protected activity along with making a protected disclosure. The statute that creates the plaintiff's cause of action does not expressly mention refusing an illegal order (Compare Gov. Code, § 8547.8(e) with Gov. Code, § 8547.2(c).) See the Directions for Use to CACI No. 2442.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Same-Decision Affirmative Defense. Government Code section 8547.8(e).

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005), Agency §§ 284 et seq.

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

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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

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

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

3. **~~[~~That [***name of defendant***] ~~[~~knew that [***name of plaintiff***] had~~/treated [***name of plaintiff***] as if [he/she] had~~ [a history of having] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];~~] [or]~~**

   ~~[That [*name of defendant***] [knew that [***name of plaintiff***] had/treated [***name of plaintiff***] as if [he/she] had] a history of having [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];]~~**

4. **That [***name of plaintiff***] was able to perform the essential job duties [with reasonable accommodation for [his/her] [***e.g., physical condition***]];**

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

   [or]

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

   [or]

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

6. **~~[~~That [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];~~] [or]~~**

   ~~[That [*name of defendant***]'s belief that [***name of plaintiff***] had [a history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];]~~**

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

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

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013, December 2014

Directions for Use

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

In the introductory paragraph and in elements 3 and 6, select the bracketed language on "history" of disability ~~include "perceived" or "history of"~~ if the claim of discrimination is based on a ~~perceived disability or a~~ history of disability rather than a current actual disability.

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

~~Under element 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "knew that [*name of plaintiff*] had." For a perceived disability, select "treated [*name of plaintiff*] as if [he/she] had."~~ Modify elements 3 and 6 if plaintiff was not actually disabled or had a history of disability, but alleges discrimination because he or she was perceived to be disabled. (See Gov. Code, § 12926(o); see also~~See~~ Gov. Code, § 12926(j)(4), (~~l~~m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) This can be done with language in element 3 that the employer "treated [*name of plaintiff*] as if [he/she] ... " and with language in element 6 "That [*name of employer*]'s belief that … ."

If the plaintiff alleges discrimination on the basis of his or her association with someone who was or was perceived to be disabled, give CACI No. 2547, *Disability-Based Associational Discrimination—Essential Factual Elements.* (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655−660 [163 Cal.Rptr.3d 392] [claim for "disability based associational discrimination" adequately pled].)

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

Regarding element 4, it is now settled that the ability to perform the essential duties of the job is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P.3d 118].)

Read the first option for element 5 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact

for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(i), (j), (m).)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Inability to Perform Essential Job Duties. Government Code section 12940(a)(1).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Perception of Disability and Assocation With Disabled Person Protected. Government Code section 12926(o).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ' " ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion … ." ' " …' The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff's prima facie case can vary considerably, generally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable *inference* of discrimination." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)
- "If the employee meets this [prima facie] burden, it is then incumbent on the employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. When this showing is made,

the burden shifts back to the employee to produce substantial evidence that employer's given reason was either 'untrue or pretextual,' or that the employer acted with discriminatory animus, in order to raise an inference of discrimination." (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744 [151 Cal.Rptr.3d 292], internal citations omitted.)

- "Summary adjudication of the section 12940(a) claim … turns on … whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the 'qualified individual with a disability' requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]'s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)

- "At most, [plaintiff] alleges only that he anticipated becoming disabled for some time after the organ donation. This is insufficient. [Plaintiff] cannot pursue a cause of action for discrimination under FEHA on the basis of his 'actual' physical disability in the absence of factual allegations that he was in fact, physically disabled." (*Rope*, *supra*, 220 Cal.App.4th at p. 659.)

- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the 'myths, fears or stereotypes' frequently associated with disabilities. … However, the statutory language does not expressly restrict FEHA's protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the 'regarded as' definition casts a broader net and protects *any* individual 'regarded' or 'treated' by an employer 'as having, or having had, any physical condition that makes achievement of a major life activity difficult' or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)

- "We say on this record that [defendant] took action against [plaintiff] based on concerns or fear about his possible future disability. The relevant FEHA definition of an individual regarded as disabled applies only to those who suffer certain specified physical disabilities or those who have a condition with 'no present disabling effect' but which 'may become a physical disability … .' According to the pleadings, [defendant] fired [plaintiff] to avoid accommodating him because of his association with his physically disabled sister. That is not a basis for liability under the 'regarded as' disabled standard." (*Rope, supra, ~~v. Auto-Chlor System of Washington, Inc.~~ (~~2013~~)* 220 Cal.App.4th at p.~~635,~~ 659 ~~[163 Cal.Rptr.3d 392]~~, internal citations omitted.)

- " 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. … While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations … ." … ' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.2d 338].)

- "[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 166 [125 Cal.Rptr.3d 1], internal citations omitted.)

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

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

- "Being unable to work during pregnancy is a disability for the purposes of section 12940." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1340 [153 Cal.Rptr.3d 367].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA),* ¶¶ 9:2160–9:2241 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation § 2:46 (Thomson Reuters)

2547. Disability-Based Associational Discrimination—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] association with a disabled person. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of plaintiff***] was [***specify basis of association or relationship, e.g., the brother of [name of disabled person]***], who had [a] [***e.g., physical condition***];**

4. [**That [***name of disabled person***]'s [***e.g., physical condition***] was costly to [***name of defendant***] because [***specify reason, e.g., [name of disabled person] was covered under [plaintiff]'s employer-provided health care plan***];]**

   [or]

   [That [*name of defendant***] feared [***name of plaintiff***]'s association with [***name of disabled person***] because [***specify, e.g., [name of disabled person] has a disability with a genetic component and [name of plaintiff] may develop the disability as well***];]**

   [or]

   [That [*name of plaintiff***] was somewhat inattentive at work because [***name of disabled person***]'s [***e.g., physical condition***] requires [***name of plaintiff***]'s attention, but not so inattentive that to perform to [***name of defendant***]'s satisfaction [***name of plaintiff***] would need an accommodation;]**

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

   [or]

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

   [or]

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

6. **That [***name of plaintiff***]'s association with [***name of disabled person***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

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

New December 2014

Directions for Use

Give this instruction if plaintiff claims that he or she was subjected to an adverse employment action because of his or her association with a disabled person. Discrimination based on an employee's association with a person who is (or is perceived to be) disabled is an unlawful employment practice under the FEHA. (See Gov. Code, § 12926(o).)

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

Three versions of disability-based associational discrimination have been recognized, called "expense," "disability by association," and "distraction." (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655−660 [163 Cal.Rptr.3d 392] [claim for "disability-based associational discrimination" adequately pled].) Element 4 sets forth options for the three versions.

Read the first option for element 5 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

If the existence of the associate's disability is disputed, additional instructions defining "medical condition," "mental disability," and "physical disability," may be required. (See Gov. Code, § 12926(i), (j), (m).)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).

- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Association With Disabled Person Protected. Government Code section 12926(o).
- " 'Three types of situation are, we believe, within the intended scope of the rarely litigated … association section. We'll call them "expense," "disability by association," and "distraction." They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.' " (*Rope, supra,* 220 Cal.App.4th at p. 657.)
- " '[A]n employer who discriminates against an employee because of the latter's association with a disabled person is liable even if the motivation is purely monetary. But if the disability plays no role in the employer's decision … then there is no *disability* discrimination.' " (*Rope, supra,* 220 Cal.App.4th at p.658.)
- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)
- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005), Constitutional Law § 936

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, Disability Discrimination—California Fair Employment And Housing Act (FEHA), ¶¶ 9:2213-9:2215 (The Rutter Group)

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

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

1. **That [***name of defendant***] was [***name of plaintiff***]'s employer;**

2. **[That [***name of defendant***] believed that [***name of plaintiff***] [had disclosed/might disclose] to a [government agency/law enforcement agency/person with authority over [***name of plaintiff***]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [***specify information disclosed***];]**

   [*or***]**

   [That [*name of plaintiff***] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;**

   [*or***]**

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

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

   [*or***]**

   [That [*name of plaintiff***] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***]'s participation in [***specify activity***] would result in [a violation of a [state/federal statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

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

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

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

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

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

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

[A disclosure is protected even though disclosing the information may be part of [*name of plaintiff***]'s job duties.]**

New December 2012; Revised June 2013, December 2013, Revoked June 2014; Restored and Revised December 2014

Directions for Use

The whistle-blower protection statute of the Labor Code prohibits retaliation against an employee who discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c).) Liabiliity may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)−(d).) Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant.

Select the first option for elements 2 and 3 for disclosure of information; select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity. In the first option for element 2, choose "might disclose" if the allegation is that the employer believed that the employee might disclose the information in the future. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648−649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].)

Select any of the optional paragraphs explaining what disclosures are and are not protected as appropriate to the facts of the case. It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].)

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

The employee must demonstrate by a preponderance of evidence that a protected activity was a

contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 2731, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.

- Affirmative Defense: Same Decision. Labor Code section 1102.6.

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

- "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)

- "As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute 'disclosing information' or a 'protected disclosure' under the California statutes." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 847.)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not

subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman, supra,* 202 Cal.App.4th at pp. 852–853.)

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

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

- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)

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

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

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment § 349

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

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

60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 250.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42 et seq. (Matthew Bender)

2732. Retaliatory Unfair Immigration-Related Practice—Essential Factual Elements (Lab. Code, § 1019)

[*Name of plaintiff***] claims that [***name of defendant***] [***specify unfair immigration-related practice, e.g., threatened to report [him/her] to immigration authorities***] in retaliation for [his/her] [***specify right, e.g., making a claim for minimum wage***]. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***]**

   [in good faith filed a complaint or informed someone about [*name of defendant***]'s alleged [***specify violation of Labor Code or local ordinance, e.g., failure to pay the minimum wage to its employees***][;/.]]**

   [or]

   [sought information regarding whether or not [*name of defendant***] was in compliance with [***specify requirement under Labor Code or local ordinance, e.g., minimum wage requirements***][;/.]]**

   [or]

   [informed someone of that person's potential rights and remedies for [*name of defendant***]'s alleged [***specify violation of Labor Code or local ordinance, e.g., failure to pay the minimum wage to its employees***] and assisted [him/her] in asserting those rights[;/.]]**

   [or]

   [*specify other exercise of rights provided by the Labor Code or local ordinance that is alleged to have caused defendant to retaliate against plaintiff***].]**

2. **That [***name of defendant***]**

   [requested more or different documents than those that are required by federal immigration law, or refused to honor documents that on their face reasonably appeared to be genuine[;/.]]

   [or]

   [used the federal E-Verify system to check the employment authorization status of [*name of plaintiff***] at a time or in a manner not required or authorized by federal immigration law[;/.]]**

   [or]

   [filed or threatened to file a false [police report/report or complaint with a state or local

agency][;/.]]

[or]

[contacted or threatened to contact immigration authorities.]

3. **That [***name of defendant***]'s conduct was for the purpose of, or with the intent of, retaliating against [***name of plaintiff***] for exercising [his/her] legally protected rights;**

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

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

[If you find that [*name of defendant***] acted as described in element 2 fewer than 90 days after [***name of plaintiff***] acted as described in element 1, you may but are not required to conclude, without further evidence, that [***name of defendant***] acted with a retaliatory purpose and intent.]**

New December 2014

Directions for Use

One who is the victim of an "unfair immigration-related practice" as defined, or his or her representative, may bring a civil action for equitable relief and any damages or penalties. (Lab. Code, § 1019(a).) While most commonly this claim would be brought by an employee against an employer, the statute prohibits unfair immigration-related practices by "an employer or any other person" against "an employee or other person." (Lab. Code, § 1019(d)(1).) Therefore, the statute does not require an employment relationship between the parties.

While the statute specifies three particular employee activities that are protected, they are not exclusive. (See Lab. Code, § 1019(a) ["includes, but is not limited to"].) Therefore, any conduct can be stated in element 1 that is alleged to have caused retaliation for the plaintiff's exercise of legally protected rights.

The statute specifies four unfair immigration-related practices. This list would seem to be exclusive. (See Lab. Code, § 1019(b)(1) ["includes, but is not limited to" omitted].) Therefore, no "other" option is included for element 2.

Engaging in an unfair immigration-related practice against a person within 90 days of the person's exercise of protected rights raises a rebuttable presumption that the defendant did so in retaliation for the plaintiff's exercise of those rights. (Lab. Code, § 1019(c).) The statute does not specify whether the presumption is one affecting only the burden of producing evidence (see Evid. Code, §§ 603, 604) or one affecting the burden of proof. (See Evid. Code, § 605.) If the statute implements a public policy against the use of immigration-related coercion to deter workers from exercising their rights under the Labor Code, its presumption would affect the burden of proof. (See Evid. Code, § 605.) The last optional

paragraph of the instruction may then be given if applicable on its facts. If, however, the presumption affects only the burden of producing evidence, it ceases to exist when the defendant produces evidence rebutting the presumption, such as a reason for the action other than retaliation. (Evid. Code, § 604.) In that case, the last paragraph would not be given.

Sources and Authority

- Retaliatory Use of Immigration-Related Practices. Labor Code section 1019.
- Unlawful Employment of Aliens. 8 United States Code section 1324a.

