Item number: 01

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Submit to JC (without circulating for comment)**

RUPRO Meeting: April 19, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Procedure and Juvenile Law: Judicial Council Forms Under Proposition 64

Committee or other entity submitting the proposal:
Criminal Law Advisory Committee and Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail):
Kimberly DaSilva, (415) 865-4534
kimberly.dasilva@jud.ca.gov

Nicole Giacinti, (415) 865-7598
nicole.giacinti@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: CLAC: December 15, 2016; Fam/Juv: December 15, 2016
Project description from annual agenda:
Criminal Law Advisory Committee:
Implementation of Proposition 64: Develop proposals to facilitate court implementation of Proposition 64, The Adult Use of Marijuana Act. Specific proposals to consider include:

- Development of forms to enable the filing of the petitions and applications, as mandated by the Act.

Family and Juvenile Law Advisory Committee:
Proposition 64: Develop rule and form proposal to implement Proposition 64, the "Control, Regulate and Tax Adult Use of Marijuana Act," commonly known as the "Adult Use of Marijuana Act." The Act legalizes and redesignates specified marijuana related offenses and regulates legalized use and for minors provides that most marijuana-related offenses are infractions.

If requesting July 1 or out of cycle, explain:
Effective January 23, 2017 the Judicial Council approved four optional forms, without circulation for comment, to insure that official council forms were available on an expedited basis. A proposal with the four approved forms circulated for public comment from December 16, 2016 to February 14, 2017. In response to comments, the committees are recommending Judicial Council approve forms CR-400, CR-401, and CR-402; JV-744A, JV-745, and JV-746; revise form JV-744; revoke forms CR-187and JV-745; renumber form CR-188 as CR-403.

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

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: May 18–19, 2017

Title
Criminal Procedure and Juvenile Law: Judicial Council Forms Under Proposition 64

Rules, Forms, Standards, or Statutes Affected
Approve forms CR-400, CR-401, and CR-402; JV-744A, JV-745, and JV-746; revise form JV-744; revoke forms CR-187 and JV-745; renumber form CR-188 as CR-403.

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

Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Agenda Item Type
Action Required

Effective Date
July 1, 2017

Date of Report
April 12, 2017

Contact
Kimberly DaSilva, 415-865-4534
kimberly.dasilva@jud.ca.gov

Nicole Giacinti, 415-865-7598
nicole.giacinti@jud.ca.gov

Executive Summary

The Criminal Law Advisory Committee recommends that the Judicial Council revoke form CR-187, and approve forms CR-400, CR-401, and CR-402, and renumber CR-188 as CR-403. The Family and Juvenile Law Advisory Committee recommends that the Judicial Council revoke form JV-745; approve forms JV-744A, JV-745, and JV-746; and revise form JV-744. These forms are designed to implement the "Control, Regulate and Tax Adult Use of Marijuana Act" ("Proposition 64"). The Judicial Council approved the current forms effective January 23, 2017, while they circulated for public comment. In response to public comments received, the committees modified the current forms, which required renumbering and/or retitling in four

instances; and, developed four additional forms. These eight proposed forms are intended to modify and replace the four forms that were approved in January 2017.

Recommendation

The Criminal Law Advisory Committee and the Family and Juvenile Law Advisory Committee recommend that the Judicial Council, effective July 1, 2017:

1. Revoke *Petition/Application (Health and Safety Code, § 11361.8) Adult Crime(s)* (form CR-187) and approve *Petition/Application (Health and Safety Code, § 11361.8) Adult Crime(s)* (form CR-400), which changes the current form CR-187 as follows:
    - Deletes the integrated proof of service;
    - Deletes the prosecuting agency response; and
    - Simplifies by reducing the amount of information required of the petitioner/applicant.

2. Approve *Proof of Service for Petition/Application* (*Health and Safety Code, § 11361.8) Adult Crime(s)* (form CR-401) for use by petitioners/applicants.

3. Approve *Prosecuting Agency Response to Petition/Application (Health and Safety Code, § 11361.8) Adult Crime(s)* (form CR-402) for use by the prosecuting agency to respond to petitioner's requested relief or to request a contested hearing.

4. Renumber *Order After Petition/Application (Health and Safety Code, § 11361.8) Adult Crime(s)* (form CR-188) as CR-403, since the creation of the proof of service and the prosecuting agency response changed the sequencing of the forms.

5. Revise *Request to Reduce Juvenile Marijuana Offense (Prop. 64–Health and Safety Code, § 11361.8(m))* (form JV-744) to:
    - Delete the prosecuting agency response;
    - Include a request for interpreter services;
    - Provide direction on when to use the attachment form, JV-744A; and
    - Include information about where to go to learn more about record sealing.

6. Approve *Attachment to Request to Reduce Juvenile Marijuana Offense (Health and Safety Code, § 11361.8)* (form JV-744A) for applicants to list additional juvenile marijuana offenses related to the same petition number.

7. Approve *Prosecuting Agency Response to Request to Reduce Juvenile Marijuana Offense (Health and Safety Code, § 11361.8)* (form JV-745) to provide the prosecuting agency with a simple and efficient way to provide and file a response to the request for a new disposition or redesignation.

8. Revoke *Juvenile Order After Request to Reduce Marijuana Offense* (form JV-745) and approve *Order After Request to Reduce Juvenile Marijuana Offense (Prop. 64–Health and*

Safety Code, § 11361.8(m)) (form JV-746), which changes what is currently form JV-745 as follows:

- Renumbers the form as JV-746, since the creation of the prosecuting agency response changed the sequencing of the forms;
- Includes a checkbox allowing the court to reseal previously sealed files; and
- Deletes the checkboxes in the header.

The new and revised forms are attached at pages 11–30.

Previous Council Action

Health and Safety Code section 11361.8, enacted as part of Proposition 64, specifically directed the Judicial Council to "promulgate and make available all necessary forms to enable the filing of the petitions and applications" provided for in the initiative. Because the new resentencing and redesignation provisions went into effect on November 9, 2016, the day after the state election, courts had an immediate need for forms to implement the procedures. In response, the Criminal Law Advisory Committee and the Family and Juvenile Law Advisory Committee developed two model adult forms and two model juvenile forms that were made publically available on the California Courts website from November 9, 2016, until January 23, 2017. Effective January 23, 2017, the Judicial Council approved four forms as optional Judicial Council forms, while they were also being circulated for public comment, to ensure that they were available on an expedited basis.

Rationale for Recommendation

Background

On November 8, 2016, the people of California voted to enact the "Control, Regulate and Tax Adult Use of Marijuana Act" ("Proposition 64"). Proposition 64 legalized and regulated the use of marijuana and redesignated specified marijuana-related offenses. New Health and Safety Code section 11361.8 enacted, as part of this proposition, also established a process through which people previously convicted of the following designated marijuana-related offenses may obtain a reduced conviction or sentence if they would have received the benefits of the law had it been in effect when the crime was committed:

- Possession under Health and Safety Code section 11357;
- Cultivation under Health and Safety Code section 11358;
- Possession for sale under Health and Safety Code section 11359; and
- Unlawful transport under Health and Safety Code section 11360.

(See Health & Saf. Code, § 11361.8(a), (e).)

This code section expressly confirms that this relief applies equally to criminal and juvenile delinquency adjudications and dispositions. (See Health & Saf. Code, § 11361.8(m).)

The adult resentencing and dismissal provisions of Prop. 64 apply to persons currently serving a sentence for an eligible offense and to those who have completed their sentence. (See Health & Saf. Code, § 11361.8(b), (f).) The request must be made before the trial court that entered the judgment of conviction in the case. (See Health & Saf. Code, § 11361.8(a), (e).) For persons currently serving a sentence, if the petition satisfies the criteria for resentencing or dismissal of sentence, the court must grant the petition unless the court determines that granting it would pose an unreasonable risk of danger to public safety. (Health & Saf. Code, § 11361.8(b).) If the court grants a request to redesignate an eligible offense as a misdemeanor or an infraction, the conviction is to be treated as a misdemeanor or an infraction for all purposes. (See Health & Saf. Code, § 11361.8(h).)

In adult cases, Prop. 64 also provides for the sealing of records of convictions dismissed under the proposition by persons who have completed their sentence. The court must "*seal the conviction as legally invalid as now established under* [Proposition 64]." (Health & Saf. Code, § 11361.8(f).)

Proposition 64 does not entirely decriminalize marijuana offenses for minors, but rather provides that all of the offenses are infractions that can be sanctioned solely with court-ordered drug education or counseling and community service. Because juvenile offenses will remain as infractions, application of the adult resentencing and redesignation provisions will not require dismissal or sealing of juvenile records.

Criminal

Current Forms

As noted above, effective January 23, 2017, the Judicial Council approved forms to implement proposition 64 while these forms were also being circulated for public comment. There are two forms currently in effect for adults that facilitate the following:

CR-187. The *Petition/Application* (form CR-187) for persons currently serving eligible sentences and persons who have completed eligible sentences allows the petitioner/applicant to:

- Identify one or multiple eligible convictions;
- Identify his or her age at the time of the conduct that gave rise to the conviction;
- Identify the nature of the substance that resulted in the conviction;
- Identify the quantity of the substance that resulted in the conviction;
- Request the desired relief;
- Waive the statutory requirement under section 11361.8 that the matter be heard by the original sentencing judge; and
- Waive his or her appearance.

It also requires the petitioner/applicant to serve the prosecuting agency with a copy of the petition/application, which contains an area for that agency to object to the request and/or to request a hearing on the matter. Proof of service on the prosecuting agency is not expressly

required by Prop. 64. However, it does require that the court grant the petition unless "the party opposing the petition" proves by clear and convincing evidence that the petitioner/applicant does not satisfy the criteria of section 11361.8(a), (f). Therefore, the proposition requires that the prosecuting agency receive the petition/application before the court may grant the requested relief. The integrated proof of service was intended to help petitioners/applicants, many of whom may be self-represented, document service of the petition/application on the prosecuting agency and to provide the court with information as to whether the prosecuting agency has been made aware of the petition/application.

CR-188. The *Order After Petition/Application* (form CR-188) allows the court to:

- Grant the relief;
- Record the date of the hearing, if held;
- Deny the relief and to state the reasons for the denial;
- Provide notice that any redesignation to a misdemeanor or an infraction shall thereafter be a misdemeanor or an infraction for all purposes;
- Relieve the petitioner from any applicable registration requirements for narcotics offenders; and
- Seal the record of conviction as applicable.

Recommended Forms

The committees recommend that the council modify the current adult forms in the following ways:

In order to accommodate the addition of a separate Proof of Service for Petition/Application and Prosecuting Agency's Response, the adult forms have been assigned numbers that differ from those approved during circulation for public comment. Consequently, the current forms CR-187 must be revoked and CR-188 must be renumbered. The recommended numbering is as follows:

- *Petition/Application (Health and Safety Code, § 11361.8) Adult Crime(s)* (form CR-400);
- *Proof of Service for Petition/Application* (*Health and Safety Code, § 11361.8) Adult Crime(s)* (form CR-401);
- *Prosecuting Agency Response to Petition/Application (Health and Safety Code, § 11361.8) Adult Crime(s)* (form CR-402); and
- *Order After Petition/Application (Health and Safety Code, § 11361.8) Adult Crime(s)* (form CR-403).

CR-400. *Petition/Application* (form CR-400). For the reasons set forth in the Comments section of this report, the committee recommends:

- Revoking the form currently numbered CR-187 and assigning it a new number to accommodate the creation of a new proof of service and prosecuting agency response;
- Deleting the integrated proof of service;
- Deleting the prosecuting agency response; and
- Simplifying the form by reducing the amount of information required by the petitioner/applicant.

Instruction boxes have also been added to the Petition/Application and the Prosecuting Agency Response to alert form users to proof of service forms.

CR-401. *Proof of Service for Petition/Application* (form CR-401). For the reasons set forth in the Comments section of this report, the committee recommends creating a new form for the proof of service.

CR-402. *Prosecuting Agency Response* (form CR-402). For the reasons set forth in the Comments section of this report, the committee recommends creating a new form for the prosecuting agency response, with an integrated proof of service.

CR-403. *Order After Petition/Application* (form CR-403). For the reasons set forth in the Comments section of this report, the committee recommends renumbering CR-188 to accommodate the creation of a new prosecuting agency response form:

Juvenile

Current Forms
There are currently two juvenile forms in effect to implement Proposition 64 that do the following:

JV-744. The *Request to Reduce Juvenile Marijuana Offense* (form JV-744) allows juvenile marijuana offenders to petition the court to obtain a new disposition, or to have their offenses redesignated as infractions under section 11361.8. This form was modeled on the current criminal *Petition/Application* (form CR-187). However, because the users of the juvenile form will primarily be either minors or young adults, the Family and Juvenile Law Advisory Committee sought to use plainer language and to streamline the form to require only the information that the offender is likely to be able to obtain. As a result, form JV-744 does not require the offender to specify the amount of marijuana involved in the offense, but only the dates and the Health and Safety Code violation for which the child was adjudicated. It was also structured so that a separate form must be completed for each eligible offense a person is requesting be redesignated under Prop. 64. It includes one additional item not on the adult petition/application to allow the petitioner to request a hearing. This item was added because section 11361.8 provides that a hearing is required if requested by the petitioner. In addition, consistent with juvenile court practice in other contexts, the form is designed to be routed by the court clerk to the probation department and prosecuting attorney after filing, rather than requiring the petitioner to serve the request on the prosecuting agency.

JV-745. The *Juvenile Order After Request to Reduce Marijuana Offense* (form JV-745) provides courts with the ability to make the relevant orders on the requests for relief under section 11361.8 for juvenile offenses. The form is consistent with the proposed criminal *Order After Petition/Application* (form CR-403) and adds content specifically relevant to juvenile offenders,

including an option for the court to order drug education or counseling and community service when ordering a new disposition for the offense as those sanctions are allowed by Prop. 64 for offenses committed by minors.

Recommended Forms

The committees recommend that the council modify the current juvenile forms in the following ways:

JV-744. *Request to Reduce Juvenile Marijuana Offense* (form JV-744). For the reasons set forth in the Comments section of this report, the committee recommends:

- Deleting the prosecuting agency response;
- Including a request for interpreter services;
- Providing direction on when to use the attachment form, JV-744A; and
- Including information about where to go to learn more about record sealing.

JV-744A. *Attachment to Request to Reduce Juvenile Marijuana Offense* (form JV-744A). For the reasons set forth in the Comments section of this report, the committee recommends creating a new form to be used as an attachment to the JV-744 when the applicant seeks reduction of multiple offenses.

JV-745. *Prosecuting Agency Response* (form JV-745). For the reasons set forth in the Comments section of this report, the committee recommends creating a new form for the prosecuting agency response, with an integrated proof of service.