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005), Agency § 337

Chin, et al., California Practice Guide: Employment Litigation, Ch. 7-E, Employment Discrimination—California Labor Code, ¶¶ 7:1510 et seq. (The Rutter Group)

3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—~~General Conditions of Confinement Claim~~Substantial Risk of Serious Harm (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to prison conditions that violated [his/her] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That while imprisoned, [***name of plaintiff***] was ~~imprisoned under conditions that~~ [***describe violation that created risk, e.g., ~~deprived [him/her] of out-of-cell exercise~~placed in a cell block with rival gang members***];**

2. **That [***name of defendant***]'s conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

3. **That [***name of defendant***] knew ~~or it was obvious~~ that [his/her~~/its~~] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

4. **That there was no reasonable justification for the conduct;**

5. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

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.**

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New September 2003; Revised December 2010, June 2011; Renumbered from CACI No. 3011 December 2012, Revised December 2014

Directions for Use

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811].) "Deliberate indifference" involves a two part inquiry. First, the inmate must show that the prison officials were aware of a "substantial risk of serious harm" to the inmate's health or safety. Second, the inmate must show that the prison officials had no "reasonable" justification for the deprivation, in spite of that risk. (*Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150.) Elements 3 and 4 express the deliberate-indifference components.

The "official duties" referred to in element 5 must be duties created pursuant to any 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 5.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)

- "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.)

- "A deprivation is sufficiently serious when the prison official's act or omission results 'in the denial of the minimal civilized measure of life's necessities.' " (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1074.)

- "The objective question of whether a prison officer's actions have exposed an inmate to a substantial risk of serious harm is a question of fact, and as such must be decided by a jury if there is any room for doubt." (*Lemire, supra,* 726 F.3d at pp. 1075−1076.)

- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer, supra*, 511 U.S. at p. 842, internal citation omitted.)

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer, supra*, 511 U.S. at p. 843 fn. 8.)

- "The second step, showing 'deliberate indifference,' involves a two part inquiry. First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to an inmate's health or safety. This part of our inquiry may be satisfied if the inmate shows that the risk posed by the deprivation is obvious. Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that risk." (*Thomas, supra,* 611 F.3d at p. 1150, footnotes and internal citations 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.)

- "[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731, internal citations omitted.)

- "The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)

- "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.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law § 826

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶¶ 11.02–11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.28 (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] with inadequate medical care in violation of [his/her] 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***] acted with deliberate indifference to this need;**

3. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

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

5. **That [***name of defendant***]'s deliberate indifference 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.

To establish "deliberate indifference," [*name of plaintiff***] must prove (1) that [***name of defendant***] knew [***name of plaintiff***] faced a substantial risk of serious harm and (2) that [he/she] disregarded that risk by failing to take reasonable measures to correct it. Negligence is not enough to establish deliberate indifference.**

[In determining whether [*name of defendant***] was deliberately indifferent, you should consider the personnel, financial, and other resources available to [him/her] or those that [he/she] could reasonably have obtained. [***Name of defendant***] is not responsible for services that [he/she] 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

Directions for Use

The "official duties" referred to in element 3 must be duties created ~~pursuant to any~~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 v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811], 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.)

- "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.)

- "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.)

- "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.)

- "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.)

- "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.)

Secondary Sources

3 Witkin, Cal. Criminal Law (4th ed. 2012) Punishment, § 244

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 826

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)

3070. Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Essential Factual Elements (Civ. Code, §§ 54.3, 55.56)

[*Name of defendant***] is the owner of [a/an] [***e.g., restaurant***] named [***name of business***] that is open to the public. [***Name of plaintiff***] is a disabled person who [***specify disability that creates accessibility problems***].**

[*Name of plaintiff***] claims that [he/she] was denied full and equal access to [***name of defendant***]'s business on a particular occasion because of physical barriers. To establish this claim, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of defendant***]'s business had barriers that violated construction-related accessibility standards in that [***specify barriers***]; and [either]**

2. **[That [***name of plaintiff***] personally encountered the violation on a particular occasion.]**

   [or]

   [That [*name of plaintiff***] was deterred from accessing [***name of defendant***]'s business on a particular occasion.]**

[A violation that [*name of plaintiff***] personally encountered may be sufficient to cause a denial of full and equal access if [he/she] experienced difficulty, discomfort, or embarrassment because of the violation.]**

[To prove that [*name of plaintiff***] was deterred from accessing [***name of defendant***]'s business on a particular occasion, [he/she] must prove both of the following:**

1. **That [***name of plaintiff***] had actual knowledge of one or more violations that prevented or reasonably dissuaded [him/her] from accessing [***name of defendant***]'s business, which [***name of plaintiff***] intended to patronize on a particular occasion.**

2. **That the violation(s) would have actually denied [***name of plaintiff***] full and equal access if [he/she] had tried to patronize [***name of defendant***]'s business on that particular occasion.]**

New December 2014

Directions for Use

Use this instruction if a plaintiff seeks statutory damages based on a construction-related accessibility claim under the Disabled Persons Act (DPA) or the Unruh Civil Rights Act. (See Civ. Code, § 55.56(a).) Do not give this instruction if actual damages are sought. CACI No. 3067, *Unruh Civil Rights Act—Damages,* may be given for claims for actual damages under the Unruh Act and adapted for use

under .the DPA.

The DPA provides disabled persons with rights of access to public facilities. (See Civ. Code, §§ 54, 54.1.) Under the DPA, a disabled person who encounters barriers to access at a public accommodation may recover minimum statutory damages for each particular occasion on which he or she was denied access. (Civ. Code, §§ 54.3, 55.56(e).) However, the Construction Related Accessibility Standard Act (CRASA) requires that before statutory damages may be recovered, the disabled person either have personally encountered the violation on a particular occasion or have been deterred from accessing the facility on a particular occasion. (See Civ. Code, § 55.56.)

Give either or both options for element 2 depending on whether the plaintiff personally encountered the barrier or was deterred from patronizing the business because of awareness of the barrier. The next-to-last paragraph is explanatory of the first option, and the last paragraph is explanatory of the second option.

Sources and Authority

- Disabled Persons Act: Right of Access to Public Facilities. Civil Code sections 54, 54.1.
- Action for Interference With Admittance to or Enjoyment of Public Facilities. Civil Code section 54.3.
- Construction-Related Accessibility Standard Act. Civil Code section 55.56.
- "Part 2.5 of division 1 of the Civil Code, currently consisting of sections 54 to 55.3, is commonly referred to as the "Disabled Persons Act," although it has no official title. Sections 54 and 54.1 generally guarantee individuals with disabilities equal access to public places, buildings, facilities and services, as well as common carriers, housing and places of public accommodation, while section 54.3 specifies remedies for violations of these guarantees, including a private action for damages." (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674 fn. 8 [94 Cal.Rptr.3d 685, 208 P.3d 623].)
- "[L]egislation (applicable to claims filed on or after Jan. 1, 2009 ([Civ. Code,] § 55.57)) restricts the availability of statutory damages under sections 52 and 54.3, permitting their recovery only if an accessibility violation actually denied the plaintiff full and equal access, that is, only if 'the plaintiff personally encountered the violation on a particular occasion, or the plaintiff was deterred from accessing a place of public accommodation on a particular occasion' (§ 55.56, subd. (b)). It also limits statutory damages to one assessment per occasion of access denial, rather than being based on the number of accessibility standards violated. (*Id.*, subd. (e).)" (*Munson, supra*, 46 Cal.4th at pp. 677−678.)
- " '[S]ection 54.3 imposes the standing requirement that the plaintiff have suffered an actual denial of equal access before any suit for damages can be brought. … [A] plaintiff cannot recover damages under section 54.3 unless the violation actually denied him or her access to some public facility. [¶] Plaintiff's attempt to equate a denial of equal access with the presence of a violation of federal or state regulations would nullify the standing requirement of section 54.3, since any

disabled person could sue for statutory damages whenever he or she encountered noncompliant facilities, regardless of whether that lack of compliance actually impaired the plaintiff's access to those facilities. Plaintiff's argument would thereby eliminate any distinction between a cause of action for equitable relief under section 55 and a cause of action for damages under section 54.3.' " (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1223 [99 Cal.Rptr.3d 746].)

- "Like the Unruh Civil Rights Act, the DPA incorporates the ADA to the extent that 'A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section.' (Civ. Code, § 54, subd. (c)." (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005), Constitutional Law § 957 et seq.

4342. Reduced Rent for Breach of Habitability

If you find that there has been a substantial breach of habitability, then you must find the reasonable reduced rental value of the property based on the uninhabitable conditions. To find this value, take the amount of monthly rent required by the [lease/rental agreement/sublease] and reduce it by the [dollar amount/ [or] percent] that you consider to reflect the uninhabitable conditions. Apply this reduction for the period of time, up to present, that the conditions were present. [You may make different reductions for different months if the conditions did not affect habitability uniformly over that period of time.]

New December 2014

Directions for Use

Give this instruction if the court decides that the jury should determine the reduced rental value of the premises based on a breach of the warranty of habitability. The court may instruct the jury to find a dollar reduction or a percent reduction, or may leave it up to the jury as to which approach to use. In this latter case, include both bracketed options.

Give the optional last sentence if the condition would not cause uniform hardship throughout the period. For example, the hardship caused by a broken furnace or air conditioner would vary according to the weather.

Code of Civil Procedure section 1174.2(a) provides that *the court* is to determine the reasonable rental value of the premises in its untenantable state up to the date of trial. But whether this determination is to be made by the court or the jury is unsettled. Section 1174.2(d) provides that nothing in this section is intended to deny the tenant the right to a trial by jury. Subsection (d) could be interpreted to mean that in a jury trial, wherever the statute says "the court," it should be read as "the jury." But the statute also provides that the court may order the landlord to make repairs and correct the conditions of uninhabitability, which would not be a jury function.

Sources and Authority

- Breach of Warranty of Habitability. Code of Civil Procedure section 1174.2.

- "The second method suggested by *Green* [*Green v. Superior Court* (1974) 10 Cal.3d 616] is to first recognize the agreed contract rent as something the two parties have agreed to as proper for the premises as impliedly warranted. Then the court should take testimony and find on the percentage reduction of habitability (or usability) by the tenant by reason of the subsequently ascertained defects. Then reduce the agreed rent by this percentage, multiply the difference by the number of months of occupancy and voila!—the tenant's damages." (*Cazares v. Ortiz* (1980) 109 Cal.App.3d Supp. 23, 29 [168 Cal.Rptr. 108].)

Secondary Sources

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 3-D, Warranty Of Habitability—Measure Of Damages—Adjusting Rental Value, ¶¶ 3:82 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 3-E, Warranty Of Habitability—Tenant Remedies, ¶¶ 3:138 et seq. (The Rutter Group)

4510. Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] failed to [perform the work for the [project/***describe construction project, e.g., kitchen remodeling***] competently/ [or] use the proper materials for the [project/** *e.g., kitchen remodeling***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] failed to [perform [his/her/its] work competently/ [or] provide the proper materials] by [***describe alleged breach, e.g., failing to apply sufficient coats of paint or failing to complete the project in substantial conformity with the plans and specifications***]; and**

2. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s failure.**

New December 2010; Revised June 2011, December 2014

Directions for Use

This instruction is for use if an owner claims that the contractor breached the contract by failing to perform the work on the project competently so that the result did not meet what was expected under the contract. This is sometimes referred to as the implied covenant that the work performed will be fit and proper for its intended use. (See *Kuitems v. Covell* (1951) 104 Cal.App.2d 482, 485 [231 P.2d 552].) The implied covenant encompasses the quality of both the work and materials. (See *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 582–583 [12 Cal.Rptr. 257, 360 P.2d 897].)

Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

The word "project" may be used if the meaning will be clear to the jury. Alternatively, describe the project in the first paragraph, and then select a shorter term for use thereafter.

This instruction is based on CACI No. 325, *Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements*. It should be given in conjunction with CACI No. 4530, *Owner's Damages for Breach of Construction Contract—Work Does Not Conform to Contract*, which provides the proper measure of damages recoverable for a breach of the implied covenant to perform work fit for its intended use.

This instruction may be adapted for use with a claim by a homeowner who purchased the property from the developer-owner against the contractor for construction defects. Th~~ate~~ claim would be based on the homeowner's status as a third-party beneficiary of the builder-developer contract. (See *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, 1422−1423 [168 Cal.Rptr.3d 81] ; see also *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 69-70 [homeowner can be beneficiary of contractor-subcontractor contract].)

Sources and Authority

- "[A]lthough [general contractor] … had a contractual relationship with the City, it also

had a duty of care to perform in a competent manner." (*Willdan v. Sialic Contractors Corp.* (2007) 158 Cal.App.4th 47, 57 [69 Cal.Rptr.3d 633].)

- "The defect complained of and the alleged breach of the warranty relate solely to fabrication and workmanship—the seams opened and the edges raveled. The failure of the carpet to last for the period warranted was occasioned by the defective sewing of the seams and binding of the edges, constituting a breach of the warranty as it related to good workmanship in assembling and installing it, but not as to the quality of the carpet itself." (*Southern California Enterprises, Inc. v. D. N. & E. Walter & Co.* (1947) 78 Cal.App.2d 750, 753–754 [178 P.2d 785], superceded by statute as stated in *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 132 [87 Cal. Rptr. 3d 5].)