JV-746. *Order After Request to Reduce Juvenile Marijuana Offense* (form JV-746). For the reasons set forth in the Comments section of this report, the committee recommends:

- Revoking the form currently numbered JV-745 and assigning it a new number to accommodate the creation of the new prosecuting agency response form;
- Including a checkbox allowing the court to reseal previously sealed files; and
- Deleting the checkboxes in the header.

Comments, Alternatives Considered, and Policy Implications

External comments

This proposal circulated for comment from December 16, 2016, to February 14, 2017. Twelve comments were received; all either agreed with the proposal if modified or did not indicate a position but proposed modifications. A chart with the full text of the comments received and each committee's responses is attached at pages 31–87. The main substantive comments and the committees' responses are discussed below.

Prosecutor Response

As noted above, both the current adult and juvenile forms include the prosecuting agency response on the petition/application and request forms. The Invitation to Comment specifically solicited on whether the prosecuting agency response should be included on the

petition/application and request forms, or on a separate form. The commentators were evenly split on this question. Nearly all of the commentators in favor of having a separate response form argued that a separate form is easier for the clerks to process and makes for a cleaner record. Those who were opposed to this either did not provide a reason or anticipated that the response would be needed in the majority of cases.

After consideration, both committees agreed that the prosecuting agency response should be removed from the petition/application and request forms and included on a separate form. Both the proposed adult and juvenile prosecuting agency response forms contain an integrated proof of service to ensure that prosecuting agencies serve their responses on petitioners/applicants, many of whom may be self-represented.

Multiple Offenses/Convictions

The second specific question asked in the invitation to comment was whether multiple offenses/convictions should be filed separately or included on a single petition/application or request form. For the juvenile forms, commentators addressed whether multiple offenses should be listed on the application or included via an attachment. The current juvenile request form requires separate requests for each new disposition or redesignation. The current adult petition/application form allows petitioners/applicants to request relief for multiple offenses/convictions bearing the same case number on a single form. The commentators were split on whether separate requests should be required for every offense, regardless of the case number. Those that advocated for separate petition/application or request forms noted that separate forms are easier to process and make for a cleaner record. Those against separate petition/application or request forms argued that it would be easier for the user if the forms included multiple offenses/convictions because a single form is less confusing and more streamlined.

After considering the benefit to records processing gained by requiring separate requests versus the burden on the applicant, the committees decided that both the adult and juvenile forms should enable petitioners to file one request for offenses related to a single case number. The recommended forms will require offenses bearing different case numbers and requests seeking different forms of relief to be filed on separate request forms.

As to the use of an attachment to the juvenile form, the responses from the commentators were again evenly split: those advocating against the attachment cited potential record processing problems and improperly venued requests. Those in support of the attachment argued that it would ease the request process for the form user. The committees ultimately decided to recommend that in juvenile cases, the additional offenses will be listed on an attachment form, JV-744A.

Simplified Language

The invitation to comment also specifically sought input on whether the forms should be written in plain language. The juvenile forms were written in a simpler language than the more formally

written criminal forms because the users of the juvenile forms will primarily be minors or young adults. Most comments on this issue supported using less formal, more simplified language. Some commentators noted concerns about legal accuracy and plain language forms. In response, the Criminal Law Advisory Committee simplified the petition/application form and the Family and Juvenile Law Advisory Committee made minor language changes to ensure accuracy.

Proof of Service

As noted above, the current juvenile request form requires the court to serve the request form on the prosecuting agency, while the current adult petition/application requires the petitioner/applicant to serve the prosecuting agency. The invitation to comment sought input on whether a proof of service form for the request or the petition/application is necessary. Those who provided comment on the juvenile form agreed that it was appropriate for the court to serve the request form; none of the comments recommended a proof of service for the juvenile form. The comments on the adult petition/application were mixed between supporting retaining the integrated proof of service and supporting separating it from the petition/application.

The committees considered whether a proof of service form was necessary. The Family and Juvenile Law Advisory Committee decided that a proof of service form was unnecessary, as the juvenile request for relief will be served by the court when it is filed by a self-represented litigant. The instruction of form JV-744 has been revised to clarify that when the form is filed by an attorney, service must be effectuated by the attorney. The Criminal Law Advisory Committee decided it would be best to retain a proof of service but separate it from the petition/application to reduce confusion and allow courts to more efficiently process the requests by eliminating filing of a second petition/application to demonstrate that the petitioner has served the prosecuting agency.

Effective Date

In addition to the specific questions posed in the Invitation to Comment, the Trial Court Presiding Judges Advisory Committee/Court Executives Advisory Committee Joint Rules Subgroup (JRS) commented on the immediate need for the revised forms. The JRS recommended that these forms become effective one month after the Judicial Council meeting. The committees agree and recommend that the new and revised criminal and juvenile law forms become effective July 1, 2017 rather than the originally proposed September 1, 2017.

Alternatives

The Family and Juvenile Law Advisory Committee also considered whether to add language on the *Order After Request to Reduce Juvenile Marijuana Offense* (form JV-746) regarding destruction of court records but determined it was unnecessary since the records are destroyed as a matter of law.

Implementation Requirements, Costs, and Operational Impacts

The requirements of section 11361.8 will impose significant workload burdens on the court to process and act upon the requests for relief by those who are eligible for retroactive relief under

Prop. 64. The proposed forms are intended to mitigate those burdens by providing courts uniform forms to streamline the process. It is anticipated that Prop. 64 will result in far fewer petitions than the courts have been required to consider under Proposition 47.

Attachments and Links

1. Judicial Council forms CR-187, CR-188, CR-400, CR-401, CR-402, CR-403, JV-744, JV- 744A, JV-745 (Revoked), JV-745 (New), and JV-746, at pages 11–30.
2. Chart of comments, at pages 31–87.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
PETITION/APPLICATION (Health and Safety Code, § 11361.8) **ADULT CRIME(S)**	CASE NUMBER:
☐ **FOR RESENTENCING OR DISMISSAL (Health & Saf. Code, § 11361.8(b))** ☐ **REDESIGNATION OR DISMISSAL/SEALING (Health & Saf. Code, § 11361.8(f))**	*FOR COURT USE ONLY* Date: Time: Department:

INSTRUCTIONS

- Before filing this form, petitioner/applicant should consult local court rules and court staff to determine if a formal hearing on the petition/application will be scheduled.
- If the petitioner is currently serving a sentence for a qualified crime, please fill out sections 1 and 2(a).
- If the applicant has completed the sentence for a qualified crime, please fill out sections 1 and 2(b).
- Complete sections 3 and 4 as necessary.
- Upon the filing of the petition/application, the petitioner/applicant is required to immediately serve the office of the prosecuting agency (the district attorney or city attorney, as appropriate) with a copy of the petition/application. It may be served personally or by mail; the signed Proof of Service, attached to this form, must be filed with the court.

1. **CONVICTION INFORMATION**

CONVICTION A:

On *(date):* _____, Petitioner/Applicant, the defendant in the above-entitled criminal action, was convicted of the following Health and Safety Code section ☐ 11357 ☐ 11358 ☐ 11359 ☐ 11360 which has been reclassified under Proposition 64.