- "[Subcontractor] agreed to perform the waterproofing and drainage work on the retaining walls built by [contractor] and had the duty to perform those tasks in a good and workmanlike manner." (*Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 749 [50 Cal.Rptr.3d 709].)

- " 'Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of the contract.' The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement." (*Kuitems, supra,* 104 Cal.App.2d at p. 485.)

- "Obviously, the statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed 'shall be fit and proper for its said intended use' … ." (*Kuitems, supra,*104 Cal.App.2d at p. 485.)

- "[N]o warranty other than that of good workmanship can be implied where the contractor faithfully complies with plans and specifications supplied by the owner … ." (*Sunbeam Constr. Co. v. Fisci* (1969) 2 Cal.App.3d 181, 186 [82 Cal.Rptr. 446], internal citations omitted.)

- "[T]here is implied in a sales contract for newly constructed real property a warranty of quality and fitness. … '[T]he builder or seller of new construction—not unlike the manufacturer or merchandiser of personalty—makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building.' … '[W]e conclude builders and sellers of new construction should be held to what is impliedly represented—that the completed structure was designed and constructed in a reasonably workmanlike manner.' " (*Burch, supra,* 223 Cal.App.4th at p. 1423, internal citations omitted.)

- "[A] contract to build an entire building is essentially a contract for material and labor, and there is an implied warranty protecting the owner from defective construction.

Clearly, it would be anomalous to imply a warranty of quality when construction is pursuant to a contract with the owner—but fail to recognize a similar warranty when the sale follows completion of construction." (*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 378–379 [115 Cal.Rptr. 648, 525 P.2d 88], internal citations omitted.)

- "Several cases dealing with construction contracts and other contracts for labor and material show that ordinarily such contracts give rise to an implied warranty that the product will be fit for its intended use both as to workmanship and materials. These cases support the proposition that although the provisions of the Uniform Sales Act with respect to implied warranty (Civ. Code, §§ 1734–1736) apply only to sales, similar warranties may be implied in other contracts not governed by such statutory provisions when the contracts are of such a nature that the implication is justified. … [¶] The reference in the stipulation to merchantability, a term generally used in connection with sales, does not preclude reliance on breach of warranty although the contract is one for labor and material. With respect to sales, merchantability requires among other things that the substance sold be reasonably suitable for the ordinary uses it was manufactured to meet. The defect of which [plaintiff] complains is that the tubing was not reasonably suitable for its ordinary use, and his cause of action may properly be considered as one for breach of a warranty of merchantability. There is no justification for refusing to imply a warranty of suitability for ordinary uses merely because an article is furnished in connection with a construction contract rather than one of sale. The evidence, if taken in the light most favorable to [plaintiff], would support a determination that there was an implied warranty of merchantability." (*Aced, supra*, 55 Cal.2d at p. 583, internal citations omitted.)

- "[P]ublic policy imposes on contractors in various circumstances the duty to finish a project with diligence and to avoid injury to the person or property of third parties." (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1450 [37 Cal.Rptr.2d 790].)

Secondary Sources

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction,* § 9.93

2 Stein, Construction Law, Ch. 5B, *Contractor's and Construction Manager's Rights and Duties,* ¶ 5B.01[2][b] (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.42 (Matthew Bender)

29 California Legal Forms, Ch. 89, *Home Improvement and Specialty Contracts*, § 89.14 (Matthew Bender)

11 Miller & Starr, California Real Estate, ~~(3d ed. 2008)~~ § 29:5 (Ch. 29, Defective Construction)~~Ch. 29, *Defective Construction*, § 29:5~~ (3d ed. 2008) (Thomson Reuters ~~West~~)

Acret, California Construction Law Manual ~~(6th ed. 2005)~~ § 5:39 (Ch. 5, Construction Defects) ~~Ch. 5, *Construction Defects,* § 5:39~~ (6th ed. 2005) (Thomson Reuters ~~West~~)

3 Bruner & O'Connor on Construction Law, ~~§§ 9:67–9:70 (Ch. 9, Warranties)~~ ~~Ch. 9, *Warranties,* §§ 9:67–9:70~~ (Thomson Reuters ~~West~~)

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 5, *Breach of Contract by Contractor,* § 5.01

5012. Introduction to Special Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form[s] in the order they appear. After you answer a question, the form tells you what to do next. ~~All 12 of you must deliberate on and answer each question.~~ At least 9 of you must agree on an answer before ~~all of~~ you can move on to the next question. However, the same 9 or more people do not have to agree on each answer.

All 12 of you must deliberate on and answer each question regardless of how you voted on any earlier question. Unless the verdict form tells all 12 jurors to stop and answer no further questions, every juror must deliberate and vote on all of the remaining questions.

When you have finished filling out the form[s], your presiding juror must write the date and sign it at the bottom [of the last page] and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2004, October 2008, December 2009, December 2014

Directions for Use

This instruction should be given if a special verdict form is used.~~If this instruction is read, do not read the sixth paragraph of CACI No. 5009, *Predeliberation Instructions*.~~

Sources and Authority

- General and Special Verdict Forms. Code of Civil Procedure section 624. ~~provides: "The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law."~~

- Special Verdicts; Requirements for Award of Punitive Damages. Code of Civil Procedure section 625. ~~provides: "In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. In all cases in which the issue of punitive damages is presented to the jury the court shall direct the jury to find a special verdict in writing separating punitive damages from compensatory damages. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court~~

~~must give judgment accordingly.”~~

- “A special verdict presents to the jury each ultimate fact in the case, so that ‘nothing shall remain to the Court but to draw from them conclusions of law.’ This procedure presents certain problems: ‘ “The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. ‘[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings ... .’ ” ’ With a special verdict, we do not imply findings on all issues in favor of the prevailing party, as with a general verdict. The verdict’s correctness must be analyzed as a matter of law.” (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596], internal citations omitted.)

- “When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors’ votes on other special verdict questions.” (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 255 [92 Cal.Rptr.3d 862, 206 P.3d 403], original italics.)

- “Appellate courts differ concerning the use of special verdicts. In one case the court said, ‘we should utilize opportunities to force counsel into requesting special verdicts.’ In contrast, a more recent decision included the negative view: ‘Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.’ Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result.” (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)

- “[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil ‘cause of action’ to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved.” (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243, footnote omitted.)

- “In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, … we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved.” (*Stoner, supra*, 46 Cal.App.4th at p. 1002.)

- “[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury’s further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of ‘the right to a jury of 12 persons deliberating on all issues.’ Permitting any nine

jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue." (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827, 685 P.2d 1178], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 342–346

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.21 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 318, *Judgments*, § 318.49 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.11 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.11 et seq.

Instruction	Commentator	Comment	BG Response
314. *Interpretation—Disputed Words*	Consumer Attorneys of California, by Jacqueline Serna, Associate Legislative Counsel	Section 314 revises the CACI instruction for "disputed words." The definition is so complex that we would not attempt to rewrite it in any fashion. CAOC member attorney Stan Peddler suggests that the section starting with "The trial court's determination" is so complicated it would almost need a series of lawyers to explain it to a jury. We recommend that this be simplified or that the committee eliminate it entirely.	The language questioned by attorney Peddler is a verbatim case excerpt, not a part of the instruction. The change that the committee proposes is simply to replace the ambiguous "terms" with the clearer "words." Not all disputed language is about "terms."
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree	No response is necessary.
315-320: Instructions on Contract Interpretation	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree, but we suggest modifying the Directions for Use to make it clear that if this instruction is given CACI No. 314 must also be given.	The Directions for Use say: "This instruction may be given with CACI No. 314." The committee believes that this sentence makes it clear that 314 must also be given.
320. *Interpretation—Construction Against Drafter*	Los Angeles County Superior Court, by Janet Garcia, Court Manager	Change "a term of the contract" to "words in the contract."	The committee agreed and has made this change.
422 and VF-406, *Providing Alcoholic Beverages to Obviously Intoxicated Minors*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree	No response is necessary.
456. *Defendant Estopped From Asserting Statute of*	State Bar of California, Litigation	Agree, but we suggest modifying the second sentence in the Directions for Use to refer to	The committee agreed and has made the suggested revision.

Instruction	Commentator	Comment	BG Response
Limitations Defense, and 457. *Statute of Limitations—Equitable Tolling—Other Prior Proceeding*	Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	"advisory findings" rather than an "advisory jury." We believe that the jury making these findings typically will be the same jury deciding the rest of the case, rather than a jury empanelled solely for advisory findings. We suggest modifying the second sentence in the Directions for Use as follows: "This instruction is for use if the court ~~empanels an advisory jury to make preliminary factual~~ submits the matter to the jury for advisory findings."	
		We also suggest modifying the second bullet point in the Sources and Authority by adding the following quotation from *Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745: " '[A] jury may be used for advisory verdicts as to questions of fact [in equitable actions]'."	The proposed language from *Hopkins* is from a parenthetical to a citation to another case. CACI format for Sources and Authority does not provide for excerpts from parentheticals.
	Los Angeles County Superior Court, by Janet Garcia, Court Manager	In the Direction for Use, add to each of the initial new paragraphs the following sentence and citation: "If the judge empanels an advisory jury, "it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper. (*Hoopes v. Dolan* (2008) 168 Cal. App. 4th 146,156."	The proposed language is not really a Direction for Use as it does not provide any useful information for the drafter. But the committee agreed that an excerpt on this point from *Hoopes* is appropriate for the Sources and Authority and has made this addition..
1010. *Affirmative Defense—Recreation Immunity—Exceptions*	Orange County Bar Association, by Thomas Bienert, Jr., President	The Civil Code § 846 exceptions for recreational use immunity for landowners generally read as proposed by the committee, and therefore are generally correct. By eliminating the current case-law definition of "willful or malicious" failure to guard or warn against a dangerous condition, the instruction	The committee considered this issue at some length before proposing these revisions. Its conclusion was that the definition of "willful or malicious" from *New* raised many unresolved

Instruction	Commentator	Comment	BG Response
		creates more ambiguity. The OCBA recommends that the prior version of option #1 which sets forth the *New vs. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689-690 definition of "willful or malicious" be retained.	questions. The committee concluded that *New* should be noted in the Directions for Use rather than in the language of the instruction.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that the current language in the introductory paragraph "unless [*name of plaintiff*] proves . . ." is clearer than "However, [*name of defendant*] is still responsible for [*name of plaintiff*]'s harm if [*name of plaintiff*] proves . . . ."	The committee believes that the proposed revision is much clearer. The current language creates an awkward run-on sentence that grafts the exceptions together with the defense. The revision first states the defense and then sets up the options for the exceptions.
		We believe that the language "[*Choose one of the following three options*]" should be deleted from the instruction. We believe that the jury should be instructed on all exceptions at issue and should not be limited to only one exception. Moreover, we believe that such directions for use belong in the Directions for Use. We suggest deleting this quoted language and adding a statement to the Directions for Use that only those exceptions that are at issue should be read.	The committee agreed and deleted this language. The three options are not mutually exclusive; more than one of them could apply. The committee also agreed that the proposed addition to the Directions for Use would be helpful and has added it.
VF-1001. *Premises Liability—Affirmative Defense ─Recreation Immunity—Exceptions*	Orange County Bar Association, by Thomas Bienert, Jr., President	Civil Code §846 sets forth three (3) exceptions to the landowner's recreational use immunity, which are each presented in CACI 1010. This proposed revisions to VF-1001 only addresses in a summary manner the first exception and do not define in any manner the statutory terms for "willful or malicious" failure to guard or warn against dangerous conditions, uses, structures, or activities. Without fully addressing the case-law definitions of "willful or malicious"	With regard to not defining "willful or malicious," see above. CACI format for verdict forms is to not include all of the options for elements from the corresponding instruction. One option is included, and then a sentence is included in the Directions for Use noting that the question

Instruction	Commentator	Comment	BG Response
		nor the other two exceptions, this instruction is incomplete and incorrect.	may be replaced by one reflecting the other options; for example: "Question 5 should be modified if either of the other two exceptions to recreational immunity from Civil Code section 846 is at issue. (see CACI No. 1010.)"
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree, but we believe that the words "skip the next three questions and answer question 6" after question 4 should be changed to "skip the next question" in light of the deletion of current questions 6 and 7.	This error has been corrected.
1123. *Affirmative Defense—Design Immunity*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest that the introductory paragraph be modified to state more clearly and directly that defendant is not responsible for harm to plaintiff caused by the plan or design if defendant proves certain facts. We believe that describing this as defendant's "claim" and then stating "In order to prove this claim, . . . " may complicate matters unnecessarily. We also find the language "harm caused to [*name of plaintiff*] based on the plan or design" cumbersome and would prefer to state more directly "harm to [*name of plaintiff*] caused by the plan or design." We note that the words "caused by the plan or design" appear in the statute (Govt. Code, § 830.6). "[*Name of defendant*] ~~claims that it~~ is not responsible for any harm ~~caused~~ to [*name of plaintiff*] ~~based on~~ caused by the plan or design of the [*insert type of property, e.g., "highway"*]~~.~~ ~~In order to prove this claim,~~ if [*name of defendant*] ~~must~~ proves	The committee agreed that "based on" should be changed to "caused by" and has made this revision. However, the word "elements" is not plain language and is never used in the body of an instruction.

Instruction	Commentator	Comment	BG Response
		both of the following elements:	
		We would add the word "and" before the second element to emphasize that both elements must be proven.	The committee agreed and has added "and."
1124. *Loss of Design Immunity (Cornette)*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	This instruction states an exception to an affirmative defense, which comes into play only if the defendant establishes the affirmative defense. The Directions for Use currently state that the instruction should be given "if the public entity defendant is entitled to design immunity unless the changed–conditions exception can be established." In other words, the current instruction assumes that design immunity is established in the first instance. The introductory paragraph for the revised instruction seems to require plaintiff to prove the three elements stated in order to establish defendant's liability for harm caused by the plan or design, even if defendant fails to establish design immunity, i.e., by failing to prove discretionary approval of the plan or design before construction (element 1 of design immunity). This is appropriate if design immunity is established, as assumed in the current instruction. But plaintiff need not prove the three elements for loss of design immunity if defendant fails to establish design immunity in the first place. We suggest that the introductory paragraph be modified as follows: "Even if [*name of defendant*] proves both of these elements, [~~N~~*name of defendant*] is ~~not~~ responsible for any harm ~~caused~~ to [*name of plaintiff*] ~~based on~~ caused	The committee agreed that changing "not responsible unless" to "is responsible if" is better and has made this change. The committee does not believe that the instruction needs to refer back to CACI No. 1123 re: "both of these elements."

Instruction	Commentator	Comment	BG Response
		by the plan or design of the [*insert type of property, e.g., "highway"*] ~~unless~~ if [*name of plaintiff*] proves the following:"	
		Consistent with the proposed modifications stated above, we suggest that language be added to the Directions for Use stating that this instruction should be given immediately following CACI No. 1123 (because of the reference to "these elements") and should be modified if the elements of design immunity are established and CACI No. 1123 is not given.	The committee has added a paragraph to the Directions for Use suggesting possible modifications if the existence of design immunity in the first instance is disputed and 1123 will be given.
1244. *Affirmative Defense—Sophisticated User*	Association of Southern California Defense Counsel, by Lawrence R. Ramsey	The proposed changes stem directly from one recent appellate decision: *Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522. In *Buckner* the jury rendered a verdict for the defense, finding no design defect and no failure to warn based on the sophisticated user defense. Plaintiff moved for a new trial and argued a lack of evidence to support the sophisticated user affirmative defense. There was no challenge to CACI 1244 in *Buckner,* and *Buckner* does not discuss the propriety of CACI 1244.	Although it is not explicit in the court's opinion, the committee believes that the only conclusion to be drawn from *Buckner* is that the court finds that CACI No. 1244's mere reference to "risk, harm, or danger" to be insufficient.
		The proposed revision replacing "harm," i.e., "*describe severity of the potential consequences*," unnecessarily complicates and confuses the "harm" requirement. This change improperly injects into the affirmative defense a new element of knowledge on the part of the sophisticated user not previously identified in California law.	The committee believes that *Buckner* compels this revision.
		The third element of the proposed revision, "Any ways to use the [*product*] to reduce or avoid the risks that were known to [*defendant*]," impermissibly requires the defendant to prove the	*Buckner* says that the user should know "any mitigation techniques of which the manufacturer is aware."

Instruction	Commentator	Comment	BG Response
		sophisticated user had the same knowledge of risk reduction and avoidance as the defendant, which is not required under *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56. But the defendant's knowledge of risk reduction and avoidance will probably be much greater than that of an individual sophisticated user in a particular use of the product. Thus, the application of this proposed change would give rise to many issues under Evidence Code section 352, because the defendant will be required to introduce evidence of its knowledge of risk reduction and avoidance that will exceed the scope of the claim, necessitate an undue consumption of time, confuse and mislead the jury, and result in undue prejudice to the defendant.	As expressed by the court in *Buckner*, the defendant does seem to have to prove that the plaintiff knew all of the mitigation techniques that the defendant knew. The committee shares the concern of the comment that this seems to be an unworkable standard. For this and other reasons explained below, the committee has decided not to modify the text of the instruction based on *Buckner* at this time. The possible expansion of the instruction that *Buckner* seems to compel will be presented in the Directions for Use. The committee does believe that a sophisticated user would know how to use the product safely. But it does not seem that the defense should have to prove that if it knows 10 ways to use the product safely, that the user would also have to know all 10; just enough of them to avoid injury.
	Consumer Attorneys of California, by Jacqueline Serna, Associate Legislative Counsel	While the revision pulls some of the buzzwords from the *Johnson* opinion ("should have known"), it then fails to sufficiently narrow the instruction to tie it to the facts of the case—as *Johnson* requires, and as the subsequent cases cited in the Sources and Authority also require. CAOC member attorney David Rosen writes, "*Johnson* is very fact dependent; it wasn't just that the plaintiff was an experienced	It would seem that the proposed changes, requiring inclusion of the specific facts of the case regarding harm and avoidance of risk, would address the concerns of the comment.

Instruction	Commentator	Comment	BG Response
		refrigerator mechanic, or that he took some classes in the field; he was licensed/certified, which meant he was required to take and pass an exam which reflected his personal, actual knowledge of the very health hazards of phosgene exposure upon which he based his failure to warn lawsuit. The language of the instruction should so reflect in a tighter fashion."	
	Gordon & Rees, by Mordecai D. Boone, on behalf of 3M Company	We ask that the Council consider language that more explicitly addresses the sophisticated intermediary or sophisticated employer circumstance, which arises frequently in mass tort litigation; we believe that a sophisticated user instruction should make clear that if a plaintiff's employer is itself a sophisticated user, the defendant manufacturer may properly rely on the employer to impart necessary information to its employees.	This comment does not address the proposed revisions, but instead requests a different change. The committee has in the past considered this argument and found it not to be supported by current California law. The committee does not propose to consider it further unless new authority supports it.
		The proposed revisions eliminate CACI No. 1244's current requirement that the manufacturer demonstrate that the user knew of the product's "risk, harm or danger," replacing it with a requirement that the manufacturer show not only that the user knew of the product's risk, but also the severity of potential consequences and ways to mitigate that risk. We believe that this change is inconsistent with settled California law as expressed in *Johnson (supra)*, and that it imposes unrealistic and virtually impossible burdens of proof on the defendant manufacturer.	While this comment lacks specificity with regard to unrealistic and virtually impossible burdens of proof, the committee has considered more specific comments and has decided not to proceed with the proposed revisions.
		We are concerned about the proposed revisions' requirement that in order for a defendant to prevail on a sophisticated user defense, the defendant must	The committee believes that whether a product is risk-free is wholly separate from whether or not the plaintiff is a

Instruction	Commentator	Comment	BG Response
		demonstrate that the plaintiff knew or should have known of the "risk posed by the product." Some accused products, including 3M's safety equipment, do not themselves pose any risk. A requirement that assumes the existence of a risk is potentially confusing to a jury and inapposite to safety products.	sophisticated user.
		Johnson does not require a defendant to prove all three of these things; indeed, it specifically notes that the user need only be "generally aware of the risk at issue." (*Johnson, supra,* 43 Cal.4th at p. 73.) Importantly, *Johnson* holds that the plaintiff's subjective state of mind (that is, his or her actual appreciation of the severity of the potential consequences, or his or her specific knowledge of particular methods of minimizing the risk) is not a factor to be considered:	The "should have known" language in the instruction present the test as objective rather than subjective.
		In the context of a safety product, the three requirements set out in the proposed revisions to CACI No. 1244 will make it effectively impossible for a manufacturer to prevail on a sophisticated user defense. The "risks" or dangers associated with such a product come not from the product itself but from its possible misuse – for example, providing a respiratory protection product to workers for use as protection against a contaminant or level of contaminant for which the product was not designed or intended. It should be enough for a manufacturer to demonstrate that the user knew or should have known how the product appropriately should be used – not that the user knew or should have known every possible type of misuse that could lead to every possible type of harm; and not that	The committee believes that if a product is safe unless misused, then there is no "risk" that gives rise to a duty to warn, and whether the injured person is or is not a sophisticated user is not relevant. The defendant's affirmative defense is product misuse under CACI No. 1245.

Instruction	Commentator	Comment	BG Response
		the user knew every way in which to use the product safely around every other product in order to mitigate the risk of harm.	
		By requiring a manufacturer to show that the user knew of "[a]ny ways to use the [*product*] to reduce or avoid the risks that were known to [*name of defendant*]," the proposed revisions potentially require the manufacturer to warn of risks of other defendants' products – the saw manufacturer will have to warn of the risks of using the saw to cut insulation – in order to claim the benefit of the sophisticated user defense.	This comment conflates the duty to warn with proof of a sophisticated user. Under *Buckner*, the defense must show that the user knew what the defendant knew about how to use the product safely. What a saw manufacturer might or might not have to warn about is not the question with regard to the sophisticated user defense.
	Horvitz & Levy, by Lisa Perrochet and Curt Cutting	The proposed revisions would require trial courts to make decisions that are properly left to the jury. The trial court would fill in the bracketed material by describing the risks of the product and the severity of potential consequences. In many cases the parties dispute these issues—what risks the product poses (if any), and what the possible consequences of those risks may be (if any). In existing practice, the parties present evidence and argument to the jury on these issues, and the jury then decides what risks the products posed, how severe the consequences might be, and whether the plaintiff was aware of those particular risks.	The committee agreed with this comment and has decided not to propose any revisions to the instruction based on *Buckner*. The proposed new language does address matters that may very well be in dispute and to be resolved by the jury. The stance of the case in *Buckner* did not involve this potential problem. But on different facts, the language proposed by the court in *Buckner* might very well intrude on the role of the jury.
		We also believe the instruction unfairly favors plaintiffs. The proposed revisions unnecessarily turn a simple concept into a multifactor test, thereby increasing the likelihood that jurors will be confused by it and reject it. The current version of the instruction already permits a jury to conclude—and permits counsel to	If the proposed revisions to the instruction favor plaintiffs, it is because that was the result in *Buckner*.

Instruction	Commentator	Comment	BG Response
		argue—that the plaintiff was not aware of all the risks, or of the severity of all those risks, or the ways to avoid the risks. Taking those factors out of counsel's argument and putting them into the instruction is unnecessary, and serves only to tip the balance in favor of plaintiffs.	
	McKenna Long & Aldridge, by Jayme C. Long	Because the proposed revision potentially requires choosing among or, at least, characterizing conflicting theories of a case, it risks pushing the resulting instruction into the realm of impermissible argument by unduly emphasizing particular evidence or theories of liability over others. While jury instructions should be tailored to a particular case, the inclusion of too much evidentiary detail can lead to a finding on appeal that an instruction lends prominence to particular theories or issues, leading the jury to conclude those are entitled to extra weight.	The committee agreed. See response to comment of Horvitz & Levy, above.
		Another practical problem is when a strict liability failure to warn claim is asserted. These cases often hinge on what was "[known/ [or] knowable in light of the [scientific/ [and] medical] knowledge that was generally accepted in the scientific community at the time of [manufacture/distribution/sale]." (CACI 1205) CACI 1244 works with CACI 1205 by allowing the jury to determine whether "at the time of the injury" the plaintiff knew or should have known of the products "risk, harm, or danger." The proposed revision to CACI 1244 usurps this jury function, inserting instead the court's determination as to what risks were known and what the severity of those risks were at the time of sale or distribution.	The committee agreed. See response to comment of Horvitz & Levy, above.