Petitioner/Applicant further states that when committing the conduct resulting in the conviction he/she was:

☐ 18 to 20 years of age; ☐ 21 years old or older. Date of birth: _____

Petitioner/Applicant further states that the nature of the substance which resulted in the conviction was:

☐ marijuana not in the form of concentrated cannabis; ☐ concentrated cannabis; ☐ marijuana plants;

☐ Other:

Petitioner/Applicant further states that the quantity of the substance which resulted in the conviction was:

☐ not more than 28.5 grams of marijuana not in the form of concentrated cannabis; ☐ not more than 4 grams of marijuana in the form of concentrated cannabis; ☐ not more than 8 grams of marijuana in the form of concentrated cannabis;

☐ not more than 6 marijuana plants.

CONVICTION B:

On *(date):* _____, Petitioner/Applicant, the defendant in the above-entitled criminal action, was convicted of the following Health and Safety Code section ☐ 11357 ☐ 11358 ☐ 11359 ☐ 11360 which has been reclassified under Proposition 64.

Petitioner/Applicant further states that when committing the conduct resulting in the conviction he/she was:

☐ 18 to 20 years of age; ☐ 21 years old or older. Date of birth: _____

Petitioner/Applicant further states that the nature of the substance which resulted in the conviction was:

☐ marijuana not in the form of concentrated cannabis; ☐ concentrated cannabis; ☐ marijuana plants;

☐ Other:

Petitioner/Applicant further states that the quantity of the substance which resulted in the conviction was:

☐ not more than 28.5 grams of marijuana not in the form of concentrated cannabis; ☐ not more than 4 grams of marijuana in the form of concentrated cannabis; ☐ not more than 8 grams of marijuana in the form of concentrated cannabis;

☐ not more than 6 marijuana plants.

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

2. **REQUEST FOR RELIEF**

a. ☐ **RESENTENCING/DISMISSAL**

Petitioner is currently serving the sentence for the crime noted above, and requests the sentence be recalled and that he/she be resentenced or the charge be dismissed as required by law.

☐ Other:

b. ☐ **REDESIGNATION/DISMISSAL/SEALING**

Applicant has completed the sentence for the crime noted above, and requests the sentence be recalled and the conviction be redesignated or dismissed. If the conviction is dismissed, applicant requests the court's record of conviction be sealed.

☐ Other:

3. **WAIVER OF HEARING BY ORIGINAL SENTENCING JUDGE**

☐ Petitioner/applicant waives the right to have this matter heard by the original sentencing judge. The presiding judge of the court may designate any judge to rule on this matter.

4. **WAIVER OF APPEARANCE**

☐ Petitioner/applicant understands there is a right to personally attend any hearing held in this matter. Petitioner/applicant gives up that right; the matter may be heard without his/her appearance.

Dated:

▶ _____

Signature of petitioner/applicant

PROSECUTING AGENCY RESPONSE

☐ The prosecuting agency has no objection to this petition/application. Petitioner/applicant is entitled to the requested relief without a hearing.

☐ The prosecuting agency requests a hearing and objects to the granting of the petition/application because:

☐ Petitioner/applicant was not convicted of an eligible offense.

☐ Other:

☐ Petitioner is eligible for relief, but relief should be denied because petitioner presents an unreasonable risk of danger to public safety if he/she is resentenced.

☐ The prosecuting agency does not object to the petitioner's/applicant's eligibility for relief, but requests a hearing on the issue of resentencing.

Dated:

▶ _____

Signature of prosecuting attorney

ATTORNEY OR PARTY WITHOUT ATTORNEY:	STATE BAR NO.:	FOR COURT USE ONLY
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:		

PROOF OF SERVICE

Check Method of Service (only one):

☐ **By Personal Service** ☐ **By Mail**

CASE NUMBER:

FOR COURT USE ONLY

Date:
Time:
Department:

1. Person serving: I am over the age of 18 and not a party to this action.
   a. Name:
   b. Residence or Business Address:
   c. Telephone:
2. I served a copy of the Petition/Application for Resentencing or Reduction to Infraction on the person or persons listed below as follows:
   a. Name of person served:
   b. Address where served:
   c. Date Served:
   c. Time Served: ☐ AM ☐ PM
3. The documents were served by the following means *(specify):*
   a. ☐ **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 2. Delivery was made (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in the office between the hours of nine in the morning and five in the evening.
   b. ☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 2 and *(specify one)*:
      (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
      (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

      I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Date:

▶ _____
Signature of Declarant

_____
(Printed Name of Declarant)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
ORDER AFTER PETITION/APPLICATION (Health and Safety Code, § 11361.8) ADULT CRIME(S) ☐ **FOR RESENTENCING OR DISMISSAL (Health & Saf. Code, § 11361.8(b))** ☐ **REDESIGNATION OR DISMISSAL/SEALING (Health & Saf. Code, § 11361.8(f))**	CASE NUMBER: ***FOR COURT USE ONLY*** Date: Time: Department:

From the petition/application filed in this matter, the records of the court, and any other evidence presented in this matter, the court finds as follows:

1. **RESENTENCING GRANTED**

☐ The petitioner is eligible for the requested relief. The petition is **GRANTED**. The court hereby recalls the sentence imposed on the designated crime(s) and enters the following additional orders:

☐ The following crime(s) is/are resentenced as ☐ misdemeanor(s) ☐ infraction(s):
(indicate crime(s))

☐ The following sentence is imposed for the commission of the crime(s):

☐ The petitioner is given credit for time served of (days):

☐ Petitioner is required to complete a period of supervision of months/days on

☐ parole ☐ postrelease community supervision ☐ mandatory supervision (Pen. Code, § 1170(h))

☐ formal probation ☐ informal probation

☐ The court releases the petitioner from any form of post conviction supervision.

☐ The court **DISMISSES** the following crime(s) for the reason that the conviction is legally invalid:

☐ Other:

2. **REDESIGNATION GRANTED**

☐ The applicant is eligible for the requested relief. The application is **GRANTED.** The court hereby recalls the sentenceimposed on the designated crime(s) and enters the following additional orders:

☐ The following crime(s) is/are redesignated as ☐ misdemeanor(s) ☐ infraction(s):
(indicate crime(s))

☐ The court **DISMISSES** the following crime(s) for the reason that the conviction is legally invalid:
(specify):

☐ Other:

Form Approved for Optional Use
Judicial Council of California
CR-188 [New January 23, 2017]

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

3. **RESENTENCING/REDESIGNATION DENIED**

☐ The petitioner/applicant is ineligible for the requested relief. The request for resentencing/redesignation/dismissal/sealing is **DENIED** as to crime(s): for the following reasons:

☐ The petitioner/applicant was convicted of an offense that is not eligible for the requested relief.

☐ The petitioner's/applicant's age at the time the crime(s) was/were committed makes petitioner/applicant ineligible for the requested relief.

☐ The nature of the marijuana substance constituting the basis of the crime(s) makes petitioner/applicant ineligible for the requested relief.

☐ The quantity of the marijuana substance constituting the basis of the crime(s) makes petitioner/applicant ineligible for the requested relief.

☐ Although petitioner is eligible for relief, for reasons set forth on the record, the court finds that resentencing of petitioner would pose an unreasonable risk of danger to public safety.

☐ Other:

4. **MISDEMEANOR/INFRACTION FOR ALL PURPOSES**

Any misdemeanor resentenced as an infraction as a result of this order shall thereafter be an infraction for all purposes. Any felony conviction resentenced as a result of this order as a misdemeanor or infraction shall be a misdemeanor or infraction for all purposes.

5. **REGISTRATION**

☐ The petitioner/applicant is relieved from the requirement to register as a narcotics offender under Health and Safety Code, §11590.