Instruction	Commentator	Comment	BG Response
	Polsinelli Law Firm, by J. Alan Warfield, on behalf of CertainTeed Corporation, Dana Companies LLC, and Union Carbide Corporation	The current version of CACI 1244 is drawn from the California Supreme Court's decision in *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 71. The proposed changes add requirements that are not imposed by *Johnson* and thus are without the Supreme Court's imprimatur.	Supreme Court authority is not required to support a CACI instruction. Appellate authority is sufficient.
		It would be particularly inappropriate to adopt changes to CACI 1244 given that there are two cases now pending before the California Supreme Court (*Webb v. Special Electric Co , Inc.* (S209927) and *Ramos v. Brenntag Specialties, Inc.* (S218176)) in which the court's decisions could well implicate these issues.	It is not likely that these two cases will have an impact on the sophisticated user doctrine. *Ramos* is a primarily a component parts case. *Webb* could affect 1244, but most likely will not affect the *Buckner* issues.
		The proposed changes do not fairly capture the central legal principle underlying the decision in *Buckner, supra,* on which they are purportedly based.	The comment does not explain what the "central legal principle" underlying *Buckner* is.
		Even if *Buckner's* analysis of the sophisticated user defense could be considered authoritative for all cases in California, the fill-in-the-blank nature of the proposed instruction is problematic. It is misleading, because it takes what is essentially a specially drafted instruction and labels it an "approved" instruction. Litigants are given free rein to fill in the blanks with whatever they choose, tempered only by opposing counsel's objections. Asking litigants to "describe the risk" and "describe the severity," without providing any instruction or limitation, will simply increase litigation and nullify the purpose of having an approved instruction.-	There is nothing *per se* inappropriate about pattern instructions requiring the user to fill in the blanks with facts from the case at issue. Nearly every CACI instruction has blanks for the user to complete. However, per the response to Horvitz & Levy, above, the committee has concluded that the blanks to be filled in under *Buckner* may invade the province of the jury in some cases and are not appropriate for a pattern instruction.
	State Bar of California, Litigation Section, Jury Instructions	We suggest that the introductory paragraph be modified to state more clearly and directly that defendant is not responsible for harm to plaintiff caused by a failure	As the committee has proposed no changes to the opening paragraph, it is beyond the scope of this proposal. However,

Instruction	Commentator	Comment	BG Response
	Committee, by Reuben A. Ginsberg, Chair	to warn in certain circumstances. We believe that describing this as defendant's "claim" and then stating "In order to prove this claim, . . . " may complicate matters unnecessarily. We suggest that the Advisory Committee consider two alternative modifications of the introductory paragraph. The first eschews use of the term "sophisticated user" in favor of simply stating the elements of the affirmative defense without introducing to the jury a term that is familiar only to lawyers and that may add nothing to jurors' understanding of this instruction. The second retains the term "sophisticated user" as a short-hand reference that may be useful.	this paragraph is in the standard CACI format to present an affirmative defense. Therefore, the committee does not propose to consider this comment in the future.
		We suggest that the third element be modified as follows for greater clarity: "~~Any ways~~ How to use the [*product*] in a way that ~~to~~ reduces or avoids the [*product*]'s risks, if ~~that were known to~~ [*name of defendant*] knew that information."	The comment is moot as the committee no longer proposes additions to the instruction text.
VF-1201. *Strict Products Liability—Design Defect—Affirmative Defense—Misuse or Modification*	Los Angeles County Superior Court, by Janet Garcia, Court Manager	Change the transitional language after Question 6 to state: "If your answer to either Question 5 or Question 6 is yes, answer Question 7. *If you answered no to Question 6 and did not answer yes to Question 5*, stop here, answer no further questions, and have the presiding juror sign and date this form."	This comment addresses what to do if only one test is at issue. This point is better handled in the Directions for Use than in the transitional language between questions.
	Orange County Bar Association, by Thomas Bienert, Jr., President	The addition of question number 4 is confusing and does not match the jury instruction for which the Verdict Form should correspond, CACI 1203, *Strict Liability – Design Defect – Consumer Expectation Test—Essential Factual Elements*. CACI 1203 does not list as an element "is the [product] one about which an	The committee considered adding this point as an optional element to 1203. However, the Directions for Use to 1203 say to add the element if the court decides that the applicability of the test is for the jury. The

Instruction	Commentator	Comment	BG Response
		ordinary consumer can form reasonable minimum safety expectations."	committee decided that was sufficient.
VF-1201 and VF-1202. *Strict Products Liability—Design Defect—Risk-Benefit Test* (to be revoked)	Orange County Bar Association, by Thomas Bienert, Jr., President	Verdict Forms 1201 and 1202 should not be combined. Combining them is contrary to the Directions for Use currently in place for these Verdict Forms, which should remain in place. The consumer expectations test requires no expert whereas the risk benefit test requires use of an expert. Combining these tests at this stage creates far too much risk for confusion. Having separate verdict forms with separate titles will help the jury understand the distinction.	The committee concluded that the Directions for Use have needlessly cautioned against combining the two tests into a single verdict form. If both tests are to go to the jury, the fact that risk-benefit involves burden-shifting is irrelevant as burden of proof is not built into verdict forms. Trial judges have requested that the two tests be combined. The need for experts is irrelevant as far as the verdict form questions are concerned.
1305. *Battery by Peace Officer*	Consumer Attorneys of California, by Jacqueline Serna, Associate Legislative Counsel	Although there has been no change in the law or other reason to depart from the well established instruction, this revision would eliminate language that is very helpful in clarifying for the jury what sorts of factors it should consider when deciding whether force is reasonable. Most jurors have no common sense experience in evaluating excessive force factors, and I do not see how eliminating these guideposts benefit anyone.	The committee agreed. See the response below to the comment of the State Bar.
		CACI 1305 only makes sense when the victim of force is under arrest (or perhaps detention) while the officer is performing a lawful arrest or detention.	This comment does not present any issues based on the proposed revisions to the instruction. It may be considered in the release cycle.
	State Bar of California, Litigation Section, Jury	We disagree with the proposed deletion of language from this instruction. *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501,	The committee agreed with the comment. *Hernandez* expressly says that instructing the

Instruction	Commentator	Comment	BG Response
	Instructions Committee, by Reuben Ginsberg, Chair	514, held that the same three factors should be considered in determining whether force was reasonable for purposes of a negligence action (wrongful death). *Hernandez* cited CACI No. 1305 with approval and stated that the three factors should be considered "in determining whether police officers used unreasonable force for purposes of tort liability." (*Id.* at p. 514.) We would retain the three factors and cite *Hernandez* in the Sources and Authority.	jury on the three factors is correct under California law. This proposed deletions have been withdrawn from the release. An excerpt from *Hernandez* has been added to the Sources and Authority as proposed by the comment.
1621. *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements*	Consumer Attorneys of California, by Jacqueline Serna, Associate Legislative Counsel	CAOC member and attorney Patrik Griego writes, "I just finished a jury trial and the jurors were confused by CACI 1621. The first question asks whether defendant negligently "caused" the injury. The 6th question asks whether the conduct was a "substantial factor" in causing the serious emotional distress. The term "caused" in the first question means "substantial factor" but it does not say that and is therefore confusing to jurors. Why use the term "substantial factor" in the sixth question and not in the first question? Jurors in my case thought that the term "caused" in the first question must mean "sole cause"; otherwise, why not use the term "substantial factor", as was done in the sixth question." We recommend that this section 1621 be clarified to avoid confusion.	The comment addresses a point not raised by the proposed changes posted for public comment. However, the committee does not perceive the problem. This instruction is about the recovery of damages for emotional distress by a bystander. So element 1 refers to the defendant causing the injury to the physical victim. Element 6 requires that the defendant's conduct be a substantial factor in causing emotional distress to the bystander. In a bystander case, the committee believes that it is highly unlikely that element 1 will be contested. If it is, there will be instructions on the underlying event, which will present causation as "substantial factor."
1620-1623, Instructions on Negligent Infliction of Emotional Distress	State Bar of California, Litigation Section, Jury Instructions	Agree	No response is necessary.

Instruction	Commentator	Comment	BG Response
	Committee, by Reuben Ginsberg, Chair		
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*	Orange County Bar Association, by Thomas Bienert, Jr., President	The proposed change to the Direction for Use should read: "[t]he explanation in the second to last paragraph…."	The committee has corrected this error.
1803. *Appropriation of Name or Likeness—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree. In addition, we suggest that a new instruction be created on the affirmative defense that requires balancing the plaintiff's right of privacy against the public interest in the dissemination of news and information.	The committee will consider this suggestion in the next cycle.
2336. *Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements*	Orange County Bar Association, by Thomas Bienert, Jr., President	We suggest leaving the deleted language in the Directions for Use pertaining to excess insurance. Since the court determines if the claim is potentially covered by the policy, the court will determine if the claim falls within the excess limits. However, deleting the paragraph concerning excess insurance will not guide the revision of the instruction such that the jury is aware that there is a difference between excess and primary insurers.	There is no explanation given nor authority provided, either in the Directions for Use or in the comment, as to how the instruction should be modified if there is an issue of excess insurance coverage. Without some guidance, the sentence is not helpful. The committee considers it a collateral point, which need not be addressed in the Directions for Use.
		The excerpt from *Shade Foods* in the Sources and Authority is the same as what was previously below But the citation is now incomplete. While the paragraph could be moved higher in the analysis, the full citation for the case needs to be set forth.	The full citation format for *Shade Foods* has been included.
	State Bar of	We believe that the Directions for	The court will decide

Instruction	Commentator	Comment	BG Response
	California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Use should state more clearly (1) that the court decides whether the claim was potentially covered by the policy and (2) that this instruction should be given only if the court decides that there was potential coverage. We suggest that the beginning of the second paragraph in the Directions for Use be modified as follows: "Whether the claim was potentially covered by the policy is an issue for the court to decide. Give this instruction only if the court decides that the claim was potentially covered. The court will decide the issue of whether the claim was potentially covered by the policy."	that there was no potential coverage only if there are no disputed facts, in which case the case will be resolved on summary judgment. If there are disputed facts, there is a duty to defend. The issue for the jury is element 4, whether the insurer's decision to deny coverage and a defense was unreasonable and without proper cause.
2407. *Affirmative Defense—Employee's Duty to Mitigate Damages*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that failure to mitigate damages is an affirmative defense and therefore suggest that the title of this instruction, and other instructions on the duty to mitigate, be changed to "Affirmative Defense—Failure to Mitigate Damages."	The committee agreed, and has revised the title.
		We believe that the "see also" citation to *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98, added to the first excerpt in the Sources and Authority adds nothing substantial to the California Supreme Court authority already cited, *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182. The point was conceded in *Rabago*. We would delete the citation to *Rabago*.	The committee believes that the "see also" to *Rabago-Alvarez* sets up the "but see" to *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432, which is the real reason for the additions to the *Parker* excerpt. The court in *Villacorta* relies heavily on *Rabago-Alvarez*. But the committee believes that this reliance is misplaced.
		We believe that the citation to *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432, added to the excerpt point belongs in a separate bullet point. The parenthetical description of the	The committee does not believe that *Villacorta* can be harmonized with *Parker*, and thus must be presented as a "but see."

Instruction	Commentator	Comment	BG Response
		case is actually a quotation. Moreover, *Villacorta* is consistent with the quoted language from *Parker*, so "but see" is not appropriate. We suggest that the new bullet point should precede the current third bullet point, which makes the same point, and should read: " 'Wages actually earned from an inferior job may not be used to mitigate damages . . . .' (*Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432.)"	
	Wilson Turner Kosmo, by Michael S. Kalt	Add: "However, minor differences in salary, benefits, or the availability of a merit-based system does not render a job inferior (*Id.* at p. 255.)" to the second paragraph of the Directions for Use. This instruction is generally correct; however, *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250-255 rejected plaintiff's contention that any minor difference in salary and benefits or the availability of a merit-based system renders a job inferior. Adding the language above is appropriate to avoid any misconception and maintains the instruction's neutrality.	The comment proposes treatise-like discussion. That is not generally the purpose of the Directions for Use, which is to present information relevant to the use and drafting of the instruction.
		Delete both *Rabago* and *Villacorta* from *Parker* excerpt in Sources and Authority. Including these citations in this jury instruction conflates the issue of actual damages (and what earnings may be used to determine Plaintiff's lost wages) with the affirmative defense of failure to mitigate damages. The affirmative defense is used if the plaintiff failed to make reasonable efforts to seek or obtain alternative employment, not in cases where the plaintiff	The committee believes that the *Parker-Rabago-Villacorta* issue is what wages can be deducted in mitigation, not what earnings may be used to determine plaintiff's lost wages (although they may functionally be the same thing). The proposed excerpt from *California School Employees* is an appellate case saying

Instruction	Commentator	Comment	BG Response
		actually obtained alternative employment. The citations suggested by the revised CACI instructions do not address this affirmative defense, but instead address what measure of damages an employee may use in calculating her lost wages. Alternatively, if the Judicial Council insists on including these citations, we suggest changing the *Robago-Alvarez* citation to *California School Employees Assn. v. Personnel Commission, supra,* 30 Cal.App.3d at p. 255 with the quote "The general rule is that the obligation to reimburse a wrongfully discharged employee may be mitigated by deducting earnings actually received from other employment." The quote cited in *Rabago-Alvarez* does not address the court's ruling or holding, but instead only addresses what the plaintiff conceded, making it not citable for this proposition. On the other hand, *California School Employees Assn.* stated the general rule on this issue. In addition, including *California School Employees Assn* together with *Villacorta* recognizes the split in authority and provides a neutral reference.	the same thing as *Parker*, a Supreme Court case.
2431. *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree that this instruction should plainly state, rather than only imply, that the conduct that plaintiff allegedly was required to engage in would violate public policy. But we believe that the proposed new sentence in the introductory paragraph inappropriately combines the public policy with defendant's requiring the plaintiff to violate it (which is addressed in element 2). For example, price fixing is a violation of public policy, and	The language in question is partially within an example of how the instruction could be completed. The committee has moved the "require": language from the instruction text to the example to address any possible lack of clarity as postulated by the comment. This change was made to CACI Nos. 2430 and 2432 also.

Instruction	Commentator	Comment	BG Response
		requiring an employee to engage in price fixing is a tort if it results in a constructive discharge. Rather than state that it is a violation of public policy to require an employee to engage in price fixing, we believe that the new sentence should state that price fixing is a violation of public policy and leave it to element 2 to state that defendant is liable only if defendant required plaintiff to engage in such conduct. Accordingly, we would modify the new sentence as follows: "[*Specify conduct alleged to violate public policy, e.g., price fixing*] ~~It~~ is a violation of public policy ~~for an employer to require that an employee [specify claim in case, e.g., engage in price fixing].~~"	
	Wilson Turner Kosmo, by Michael S. Kalt	Revise last paragraph of Directions for Use to read: "The judge should determine ~~whether the purported reason for plaintiff's resignation would amount to a violation of public policy~~ whether the action allegedly required by the employer violated a fundamental public policy." See *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 889-890 [outlining four part test as to whether a policy is sufficient to support a tortious discharge claim]; *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090, overruled on other grounds by *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 71 ["The difficulty, of course, lies in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee."]. If the judge does not conclude this, the claim should be dismissed prior to	The committee has added a citation to *Gantt* to support this paragraph. The citation has been added to CACI Nos. 2430 and 2432 also. The proposed additional discussion is not appropriate for Directions for Use.

Instruction	Commentator	Comment	BG Response
		submission to the jury. The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved."	
2432. *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	The essence of this claim is that plaintiff was subjected to intolerable working conditions that violated public policy and was forced to resign. We believe that the first sentence in the Directions for Use says it well: "This instruction should be given if plaintiff claims that his or her constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy." But the instruction itself does not convey this so clearly, and the example in the proposed new sentence does not correspond with the example in element 2. We believe that the two examples should be the same. And the example given seems to combine two separate Labor Code violations, failure to pay overtime and failure to pay minimum wage, into one. We suggest that the introductory paragraph be modified as follows for greater clarity and consistency: "[*Name of plaintiff*] claims that [*name of defendant*] forced [him/her] to resign ~~for reasons~~ by subjecting [him/her] to working conditions that violated public policy. It is a violation of public policy for an employer to ~~require an employee to~~ [*specify claim in case, e.g., require an employee to work ~~more than forty hours a week~~ for less than minimum wage*]. To establish this claim, [*name of plaintiff*] must prove all of the following:"	The committee agreed that the examples in the introductory paragraph and in element 2 should be the same. The committee is not concerned that the example includes two Labor Code violations as overtime and minimum wage violations often go hand in hand.
		We suggest that the title be modified to "Constructive Discharge in Violation of Public	The committee agreed with the comment and has removed "for

Instruction	Commentator	Comment	BG Response
		Policy—Plaintiff Required to Endure Intolerable Conditions ~~for Improper Purpose~~ That Violate~~s~~d Public Policy."	Improper Purpose" from the title.
	Wilson Turner Kosmo, by Michael S. Kalt	The proposed addition to the introductory paragraph is vague and does not make sense in the context for which this instruction is designed to address, i.e. the employee resigns because of intolerable working conditions created by the employer allegedly due to the employer's violation of a fundamental public policy. The judge should determine as a matter of law whether the employer's alleged actions violated a fundamental public policy. By adding the proposed sentence it invites the juror to make this determination. As such, our recommendation is to not include this sentence at all	The committee does not believe that instructing the jury that particular acts, if proved, constitute a violation of public policy invites the jury to make this determination. The committee believes the opposite; that this language is essential to ensure that the jury does *not* consider whether a public policy has been violated.
		The instruction should also be clarified as to what constitutes "intolerable working conditions." "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1254, abrogated on other grounds by *Romano v. Rockwell Int'l, Inc.* (1996) 14 Cal.4th 479.) The employee's resignation must be employer-coerced, not caused by the voluntary action of the employee or by conditions or matters beyond the employer's reasonable control. (*Turner, supra,* 7 Cal.4th at p. 1248.) "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable." (*Id.* at 1246-1247.) "Single, trivial, or isolated acts of [misconduct] are insufficient to	The committee agrees that the inclusion of an explanation of "intolerable working conditions" in the last paragraph may be insufficient for reasons noted in the comment. However, the comment is beyond the scope of matters posted for public comment. It will be addressed in the next cycle.

Instruction	Commentator	Comment	BG Response
		support a constructive discharge claim." (*Id.* [internal citations omitted].) So revise last paragraph to read: To be intolerable, the adverse working conditions must be unusually aggravated ~~or repeatedly offensive~~ to a reasonable person in [name of plaintiff]'s position or must amount to a continuous pattern over a prolonged period of time.	
2442. *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements*	Hon. David Abbott, Judge of the Superior Court of Sacramento County	The proposed addition of CACI No. 2442 will certainly be helpful in whistleblower employment cases. I am currently in such a trial, with jury instructions in draft at present. This proposed instruction and use notes will assist me in drafting final instructions and in addressing requests from counsel for "pinpoint" instructions. I'll provide comments and feedback as I deal with the final version in my case.	The committee looks forward to getting Judge Abbott's feedback on this instruction.
	California Employment Lawyers Association, by David deRobertis	The instruction's focus on "discharge" ignores the unique statutory definition of adverse action in this context as including "acts of reprisal, retaliation, threats, coercion or similar acts."	The committee has considered the question of how to present adverse actions short of discharge in a series entitled Wrongful Termination. The committee's decision is to limit the actual instruction text to discharge, and then explain in the Directions for Use how to modify the instruction for other adverse employment actions.
		We understand that the second paragraph of the Directions for Use tries to address this issue. However, it does so in a confusing manner, which will create a risk that trial courts will simply use CACI 2509	The committee does not believe that the second paragraph of the Directions for Use is confusing. It says to replace "discharge" with

Instruction	Commentator	Comment	BG Response
		(*Adverse Employment Action-Explained*) to fill the gap in this instruction when it is used for adverse actions shy of termination. To avoid this result, the statutory language - "engages in acts of reprisal, retaliation, threats, coercion, or similar acts" - should either be found in the text of the instruction or, alternatively, at the very least, directly included in the "Directions for Use." Doing so will ensure that courts are well-tuned into the idea that this statute contains its own unique adverse action language that differentiates it from other statutes (such a the FEHA) for which instruction 2509 is well-suited.	whatever the adverse action was in the case. The committee does not see a likelihood that the court would just give 2509. 2509 is for use if the jury is to decide whether an action was adverse or not. If that is an issue, then 2509 should be given; if not, then the user just inserts "demotion" or whatever adverse action is at issue in the case in place of "termination." The list of prohibited acts is in the first paragraph of the Directions for Use.
	Joshua C. Irwin, Deputy Attorney General, State of California	As written, proposed CACI No. 2442 is somewhat confusing. The title suggests that it addresses only the "protected disclosure" aspect of the Whistleblower Protection Act (see Gov. Code, § 8547.2(e).) However, the body more generally addresses at least some of the elements of a cause of action for retaliation under the WPA. (See Gov. Code § 8547.8(c) and (e)). To be clearer for a jury, CACI 2442 should state only the elements of a cause of action for WPA retaliation and be given a title that reflects this content. The definition of "protected disclosure" (see elements 1 through 3 of proposed CACI 2442) is better understood and considered if it is addressed as a stand-alone instruction. See proposed new CACI 2442.5.	The committee prefers a single instruction rather than the proposed division into separate instructions, which would move the meaning of "protected activity" from 2442 into a separate definitional instruction (the proposed 2442.5) The second part of the proposed 2442.5 sets forth the very complex statutory definition of "improper governmental activity." The committee does not believe that it is necessary to give all of this language to the jury. As noted in the Directions for Use, whatever governmental activity is at issue in the case can be included if necessary.

Instruction	Commentator	Comment	BG Response
		2442 needs an element stating that the defendant was aware of the protected disclosure. While there is no reported WPA case law on this point, cases dealing with retaliation causes of action under the Fair Employment and Housing Act and Labor Code section 1102.5 state that an employer or actor must be aware of the protected activity. (See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614-615 ["Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity"]; *Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 69-70, 73.) If there is more than one defendant, plaintiff must establish that each defendant was aware of the protected disclosure(s).	Awareness is subsumed within Element 5, which says that the protected disclosure was a contributing factor in the adverse action. If the defendant was not aware of the disclosure, it could not be a contributing factor.
		The instruction should specify that the discharge was after the protected disclosure. Government Code section 8547.8(c) prohibits "acts of reprisal, retaliation, threats, coercion, or similar acts" against plaintiff. If those acts do not occur after the protected disclosure, they cannot be taken because of that disclosure.	This point is also subsumed within "contributing factor."
		2442 should have an element that reflects the language in section 8547.8(c) that there is a cause of action against a person who *intentionally* engages in retaliation. See *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 860-861, dealing with the analogous the Education Code provisions extending WPA to community college employees.	Intent is also subsumed within "contributing factor."
	State Bar of California, Litigation Section, Jury	Agree	No response is necessary

Instruction	Commentator	Comment	BG Response
	Instructions Committee, by Reuben Ginsberg, Chair		
	Wilson Turner Kosmo, by Michael S. Kalt	Change "contributing factor" to "substantial motivating factor." They don't say why. I assume they believe that *Harris v. City of Santa Monica* applies to this statute.	This statute uses "contributing factor" and then creates a specific affirmative defense based on that language. The committee believes that because "contributing factor" is addressed in the statute, the instruction should use that language.
2443. *Affirmative Defense—Same Decision*	California Employment Lawyers Association, by David deRobertis	The "same-decision" defense instruction must include the concept that the employer would have taken the same action *at the same time* based on wholly legitimate reasons.	The committee agreed with the comment and has added language clarifying that the defendant must have considered the valid reason at the time when the adverse action was taken.
	Joshua C. Irwin, Deputy Attorney General, State of California	The proposed CACI No. 2443 appears to be a correct statement of the law. However, it should add the term "protected" before the first appearance of the word "disclosure."	The committee agreed with the comment and has added "protected."
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree with this proposed new instruction, but find it cumbersome. The instruction is a single sentence with three ifs, which could be confusing. We believe that the initial clause ("If [*name of plaintiff*] proves that [his/her] disclosure was a contributing factor to [his/her] discharge") is unnecessary because the jury need not decide whether plaintiff has proven his or her case to find that the affirmative defense applies. We would delete this initial clause.	This instruction is contingent on first finding that there was prohibited retaliation. Without the initial clause, the jury could lose sight of this limitation.
	Wilson Turner Kosmo, by Michael S. Kalt	Change "contributing factor" to "substantial motivating factor." They don't say why. I assume they	This statute uses "contributing factor" and then creates this

Instruction	Commentator	Comment	BG Response
		believe that *Harris v. City of Santa Monica* applies to this statute.	specific affirmative defense based on that language. The instruction must reflect this statutory language.
		Add "anyways" after "would have discharged plaintiff."	The committee agreed with the comment, but prefers "anyway" to "anyways."
		Delete: "even if [*name of plaintiff*] had not made protected disclosures [or refused an illegal order]" at the end of the instruction.	The committee agreed that that deletion of most of this language improves clarity. The language of the instruction has been revised, but reference to "refusing an illegal order" has been retained.
2540. *Disability Discrimination—Disparate Treatment—Essential Factual Elements*	California Employment Lawyers Association, by David deRobertis	Elimination of the standard, Judicial Council-approved language covering the "perceived as" prong of the statutory definition of protected disabilities will leave litigants and trial court without guidance on how to properly define this type of claim in jury instructions. CELA acknowledges that it appears that the intent of the proposed change is to retain Instruction 2540 to cover "perceived as" disability claims given the comment in the "Directions for Use" about modifying elements 3 and 6 in a "perceived as" case. But CELA is troubled by the removal of the standard, Judicial Council-approved language from the instruction itself for a "perceived as" claim.	The proposed revisions to this instruction conform it to a decision made previously to simplify several FEHA cause-of-action instructions by reducing the options. Rather than trying to build perception and association discrimination into the instructions themselves, the Directions for Use now note the possible modification of the instruction for use in these cases.
		If, nonetheless, the "perceived as" language is going to be removed from the text of the instruction, it should be incorporated in abbreviated form into the Directions for Use. This could be done, for example, as follows with the bolded text being our suggested	The committee agreed with the comment and has revised the Directions for Use along the lines suggested in the comment.