6. **SEALING OF CONVICTION**

☐ The court's record of conviction is ordered sealed. No access to the information shall be permitted without court order.

IT IS SO ORDERED.

Dated:

_____
JUDICIAL OFFICER

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	*FOR COURT USE ONLY*
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	DRAFT Not Approved For Use by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
PETITION/APPLICATION (Health and Safety Code, § 11361.8) **ADULT CRIME(S)**	CASE NUMBER:
☐ **RESENTENCING OR DISMISSAL (Health & Saf. Code, § 11361.8(b))** ☐ **REDESIGNATION OR DISMISSAL/SEALING (Health & Saf. Code, § 11361.8(f))**	*FOR COURT USE ONLY* Date: Time: Department.:

1. **CONVICTION INFORMATION (Check all that apply)**
   - ☐ 11357 - Possession of Marijuana
   - ☐ 11358 - Cultivation of Marijuana
   - ☐ 11359 - Possession of Marijuana for Sale
   - ☐ 11360 - Transportation, Distribution, or Importation of Marijuana
   - ☐ 11362.1 - Personal Use of Marijuana

2. **REQUEST (check all that apply)**
   - ☐ PETITION: Petitioner is currently serving a sentence in the above-captioned case and now requests the court recall/resentence/dismiss the conviction.
   - ☐ APPLICATION: Applicant has completed his/her sentence in the above captioned case and now requests the court dismiss & seal/redesignate the conviction.

3. **WAIVER OF HEARING BY ORIGINAL SENTENCING JUDGE**
   - ☐ Petitioner/applicant waives the right to have this matter heard by the original sentencing judge. The presiding judge of the court may designate any judge to rule on this matter.

4. **WAIVER OF APPEARANCE**
   - ☐ Petitioner/applicant understands there is a right to personally attend any hearing held in this matter. Petitioner/applicant gives up that right; the matter may be heard without his/her appearance.

Dated:

▶ _____
SIGNATURE OF PETITIONER/APPLICANT

Form CR-401 (Proof of Service for Petition/application adult crimes) may be used to provide proof of service of this petition/application.

Form Approved for Optional Use
Judicial Council of California
CR-400 [New July 1, 2017]

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	*FOR COURT USE ONLY*
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	DRAFT Not Approved For Use by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
PROOF OF SERVICE **FOR PETITION/APPLICATION (Health and Safety Code, § 11361.8)** **ADULT CRIME(S)** **Method of Service (only one):** ☐ **Personal Service** ☐ **Mail**	CASE NUMBER: *FOR COURT USE ONLY* Date: Time: Department:

1. Person serving: I am over the age of 18 and not a party to this action.
   a. Name:
   b. Residence or Business Address:
   c. Telephone:

2. I served a copy of the Petition/Application for Resentencing or Reduction on the person or persons listed below as follows:
   a. Name of person served:
   b. Address where served:
   c. Date Served:
   c. Time Served: ☐ AM ☐ PM

3. The documents were served by the following means *(specify):*
   a. ☐ **by personal service.** I personally delivered the documents to the persons at the addresses listed in item 2. Delivery was made (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in the office between the hours of nine in the morning and five in the evening.
   b. ☐ **by United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 2 and *(specify one)*:
      (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
      (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

      I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

▶ _____
SIGNATURE OF DECLARANT

_____
(PRINTED NAME OF DECLARANT)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	*FOR COURT USE ONLY*
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	DRAFT Not Approved For Use by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
PROSECUTING AGENCY RESPONSE TO PETITION/APPLICATION (Health and Safety Code, § 11361.8) ADULT CRIME(S)	CASE NUMBER: *FOR COURT USE ONLY* Date: Time: Department:

PROSECUTING AGENCY RESPONSE

☐ The prosecuting agency has no objection to this petition/application. Petitioner/applicant is entitled to the requested relief without a hearing.

☐ The prosecuting agency requests a hearing and objects to the granting of the petition/application because:

☐ Petitioner/applicant was not convicted of an eligible offense.

☐ Other:

☐ Petitioner is eligible for relief, but relief should be denied because petitioner presents an unreasonable risk of danger to public safety if he/she is resentenced.

☐ The prosecuting agency does not object to the petitioner's/applicant's eligibility for relief, but requests a hearing on the issue of resentencing.

Dated:

▶ _____

SIGNATURE OF PROSECUTING ATTORNEY

Form Approved for Optional Use
Judicial Council of California
CR-402 [New July 1, 2017]

PROSECUTING AGENCY RESPONSE TO PETITION/APPLICATION (Health and Safety Code, § 11361.8) ADULT CRIME(S)

Health and Safety Code, § 11361.8
www.courts.ca.gov

PEOPLE OF THE STATE OF CALIFORNIA v DEFENDANT:	CASE NUMBER:

PROOF OF SERVICE
FOR PROSECUTING AGENCY RESPONSE
Method of Service (only one):

☐ **Personal Service** ☐ **Mail**

1. Person serving: I am over the age of 18 and not a party to this action.
   a. Name:
   b. Residence or Business Address:
   c. Telephone:

2. I served a copy of the Petition/Application for Resentencing or Reduction on the person or persons listed below as follows:
   a. Name of person served:
   b. Address where served:
   c. Date Served:
   c. Time Served: ☐ AM ☐ PM

3. The documents were served by the following means *(specify):*
   a. ☐ **by personal service.** I personally delivered the documents to the persons at the addresses listed in item 2. Delivery was made (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in the office between the hours of nine in the morning and five in the evening.

   b. ☐ **by United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 2 and *(specify one)*:

      (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

      (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

      I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Date:

▶ _____
SIGNATURE OF DECLARANT

_____
(PRINTED NAME OF DECLARANT)

CR-403

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	DRAFT Not Approved For Use by the Judicial Council
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
ORDER AFTER PETITION/APPLICATION (Health and Safety Code, § 11361.8) **ADULT CRIME(S)** ☐ **RESENTENCING OR DISMISSAL (Health & Saf. Code, § 11361.8(b))** ☐ **REDESIGNATION OR DISMISSAL/SEALING (Health & Saf. Code, § 11361.8(f))**	CASE NUMBER: *FOR COURT USE ONLY* Date: Time: Department:

From the petition/application filed in this matter, the records of the court, and any other evidence presented in this matter, the court finds as follows:

1. **RESENTENCING GRANTED**

☐ The petitioner is eligible for the requested relief. The petition is **GRANTED**. The court hereby recalls the sentence imposed on the designated crime(s) and enters the following additional orders:

☐ The following crime(s) is/are resentenced as ☐ misdemeanor(s) ☐ infraction(s):
(specify crime(s)):

☐ The following sentence is imposed for the commission of the crime(s):

☐ The petitioner is given credit for time served of (days):

☐ Petitioner is required to complete a period of supervision of months/days on
☐ parole ☐ postrelease community supervision ☐ mandatory supervision (Pen. Code, section 1170(h))
☐ formal probation ☐ informal probation

☐ The court releases the petitioner from any form of postconviction supervision.

☐ The court **DISMISSES** the following crime(s) for the reason that the conviction is legally invalid:

☐ Other:

2. **REDESIGNATION GRANTED**

☐ The applicant is eligible for the requested relief. The application is **GRANTED.** The court hereby recalls the sentence imposed on the designated crime(s) and enters the following additional orders:

☐ The following crime(s) is/are redesignated as ☐ misdemeanor(s) ☐ infraction(s):
(specify crime(s)):

☐ The court **DISMISSES** the following crime(s) for the reason that the conviction is legally invalid:
(specify):

☐ Other:

Form Approved for Optional Use
Judicial Council of California
CR-403 [Revised July 1, 2017]

ORDER AFTER PETITION/APPLICATION
(Health and Safety Code, § 11361.8)
ADULT CRIMES

Health and Safety Code, § 11361.8
www.courts.ca.gov

PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	CASE NUMBER:

3. **RESENTENCING/REDESIGNATION DENIED**

☐ The petitioner/applicant is ineligible for the requested relief. The request for resentencing/redesignation/dismissal/sealing is **DENIED** as to crime(s): for the following reasons:

- ☐ The petitioner/applicant was convicted of an offense that is not eligible for the requested relief.
- ☐ The petitioner's/applicant's age at the time the crime(s) was/were committed makes petitioner/applicant ineligible for the requested relief.
- ☐ The nature of the marijuana substance constituting the basis of the crime(s) makes petitioner/applicant ineligible for the requested relief.
- ☐ The quantity of the marijuana substance constituting the basis of the crime(s) makes petitioner/applicant ineligible for the requested relief.
- ☐ Although petitioner is eligible for relief, for reasons set forth on the record, the court finds that resentencing of petitioner would pose an unreasonable risk of danger to public safety.
- ☐ Other:

4. **MISDEMEANOR/INFRACTION FOR ALL PURPOSES**

Any misdemeanor resentenced as an infraction as a result of this order shall thereafter be an infraction for all purposes. Any felony conviction resentenced as a result of this order as a misdemeanor or infraction shall be a misdemeanor or infraction for all purposes.

5. **REGISTRATION**

☐ The petitioner/applicant is relieved from the requirement to register as a narcotics offender under Health and Safety Code section 11590.

6. **SEALING OF CONVICTION**

☐ The court's record of conviction is ordered sealed. No access to the information shall be permitted without court order.

IT IS SO ORDERED.

Dated:

JUDICIAL OFFICER

PARTY WITHOUT AN ATTORNEY OR ATTORNEY:	STATE BAR NO. (if applicable):	*FOR COURT USE ONLY*
NAME:		DRAFT Not Approved by the Judicial Council
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
CASE NAME:		CASE NUMBER:
REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE		Date: Time: Department:

INSTRUCTIONS

- Use this form if you went to court and were found to have committed a marijuana offense when you were under the age of 18 and you want to reduce the charge on your record. You need to use a different form if you were 18 or older at the time of the offense.
- If you have more than one juvenile marijuana offense:
  - A. Use a separate JV-744 form for each marijuana offense that has a different case number or if you are requesting a different remedy in item 3 or 4.
  - B. Use form JV-744A to list marijuana offenses that have the same case number even if the court decided you violated a marijuana law on a different day. You need to list the date the court made its decision.
- If this form asks for information that you do not have, you can contact your attorney. If you don't have an attorney, the public defender's office or the court in the county where you went to court can probably help you get the information.
- The court will serve this form for you unless you have an attorney. If you have an attorney, he/she must serve the form.
- How to fill out the form without an attorney:
  - A. Put your name and contact information in the box at the top of the form and in number 1 below.
  - B. Put the address of the court from your court papers in the box below your address. This form must be filed in the same county where you went to court for this offense.
  - C. Fill out number 2 about the marijuana offense.
  - D. If you are on probation now for the marijuana offense, also check number 3 to ask the judge to make new dispositional orders (a new sentence) based on the new law. The new orders cannot be worse than your original sentence.
  - E. If you have completed probation for the marijuana offense, check number 4 to ask the judge to change your offense to an infraction. So, if it was a misdemeanor or a felony, it will now be treated like a traffic ticket.
  - F. Your case may be heard by the judge who originally sentenced you or the court will have a different judge hear your request.
  - G. You will not have a hearing (talk to a judge) unless you ask for one. You can check one of the boxes in number 5 if you want the court to set a hearing. If you will need an interpreter, ask for one in number 6.
  - H. You can check number 5(c) if you do not want to come to court if there is a hearing.

For more information about Proposition 64 and filling out this form, go to www.courts.ca.gov/prop64.htm.

For information about record sealing, go to www.courts.ca.gov/28120.htm.

1. MY INFORMATION

My name is:

I was born on *(date):*

Form Approved for Optional Use
Judicial Council of California
JV-744 [Rev. July 1, 2017]

REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE
(Health and Safety Code, § 11361.8(m))

Health and Safety Code, § 11361.8
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

2. OFFENSE INFORMATION

On (*date*): _____ I was found to come within the jurisdiction of the court under Welfare and Institutions Code section 602 for a violation of Health and Safety Code section *(check all that apply):*

- ☐ 11357—Possession of Marijuana
- ☐ 11358—Cultivation of Marijuana
- ☐ 11359—Possession of Marijuana for Sale
- ☐ 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

☐ I have attached form JV-744A because I have more than one marijuana offense with this case number.

3. REQUEST FOR A NEW DISPOSITIONAL ORDER (RESENTENCING)

☐ I am currently subject to a dispositional order (on probation) for the marijuana offense in number 2. I request that the dispositional order be recalled and relief be granted in accordance with Health and Safety Code section 11361.8(b) so that I will be resentenced.

4. REQUEST FOR REDESIGNATION

☐ I am no longer a ward of the court (completed probation) for the marijuana-related offense in number 2. I request the court's dispositional order be recalled and in accordance with Health and Safety Code section 11361.8(f). The offense will be redesignated as an infraction (treated like a traffic ticket).

5. REQUEST FOR HEARING/WAIVER OF APPEARANCE

a. ☐ I request a hearing if the prosecuting agency opposes my request. I understand that if I check this box, the court will hold a hearing only if the prosecution agency disagrees with my request.

b. ☐ I request that the court hold a hearing even if my request is not opposed by the prosecution agency.

c. ☐ I understand that I have a right to attend any hearing about my request and argue on my behalf. I give up that right. The case may be heard without my presence.

6. REQUEST FOR INTERPRETER

☐ If there is a hearing, I will need a *(language)* _____ interpreter.

7. WAIVER OF HEARING BY ORIGINAL SENTENCING JUDGE

☐ I waive the right to have the judge who originally sentenced me hear my request. I understand that if I don't waive this right, I will not have the hearing in front of the original judge if he/she is unavailable.

Date: _____

▶ _____
SIGNATURE OF PETITIONER

INSTRUCTIONS - AFTER YOU COMPLETE THIS FORM

File this form with the court. The court will send a copy to the probation department and to the prosecuting agency.