Instruction	Commentator	Comment	BG Response
		addition "Modify elements 3 and 6 if plaintiff was not actually disabled or had a history of a disability, but alleges discrimination because he or she was perceived to be disabled. (See Gov. Code,§ 12926(o); see also Gov. Code,§ 12926G)(4)(m)(4) [mental and physical disability include being regarded or treated as disabled by the employer.]. **This can be done with language in element 3 that the employer "treated [name of plaintiff] as if [he/she] ... " and with language in element 6 "That [name of employer's] belief that ... "**	
	Orange County Bar Association, by Thomas Bienert, Jr., President	In the Sources and Authority, the added authority set forth in the first two full bulleted excerpts from *Rope v. Auto-Chlor System of Washington, Inc.* (2014) 220 Cal.App.4th 635should be deleted in that they are not relevant to this instruction.	The committee agreed with the comment and has removed these excerpts on associational discrimination. Proposed new CACI No. 2547, to which this instruction cross refers, addresses associational discrimination. Thus, these excerpts are not needed here.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree	No response is necessary.
	Wilson Turner Kosmo, by Michael S. Kalt	Agree	No response is necessary.
2547. *Disability-Based Associational Discrimination—Essential Factual Elements*	California Employment Lawyers Association, by David	The proposed language for the first and third options of element 4 misstates the law because it does not properly account for an adverse employment action based on the	The committee believes that the comment makes an interesting argument that may very well prove to be correct some

Instruction	Commentator	Comment	BG Response
	deRobertis	employer's mistaken, stereotypical beliefs. It requires proof of the underlying asserted facts rather than permitting the employee to rely on proof of the employer's mistaken belief as to the underlying asserted facts as an alternative. Thus, for example, the plaintiff must actually prove that the association with the individual with a disability "was costly" to the employer or that the employee "was somewhat inattentive at work." In some cases, these underlying facts may be reality. The employee may actually have been "somewhat inattentive at work"; but, in other cases, the employer may mistakenly assume based on stereotypical thought processes that the employee will be inattentive or unreliable. In this latter scenario, the plaintiff will not need to prove these underlying facts because they are not reality but rather they are incorrectly assumed or mistaken facts by the employer.	day. But the argument relies on federal cases under the Americans with Disabilities Act. CACI instructions cannot rely on federal cases construing different statutes. *Rope, supra,* on which this instruction is based, also relies on ADA cases, but the court did not expressly adopt this position. In fact, in footnote 13, the court says that Rope *cannot* rely on the "distraction" category because he pled that he was not distracted. If the commentator is right, Rope should have been able to claim to be a victim of "distraction" associational discrimination based on the employer's misperception that he was likely to be distracted.
		The suggested language "is likely" in the second option of element 4 overstates the requirement and should be replaced with "may."	The committee agreed with the comment and has made this replacement.
	Wilson Turner Kosmo, by Michael S. Kalt	In the first option to element 4, change "costly" to "an unduly burdensome expense."	*Rope* says "costly." The instruction should use the court's language, particularly when it is better plain English.
		In the third option for element 4, change "but not so inattentive that to perform to [*name of defendant*]'s satisfaction [*name of plaintiff*] would need an accommodation;" to "but [*name of plaintiff*] did not [himself/herself] require an accommodation to perform their job duties;	The comment does not indicate why this change should be made. There is no connection in the proposed language between the inattentiveness and the question of an accommodation.

Instruction	Commentator	Comment	BG Response
2730. *Whistleblower Protection—Essential Factual Elements*	California Employment Lawyers Association, by David deRobertis	The bracketed phrase "acting on behalf of' in the first element is confusing. It appears that this language is intended to cover the concept that Labor Code section 1102.5' s prohibitions apply not just to the employer but also to "any person acting on behalf of the employer .... " (Lab. Code §1102.5(a), (b), and (c).) However, nothing in the Directions for Use or otherwise makes this clear. Thus, we submit that if this bracket is intended to be used only for individual defendants to ensure that their conduct was done "on behalf of the employer," then the "Directions for Use" should make this clear. Otherwise, there is a risk that courts will include this bracket when the only party being sued is the employer entity itself.	The committee agreed with the comment and has deleted “acting on behalf of.”
		Because a disclosure may be about something “unwise, wasteful" gross misconduct, or the like,” but that is also a legal violation, the word “merely” needs to be added.	The committee agreed with the comment. “Merely” has been added.
		Delete: "A report of publicly known facts is not a protected disclosure." This statement is not an accurate statement of California law under Labor Code section 1102.5 or, at the very least, it is such a unsettled proposition that it does not belong in a standard, CACI instruction. A new case, *Hager v. County of Los Angeles* (2014) 228 Cal. App. 4th 1538, 1548-1553, directly disagreed with *Mize-Kurzman's* assertion that a report of already known facts cannot be a protected disclosure. Apart from *Hagar,* CELA argues at length that *Mize-Kurzman* was wrongly decided on this point.	The committee agreed that *Hager* casts serious doubt on *Mize-Kurzman* on this point. But a petition for review has been filed in *Hager*, which means that the case will not be final in time to make the 2015 edition. Nevertheless, the committee has deleted the last sentence on publicly known facts, while noting the holding of *Mize-Kurzman* in the Directions for Use.
	State Bar of California, Litigation	Rather than include the bracketed language “[acting on behalf of]” in element 1, we would delete that	The committee agreed with the comment and has deleted “acting on

Instruction	Commentator	Comment	BG Response
	Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	language and state in the Directions for Use that the instruction should be modified if the claim is based on the conduct of a person acting on behalf of the employer. We believe that the defendant in most cases will be the employer, rather than a person acting on behalf of the employer. If the defendant is not the employer, other references in the instruction to the defendant may need to be changed to be consistent with the statute. For example, Labor Code section 1102.5(b) states that "[a]n *employer, or any person acting on behalf of the employer*, shall not retaliate" (Italics added). If the defendant is the employer, then "[*name of defendant*]" is appropriate the first time it appears in element 2. But if the defendant is a person acting on behalf of the employer, it may be appropriate to name the employer rather than the defendant in element 2. The reference to "[*name of defendant*]'s policies" in the first bracketed sentence after element 7 also may need to be changed if the defendant is not the employer.	behalf of."
		Element 1 of the previous version of this instruction stated, "That [*name of plaintiff*] was an employee of [*name of defendant*]." We find this language clearer and more direct than the proposed new language and would use this language in element 1.	The committee sees no significant difference between the previous and current language.
	Wilson Turner Kosmo, by Michael S. Kalt	Change the third option for element 3 to "<u>That [*name of plaintiff*]'s refusal to</u> [specify activity <u>in which plaintiff refused to participate</u>] would result in [a violation of a [state/federal statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];".	The first proposed change is not correct. It is not the refusal that would result in a violation; it is the participation. The committee has revised the option to make that clear. The second proposed

Instruction	Commentator	Comment	BG Response
			change is unnecessary because "in which the plaintiff refused to participate" is stated in element 2. It does not need to be repeated in element 3.
		Delete: "[A disclosure is protected even though disclosing the information may be part of [*name of plaintiff*]'s job duties.]. This can be a special jury instruction if at all applicable.	The committee believes that it is an appropriate optional element.
2732. *Retaliatory Unfair Immigration-Related Practice—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Labor Code section 1019(a) refers to an alleged violation of "this code or local ordinance." Element 1 in this instruction refers instead to defendant's violation of "a legal obligation." We believe that the language "violation of law" accurately conveys the meaning of section 1019 and is more familiar language to lay jurors than "violation of a legal obligation." Also, rephrase the first option to the active voice.	The committee concluded that both "violation of a legal obligation" and "violation of law" were too broad as the statute requires a violation of the Labor Code or local ordinance. The instruction was restructured to require the user to insert the particular violation alleged.
		Labor Code section 1019(b)(1)(C) was amended in June 2014, effective January 1, 2015. The amendment adds the words "or a false report or complaint with any state or federal agency." Accordingly, we suggest that the language "[filed or threatened to file a false police report[;/.]]"	The committee is grateful for this information and has revised the instruction as suggested.
	Wilson Turner Kosmo, by Michael S. Kalt	In element 1, delete the open "specify other" option or reword it to read: "[*specify other plaintiff conduct in violation of the Labor Code or local ordinance alleged to have caused retaliation*]." This can be a special jury instruction if at all applicable.	If the plaintiff's conduct was something other than one of those specified in the statute, the instruction has to set forth the acts.
		In element 3, add "legal" thus: That [*name of defendant*]'s conduct was for the purpose of, or with the intent of, retaliating against [*name*	The committee has added "legally protected."

Instruction	Commentator	Comment	BG Response
		of plaintiff] for exercising [his/her] legal rights;	
		Add to the end of the instruction as a new paragraph (Lab. Code § 1019(b)(2)): "Unfair immigration-related practice" does not include conduct undertaken at the express and specific direction or request of the federal government."	The committee does not believe that this limitation from the statute would ever be a jury issue.
		Delete the paragraph from the Directions for Use about the option to specify other conduct in element 1.	The committee believes that it is important to alert the user to the "includes but is not limited to" language from the statute.
3040. *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree with the revisions to the instruction, but we would delete the excerpt from *Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240, in the Sources and Authority. The quotation provides no clear guidance and appears to provide no solid authority.	Element 4 requires that there be no reasonable justification. The excerpt from *Grenning* addresses this element.
3041. *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We disagree with the proposed revisions that are based on *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, a 6-5 en banc opinion. The holding in *Peralta* is by no means settled law binding on California courts. It is not unlikely that other federal courts will reach the opposite conclusion. We believe that until more solid authority can be cited, the bracketed final paragraph in the instruction and the citations to *Peralta* in the Directions for Use and Sources and Authority should be deleted.	The committee believes that the comment raises a legitimate point, but one that the committee expressly considered. The conclusion was that *Peralta* merited an optional paragraph in the instruction. However, the Directions for Use have been revised to make it clear that *Peralta* is not binding on a California court and that the optional paragraph is provided should the court decide that it agrees with *Peralta*.
3070. *Disability Discrimination—Access Barriers to Public*	James S. Link, Attorney at Law, Pasadena	This jury instruction should not be limited to the Disabled Persons Act, of which section 54.3 is a part.	The committee agreed that the Directions for Use should note that the

Instruction	Commentator	Comment	BG Response
Facility—Construction-Related Accessibility Standards Act—Essential Factual Elements		Rather, it should also be extended to the Unruh Civil Rights Act, of which Civil Code § 52 is a part. This proposed extension follows from the provisions of Civil Code section 55.56, which provides: (a) Statutory damages under either **subdivision (a) of Section 52** or subdivision (a) of Section 54.3 may be recovered in a construction-related accessibility claim against a place of public accommodation only if a violation or violations of one or more construction-related accessibility standards denied the plaintiff full and equal access to the place of public accommodation on a particular occasion.	CRASA also applies to claims under the Unruh Act.
		I have previously sent letters to the CACI committee respecting the damage instructions regarding the Unruh Civil Rights Act. In those letters, I noted the Committee does not address section 55.56 in CACI Nos. 3060 and 3067 and VF 3030 where it is stated damages may be presumed on an Unruh violation. Section 55.56 precludes the assertion that damage is "presumed." The Committee does not even cite section 55.56 in the notes to CACI Nos. 3060 and 3067 and VF 3030. Civil Code § 52 has required for a very long time proof of actual harm or damage. The law on which the Committee relies is out of date, dicta or not applicable as set out in my prior correspondence.	The commentator has made, and the committee has rejected, this argument several times previously. The Unruh Act applies to many kinds of discrimination in public accommodations, not just to accessibility barrier claims. CACI Nos. 3060 and 3067 are correct for all Unruh Act claims except CRASA claims. With this new CRASA instruction that mentions that it applies under the Unruh Act, the committee has addressed any possible confusion created by not building CRASA limitations into the CACI Unruh instructions.
	State Bar of California, Litigation Section, Jury	Civil Code section 54.3(a) authorizes an award of actual or statutory damages, and section 55.56 states the requirements for an	The committee agreed with the comment and has added references to statutory damages to the

Instruction	Commentator	Comment	BG Response
	Instructions Committee, by Reuben Ginsberg, Chair	award of statutory damages based on a construction-related accessibility claim. This new instruction includes the elements required to recover statutory damages on such a claim, as distinguished from the elements required for an award of actual damages. We suggest that the following sentence be added at the beginning of the Directions for Use: "Use this instruction if a plaintiff seeks statutory damages based on a construction-related accessibility claim."	Directions for Use along the lines suggested.
		We suggest that the title be modified to "Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Statutory Damages—Essential Factual Elements (Civ. Code, §§ 54.3, 55.56)"	The committee believes that the addition to the Directions for Use is sufficient. A title change would just make the title even longer.
		We suggest that the final paragraph in the Directions for Use be modified as follows: "This instruction can be modified for use if actual damages are sought by deleting element 2 and all that follows and adding a new element 2 stating that the defendant's conduct was a substantial factor in causing the plaintiff's harm. If actual damages are sought, CACI No. 3067, Unruh Civil Rights Act—Damages, may be given.	The committee agreed that the final paragraph could be improved, but did not agree with the revision proposed in the comment. Rather than suggest what would be essentially an entirely new instruction, it would be better to say that because the CRASA only applies to the recovery of statutory damages, the instruction should not be given if actual damages are sought.
4342. *Reduced Rent for Breach of Habitability*	California Judges Association	Because the law is unsettled, it seems it would be best not have this instruction at all.	While CACI instructions are usually not provided for unsettled points of law, the committee has received multiple requests for this

Instruction	Commentator	Comment	BG Response
			instruction from judges who believe that the reduction of rent is a jury issue. The Directions for Use make it clear that the instruction rests on an unresolved point.
		For a substantial breach of the warranty of habitability, the rent is reduced on a periodic basis (usually monthly, because usually the rent is paid monthly) by the percentage that the premises is uninhabitable. This instruction gives an option of making a simple dollar amount reduction, and using the dollar amount is too vague to accurately reflect the percentage of uninhabitability.	The committee does not see any vagueness. If rent is $1000 a month and the jury finds that rent should be reduced by half because of uninhabitability, it can either say $500 or 50 percent.
		The instruction assumes that the reduction is consistent for whatever period the jury determines. The reduction for habitability can vary from month to month. For example, if the breach were for the breakdown of a furnace starting April 1, the reduction could be 50 percent for April, 40 percent for May, 30 percent for June, 10 percent for July, and 0 percent for August. The instruction does not address the very definite possibility of a variance of the substantial breach over time.	The committee agreed with the comment and has added an optional sentence to the instruction and a paragraph to the Directions for Use.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree	No response is necessary.
4510. *Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential*	State Bar of California, Litigation Section, Jury Instructions	We suggest that the proposed new paragraph in the Directions for Use be modified for greater clarity and consistency. Also, *Gilbert Financial Corp. v. Steelform*	The committee agreed that the current language could use some greater clarity and revised it somewhat.