SHORT TITLE	CASE NUMBER:

ATTACHMENT TO REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE

______ On (*date*): ____________________ , the court found that I violated Welf. and Inst. Code section *(check all that apply):*

- [ ] 11357—Possession of Marijuana
- [ ] 11358—Cultivation of Marijuana
- [ ] 11359—Possession of Marijuana for Sale
- [ ] 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

______ On (*date*): ____________________ , the court found that I violated Welf. and Inst. Code section *(check all that apply):*

- [ ] 11357—Possession of Marijuana
- [ ] 11358—Cultivation of Marijuana
- [ ] 11359—Possession of Marijuana for Sale
- [ ] 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

______ On (*date*): ____________________ , the court found that I violated Welf. and Inst. Code section *(check all that apply):*

- [ ] 11357—Possession of Marijuana
- [ ] 11358—Cultivation of Marijuana
- [ ] 11359—Possession of Marijuana for Sale
- [ ] 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

______ On (*date*): ____________________ , the court found that I violated Welf. and Inst. Code section *(check all that apply):*

- [ ] 11357—Possession of Marijuana
- [ ] 11358—Cultivation of Marijuana
- [ ] 11359—Possession of Marijuana for Sale
- [ ] 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

______ On (*date*): ____________________ , the court found that I violated Welf. and Inst. Code section *(check all that apply):*

- [ ] 11357—Possession of Marijuana
- [ ] 11358—Cultivation of Marijuana
- [ ] 11359—Possession of Marijuana for Sale
- [ ] 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

______ On (*date*): ____________________ , the court found that I violated Welf. and Inst. Code section *(check all that apply):*

- [ ] 11357—Possession of Marijuana
- [ ] 11358—Cultivation of Marijuana
- [ ] 11359—Possession of Marijuana for Sale
- [ ] 11360—Transportation, Distribution, or Importation of Marijuana

Proposition 64 has reclassified this offense as an infraction when committed by a person under the age of 18. At the time of the offense, I was under the age of 18.

Form Approved for Optional Use
Judicial Council of California
JV-744A [New July 1, 2017]

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY*
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	CASE NUMBER:
JUVENILE ORDER AFTER REQUEST TO REDUCE MARIJUANA OFFENSE **(Prop. 64–Health and Safety Code, § 11361.8(m))** ☐ **FOR NEW DISPOSITION** **(Health & Saf. code 11361.8(b))** ☐ **REDESIGNATION** **(Health & Saf. code 11361.8(f))**	Date: Time: Department:

From the petition/application filed in this matter, the records of the court, and any other evidence presented in this matter, the court finds as follows:

1. **NEW DISPOSITION GRANTED**

☐ The petitioner is eligible for the requested relief. The petition is GRANTED. The court hereby recalls its disposition for the designated offense and makes the following additional orders:

☐ The following offense is redesignated as an infraction (indicate offense): _____

☐ Petitioner is required to complete:

☐ hours of drug education and counseling and/or

☐ hours of community service, within days from the date of this order.

☐ Wardship and delinquency jurisdiction for this offense is terminated.

☐ Other: _____

2. **REDESIGNATION GRANTED**

☐ The petitioner is eligible for the requested relief. The application is **GRANTED**. The court hereby redesignates the following offense for which the child was found to be within the jurisdiction of the court under Welfare and Institutions Code section 602 as an infraction (indicate offense): _____.

3. **NEW DISPOSITION/REDESIGNATION DENIED**

☐ The petitioner is ineligible for the requested relief. The request for a new dispositional order/redesignation is **DENIED** for the following reasons:

☐ The offense for which petitioner was found to be within the jurisdiction of the court under Welfare and Institutions Code section 602 is not eligible for the requested relief under Health and Safety Code section 11361.8.

☐ Although petitioner is eligible for relief, for reasons set forth on the record, the court finds that modifying the petitioner's disposition would pose an unreasonable risk of danger to public safety.

☐ Other: _____

Form Approved for Optional Use
Judicial Council of California
JV-745 [New January 23, 2017]

Health and Safety Code, § 11361.8
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

4. **INFRACTION FOR ALL PURPOSES**
   Any offense redesignated as an infraction as a result of this order shall thereafter be an infraction for all purposes.

IT IS SO ORDERED.

Dated: _____ _____
JUDICIAL OFFICER

PARTY WITHOUT AN ATTORNEY OR ATTORNEY:	STATE BAR NO. (if applicable):	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	DRAFT Not Approved by the Judicial Council
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
CASE NAME:		
PROSECUTING AGENCY RESPONSE TO REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE		CASE NUMBER:
		Date: Time: Department:

TO BE FILLED OUT BY THE PROSECUTING AGENCY

PROSECUTING AGENCY RESPONSE

☐ The prosecuting agency has no objection to this petition. Applicant is entitled to the requested relief without a hearing.

☐ The prosecuting agency does not object to the applicant's eligibility for relief, but requests a hearing on the issue of a new dispositional order.

☐ The prosecuting agency requests a hearing and objects to the granting of the petition because:

- ☐ The prosecuting agency does not agree that the petition should be granted because the offense for which applicant was found to be within the jurisdiction of the court under Welfare and Institutions Code section 602 is not eligible for the requested relief under Health and Safety Code section 11361.8.
- ☐ Applicant is eligible for relief, but relief should be denied because applicant presents an unreasonable risk of danger to public safety if he/she is resentenced.
- ☐ Other: _____

Date: _____ _____

SIGNATURE OF PROSECUTING AGENCY

Form Approved for Optional Use
Judicial Council of California
JV-745 [New July 1, 2017]

PROSECUTING AGENCY RESPONSE TO REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE
(Health and Safety Code, § 11361.8(m))

Health and Safety Code, § 11361.8
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

1. Person serving: I am over the age of 18 and not a party to this action.
   a. Name:
   b. Residence or Business Address:
   c. Telephone:
2. I served a copy of the *Prosecuting Agency Response to Request to Reduce Juvenile Marijuana Offense* on the person or persons listed below as follows:
   a. Name of person served:
   b. Address where served:
   c. Date Served:
   c. Time Served: ☐ AM ☐ PM
3. The documents were served by the following means *(specify):*
   a. ☐ **by personal service.** I personally delivered the documents to the persons at the addresses listed in item 2. Delivery was made (a) to the attorney personally; or (b) by leaving the documents at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the notice or papers could be left, by leaving them in a conspicuous place in the office between the hours of nine in the morning and five in the evening.
   b. ☐ **by United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 2 and *(specify one)*:
      (1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
      (2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

      I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at *(city and state):*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct

Date:

▶ _____
SIGNATURE OF DECLARANT

_____
(PRINTED NAME OF DECLARANT)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* DRAFT Not Approved by the Judicial Council
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
ORDER AFTER REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE	CASE NUMBER: Date: Time: Department:

From the petition/application filed in this matter, the records of the court, and any other evidence presented in this matter, the court finds as follows:

1. **NEW DISPOSITION GRANTED**

☐ The applicant is eligible for the requested relief. The petition is **GRANTED**. The court recalls its disposition for the designated offense and makes the following additional orders:

☐ The following offense is redesignated as an infraction *(indicate offense(s) and date of petition):*

☐ Applicant is required to complete:

☐ hours of drug education and counseling and/or

☐ hours of community service, within days from the date of this order.

☐ Wardship and delinquency jurisdiction for this offense is terminated.

☐ Delinquency jurisdiction remains in effect. All prior orders remain in full force and effect. The court vacates condition number(s) of the terms and conditions of probation.

2. **REDESIGNATION GRANTED**

☐ The applicant is eligible for the requested relief. The request is **GRANTED**. The court hereby redesignates the following offense(s) as an infraction *(indicate offense(s)):* _____ .

3. **NEW DISPOSITION/REDESIGNATION DENIED**

☐ The applicant is ineligible for the requested relief. The request for a new dispositional order or redesignating is **DENIED** for the following reasons:

☐ The offense for which the applicant was found to be within the jurisdiction of the court under Welfare and Institutions Code section 602 is not eligible for the requested relief under Health and Safety Code section 11361.8.

☐ Although applicant is eligible for relief, for reasons set forth on the record, the court finds that modifying the applicant's disposition would pose an unreasonable risk of danger to public safety.