Instruction	Commentator	Comment	BG Response
Factual Elements	Committee, by Reuben Ginsberg, Chair	*Contracting Co.* (1978) 82 Cal.App.3d 65, 69-70 held that an owner could maintain a cause of action against a subcontractor for breach of the implied warranty of quality and fitness if the owner was an intended beneficiary of the contract between the general contractor and the subcontractor. We believe that this deserves mention as well. We suggest that the proposed new paragraph be modified as follows: "This instruction may be adapted for use ~~with a claim by a homeowner who purchased the property from the developer-owner against the contractor for construction defects~~ if an owner claims to be a third party beneficiary of a construction contract between the developer and a contractor or between a general contractor and a subcontractor. ~~That claim would be based on the proposition that the homeowner is a third-party beneficiary of the builder-developer contract.~~ (See *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, 1422-1423; *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 69-70.)"	But the comment's proposed rewrite elevates the third-party beneficiary point to be the basis of the claim rather than it just being the underlying legal reason for liability. *Gilbert* has been added to the citation as a "see also" to point out the applicability to subcontractors.
5012. *Introduction to Special Verdict Form*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree. We believe that the proposed new language clarifies an important point regarding the requirement that all jurors deliberate on each question, and we enthusiastically support the revision.	The committee appreciates the comment.

Instruction	Commentator	Comment	BG Response
All except as noted above	Orange County Bar Association, by Thomas Bienert, Jr., President	Agree	No response is necessary.

JUDICIAL COUNCIL OF CALIFORNIA
RULES AND PROJECTS COMMITTEE

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EXECUTIVE AND PLANNING COMMITTEE

RULES AND PROJECTS COMMITTEE

MINUTES OF OPEN MEETING

August 19, 2014
Teleconference

Advisory Body Members Present:	Hon. Harry E. Hull (chair, RUPRO), Hon. Douglas P. Miller (chair, E&P), Hon. Judith Ashmann-Gerst (vice-chair, RUPRO), Hon. David M. Rubin (vice-chair, E&P), Hon. Sue Alexander, Hon. David De Alba, Mr. James P. Fox, Hon. Teri L. Jackson, Hon. Brian L. McCabe, Hon. Mary Ann O'Malley, Hon. Dean T. Stout, Ms. Mary Beth Todd, Hon. Charles D. Wachob, Hon. Brian Walsh, Mr. David H. Yamasaki
Advisory Body Members Absent:	Hon. Stephen H. Baker, Hon. Emilie H. Elias, Ms. Angela J. Davis, Hon. Morris D. Jacobson, and Mr. Mark P. Robinson, Jr.
Others Present:	Mr. Cliff Alumno, Ms. Lisa Bartlow, Ms. Deborah Brown, Ms. Nancy Carlisle, Mr. Arturo Castro, Ms. Roma Cheadle, Mr. Patrick Ferrales, Mr. Bob Fleshman, Ms. Leah Rose-Goodwin, Hon. Steven Jahr, Ms. Camilla Kieliger, Ms. Susan McMullan, Mr. Patrick O'Donnell, Ms. Adrienne Toomey

DISCUSSION AND ACTION ITEMS

Item 1: Judicial Administration: Rule for Trial Court Budget Advisory Committee (Amend Cal. Rules of Court, rule 10.64)

E&P Action: The Executive and Planning Committee approved the proposal for circulation for comment.

RUPRO Action: The Rules and Projects Committee approved the proposal for circulation for comment.

Item 2: Judicial Administration: Rules for Advisory Groups (Adopt Cal. Rules of Court, rules 10.65, 10.66, and 10.67 and amend rules 10.2 and 10.50; revise *Trial Court Facility Modifications Policy*)

E&P Action: The Executive and Planning Committee approved the proposal for circulation for comment.

RUPRO Action: The Rules and Projects Committee approved the proposal for circulation for comment.

Item 3: Criminal Justice Realignment: Imposition of Mandatory Supervision

RUPRO Action: The Rules and Projects Committee approved the proposal for circulation for comment.

ADJOURNMENT

There being no further business, the meeting was adjourned.

Approved by the advisory body on enter date.

JUDICIAL COUNCIL OF CALIFORNIA

EXECUTIVE AND PLANNING COMMITTEE

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EXECUTIVE AND PLANNING COMMITTEE (E&P)

RULES AND PROJECTS COMMITTEE (RUPRO)

MINUTES OF OPEN MEETING WITH CLOSED SESSION

Tuesday, October 9, 2014
12:10 to 1:40 p.m.
Teleconference

Advisory Body Members Present:	E&P: Justice Douglas P. Miller (Chair); Judge David M. Rubin (Vice Chair); Justice Judith Ashmann-Gerst; Presiding Judge Marla O. Anderson; Presiding Judge Marsha G. Slough; Assistant Presiding Judges Morris D. Jacobson and Dean T. Stout; Ms. Mary Beth Todd and Ms. Donna D'Angelo Melby RUPRO: Associate Justice Harry E. Hull, Jr., (Chair); Presiding Judge Brian L. McCabe (Vice Chair); Presiding Judge Brian J. Back; Assistant Presiding Judge Martin J. Tangeman; Judges David Rosenberg and Joan P. Weber; Commissioner David E. Gunn; Mr. Richard D. Feldstein, Mr. James P. Fox, and Ms. Debra Elaine Pole
Advisory Body Members Absent:	E&P:; Assistant Presiding Judge Charles D. Wachob; Judge James R. Brandlin RUPRO: Judge David DeAlba
Invited Guests Present:	Judge Laurie Earl, Cochair, Trial Court Budget Advisory Committee
Committee Staff Present:	Ms. Jody Patel and Ms. Nancy Carlisle
Staff Present:	Mr. Peter Allen, Mr. Cliff Alumno, Ms. Heather Anderson, Mr. Patrick Ballard, Ms. Deborah C. Brown; Ms. Tina Carroll, Mr. Arturo Castro, Mr. Steven Chang, Ms. Roma Cheadle, Ms. Jessica Craven, Mr. Curtis L. Child, Ms. Cristina Foti, Ms. Donna Hershkowitz, Mr. Burt Hirschfield, Ms. Leah Rose-Goodwin, Mr. Chris Magnusson, Mr. Patrick McGrath, Ms. Vicky Muzny, Ms. Amy Nuñez, Ms. Diane Nunn, Mr. Patrick O'Donnell, Ms. Kelly Quinn, Ms. Anne Ronan, Mr. Corby Sturges, Mr. Zlatko Theodorovic

OPEN MEETING

Call to Order and Roll Call

The committee chairs called the meeting to order at 12:10 p.m., and committee staff took roll call.

JOINT MEETING: DISCUSSION AND ACTION ITEM (ITEM 1)

Item 1

Trial Court Budget Advisory Committee (TCBAC): Rule Amendments (Action Required)
E&P and RUPRO reviewed a proposal amending California Rules of Court, rule 10.64, the rule governing TCBAC to make a change to the membership category for presiding judges. The proposal also recommended that the rule be amended to eliminate a provision concerning the appointment of cochairs and to make minor technical changes.

Action: E&P approved the proposed amendments to California Rules of Court, rule 10.64. The proposal was forwarded to RUPRO for its consideration. RUPRO approved the proposal and recommended its placement on the consent agenda of the October Judicial Council meeting. The proposal was forwarded to E&P for consideration of RUPRO's recommendation (see Item 5 below).

E&P MEETING: DISCUSSION AND ACTION ITEMS (ITEMS 2–5)

Item 2

Trial Court Budget Advisory Committee (TCBAC): Term Extensions (Action Required)
E&P reviewed a request from TCBAC chair regarding term extensions for all existing members through December 31, 2014, in order to continue addressing critical budget challenges facing the trial courts during this interim period.

Action: E&P approved the request from the TCBAC chair to extend the terms of all existing members through December 31, 2014.

Item 3

Approval of Minutes (Action Required)
E&P reviewed the minutes of its August 12 and 19, 2014, meetings.

Action: E&P approved the minutes of its August 12 and 19, 2014, meetings.

Item 4

Subordinate Judicial Officer (SJO) Positions (Action Required)
E&P reviewed requests from several superior courts to change the number of SJO positions in their courts.

Action: E&P approved requests from four superior courts, as follows, to change number of SJO positions in those courts:

- ***Superior Court of Kings County: Increase the FTE associated with one commissioner position by 0.1 FTE.***
- ***Superior Court of Lake County: Reduce the workload of on SJO position by 0.2 FTE***
- ***Superior Court of Marin County: Reduce the SJO positions authorizezd by 1.8 FTE***
- ***Superior Court of San Francisco County: Reduce the SJO positions authorized by 9.1 FTE.***

Item 5

Agenda Setting for the October 27–28, 2014, Judicial Council Meeting (Action Required)
E&P reviewed available draft reports and set agenda for the October Judicial Council meeting.

Action: E&P approved the following items for placement on the October Judicial Council meeting agenda:

- ***Judicial Workload Assessment: 2014 Update of Judicial Needs Assessment and Proposed Revision to Methodology Used to Prioritize New Judgeships***
- ***Criminal Justice: Recidivism Reduction Fund Court Grant Program***
- ***Update to Court Technology Governance and Strategic Plan***
- ***Special Juvenile Immigration Status and the California Courts***
- ***Appellate Procedure: Confidential Records***
- ***Appellate Procedure: Extensions of Time to File Briefs***
- ***Appellate Procedure: Judicial Notice Requests***
- ***Appellate Procedure: Record in Juvenile Appeals***
- ***Criminal Justice Realignment: Petition and Order for Dismissal***
- ***Criminal Justice Realignment: Petitions for Revocation of Supervision***
- ***Fee Waivers: Payments Over Time and Specific Fees Included in Waivers***
- ***Child Support: Revise Income Withholding for Support and Related Instructions***
- ***Family Law: Petition and Response for Dissolution, Legal Separation, and Nullity of Marriage and Domestic Partnership***
- ***Family Law: Uniform Standards of Practice for Providers of Supervised Visitation***
- ***Family and Juvenile Law: Parentage***
- ***Juvenile Dependency: Attorney Training***
- ***Juvenile Dependency: Information Form for Parents***
- ***Judicial Administration: Rule for Trial Court Budget Advisory Committee***
- ***Rules and Forms: Miscellaneous Technical Changes***
- ***Decedents' Estates: Waiver of Bond by Beneficiaries of Estates***
- ***Probate Conservatorship and Guardianship: Accounting Schedules for Gains and Losses on Sales of Estate Assets***
- ***2014 Report to the Legislature: Judicial Administration Standards and Measures That Promote the Fair and Efficient Administration of Justice***
- ***Equal Access Fund: Distribution of Funds for Partnership Grants and IOLTA-Formula Grants***
- ***Judicial Administration: Change of the Duties of the Advisory Committee on Financial Accountability and Efficiency of the Judicial Branch***
- ***Judicial Council Report to the Legislature: Allocations and Reimbursements to the Trial Courts for Fiscal Year 2013–2014***

- ***Judicial Council Report to the Legislature: Allocation of New Judgeships Funding in FY 2013–2014***
- ***Judicial Council Report to the Legislature: Electronic Recording Equipment***
- ***Juvenile Dependency: Proposed Allocation for Fiscal Year 2014–2015 for Court Appointed Special Advocate Local Assistance***
- ***Judicial Council Report to the Legislature: Cash-Flow Loans Made to Trial Courts in Fiscal Year 2013–2014***
- ***Adoption and Permanency Month: Judicial Council Resolution***
- ***Court Facilities: The Napa Seismic Experience (No materials for this item.)***
- ***Final Report of the Implementation Task Force on Self-Represented Litigants***
- ***Judicial Council: Implementation of Judicial Council Directives on Judicial Council Staff Restructuring***
- ***Court Facilities: Trial Court Facility Modification Quarterly Activity Report, Quarter 4 of Fiscal Year 2013–2014***
- ***Trial Courts: Annual Investment Report for Fiscal Year 2013-2014***

ADJOURNMENT

There being no further open meeting business, the meeting was adjourned at 1:00 p.m.

E&P MEETING: CLOSED SESSION

Item 6
Pursuant to California Rules of Court, rule 10.75(d)(1)
Review materials regarding out-of-cycle vacancies on advisory bodies.

Action: E&P determined its recommendations to be sent to the Chief Justice for out-of-cycle vacancies on advisory bodies.

Item 7
Pursuant to California Rules of Court, rule 10.75(c)(1)
Facilities Policy Development

Action: Informational only; therefore, no action by E&P.

Adjourned closed session at 1:30 p.m.

Approved by the Executive and Planning Committee on [enter date].
Approved by the Rules and Projects Committee on [enter date].