☐ Other: _____

Form Approved for Optional Use
Judicial Council of California
JV-746 [New July 1 , 2017]

ORDER AFTER REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE
(Health and Safety Code, § 11361.8(m))

Health and Safety Code, § 11361.8
www.courts.ca.gov

CASE NAME:	CASE NUMBER:

4. **INFRACTION FOR ALL PURPOSES**

Any offense redesignated as an infraction as a result of this order shall thereafter be an infraction for all purposes.

5. **PREVIOUSLY SEALED RECORD**

☐ The record was previously sealed pursuant to Welfare and Institutions Code section 781 or 786 and it is ordered resealed.

IT IS SO ORDERED.

Dated: _____ _____

JUDICIAL OFFICER

W17-01

Criminal Procedure and Juvenile Law: Judicial Council Forms Under Proposition 64 (Approve forms CR-187, CR-188, JV-744, and JV-745.)

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

	Commentator	Position	Comment	Committee Response
1.	Albert De La Isla Principal Analyst, Adult Division Superior Court of California, County of Orange	AM	1. Form should require a separate petition / application for each conviction / offense.	1. The Criminal Law Advisory Committee (hereafter CLAC) declines to require a separate petition/application form for each conviction/offense. Using a single form for each case that permits petitioners/applicants to include all eligible convictions that apply to that case, will enable courts to efficiently process petitions/applications by case number while allowing the petitioner/applicant to consolidate multiple convictions on a single form.
			2. Prosecuting Agency response should be on a separate form, not on the CR-187.	2. CLAC agrees that the prosecuting agency's response should be separated from the petition/application, as a separate response form will streamline the filing process and eliminate the need for duplicate copies of the form in the court file. The prosecuting agency's response now contains an integrated proof of service, intended to ensure that the prosecution serves the petitioners/applicants, many of whom will be self-represented, with its response.
			3. Footer of CR-187 should be the same as the title and show as ADULT CRIME(S) instead of ADULT CRIMES.	3. CLAC agrees with the suggestion to align the titles with the footers.
			4. The section where the petitioner / applicant "further states the nature of the substance which resulted in the conviction was:" may be difficult for a defendant to fill out as they may not have that	4. CLAC agrees that the "nature of the substance which resulted in the conviction" is not a required field and has removed it from the form.

			information. Is this a required field in order to file the petition? Our recommendation is that it is not required. 5. On the waiver of hearing by original sentencing judge, if the box is not checked it gives the impression that the court has to send it to the sentencing judge. We understand that the Presiding Judge can still designate any judge to rule on it. So, is that box necessary? 6. Proof of /service form should not have a "For Court Use Only" section as the court is not filing it nor would we be filling out that calendaring information. Also, the footer should reference proof of service. 7. CR 188, same comment about the footer, should be CRIME(S) not CRIMES to be consistent with the title of the form. Also remove the "For Court Use	5. CLAC declines to delete the box that permits the applicant/petitioner to waive the hearing by the original sentencing judge. Health & Safety Code section 11361.8 subdivisions (a) and (e) provide the petitioner/applicant with the right to file "before the trial court that entered the judgment of conviction." Subdivision (i) allows a presiding judge to designate another judge to make the ruling only when the judge that originally sentenced the petitioner is not available. In all other cases, the petitioner/applicant must waive his/her right for review by the original sentencing judge before a different judge is authorized to rule on the petition/application. The waiver box provides courts with the flexibility to assign different judges on these cases, expediting the relief. 6. The Proof of Service for Petition/Application is now a separate form. The committee declines to delete the "court use only" portion of the proof of service because it is not an order. 7. CLAC agrees with the suggestion to align the titles with the footers.

			Only" section of the form, this is an order so we would not be filling out hearing information.	
2.	Drug Policy Alliance Joy Haviland Staff Attorney	N/I	Dear Members of the Judicial Council: These comments are submitted on behalf of the Drug Policy Alliance, in response to the Invitation to Comment on Judicial Council forms CR-187, CR-188, JV-744 and JV-745 (after circulation renumbered as JV-746). The Drug Policy Alliance ("DPA") is a national advocacy group committed to ending the war on drugs and to building a policy response to drugs that is grounded in science, compassion, health and human rights. Through our political advocacy arm and 501(c)(4) organization, Drug Policy Action, we served as co-chairs and co-sponsors of the official Proposition 64 ("Prop. 64") campaign. We are thus particularly interested in making sure any form is adopted in accordance with the new law. **General Comments** We appreciate the efforts of Judicial Council to develop a uniform petition and application that can be used throughout the state by petitioners seeking to reduce or dismiss a prior marijuana conviction. Our primary concerns with the form are twofold: the usability of the form and a burden being placed upon petitioners/applicants, rather than the district attorney. As described below in response to question (1), the form as drafted is not very user friendly for an unrepresented applicant. If an applicant does not	Usability Comments "[Q]uantitiy of the substance which resulted in the conviction"

			know the quantity of substance which resulted in the conviction, it is unclear how they should fill out the application. It is also unclear what an applicant is waiving when they fill out the form. A broader information sheet or list of instructions might be helpful in clarifying for unrepresented (or even for represented) applicants how they should answer these questions. Secondly, as raised by the Los Angeles County Public Defender, CR-187 mistakenly places the burden on petitioners/applicants to establish the type of reduction for which they qualify. The form requires a petitioner/applicant to state the type of marijuana and the quantity of the marijuana involved in the conviction. The answer given will not affect whether a petitioner/applicant gets resentenced, but how they get resentenced. For example, prior to Prop. 64, cultivation of any marijuana was a felony offense. It is now legal to cultivate up to six plants inside a private residence and cultivation of more than six plants will result in a misdemeanor offense. No matter how someone answers this question they will get resentenced, but the answer here will affect whether the result will be a dismissal or reduction to a misdemeanor.	CLAC agrees that the "nature of the substance which resulted in the conviction" is not a required field and has removed it from the form. Unclear Waiver CLAC agrees to clarify which rights of the defendant each waiver applies to and will separate the waiver from the signature line more clearly. Information Sheet CLAC declines to develop an information sheet because the form has been simplified. Burden Comment Please see CLAC's response to the Los Angeles Public Defender and Alternate Public Defender's joint comment. Los Angeles District Attorney's Form Please see CLAC's response to the Los Angeles Public Defender and Alternate Public Defender's joint comment.

			In other words, the form places the burden on the petitioner/applicant to establish how they should get resentenced yet the statute places the burden on the party opposing the petition (i.e. the District Attorney). The resentencing statute of Prop. 64 was clearly modeled on the resentencing statute of Prop. 47. It's reasonable to conclude that the inclusion of this language clarifying the burden of proof for eligibility at a particular threshold was intentional to circumvent the problems of proof that have arisen in establishing eligibility in Prop. 47. To ignore the "clear and convincing evidence" language renders it superfluous. The form should be revised to reflect that the burden on establishing *how* or the type of result a petition/application receives is on the District Attorney. **Request for Specific Comments** (1) Should form CR-187 be in more plain language? Yes. It is likely that pro se petitioner/applicants will use this form, especially in the case of an applicant who has already completed his or her sentence. Certain terms and directions are confusing in the form. For example, in Box 1 under conviction information, it's unclear what an applicant is to do if they do not know the quantity or weight of the amount of marijuana. Should they leave the box blank? Should they guess? If they guess wrong, will they be penalized in any matter? This also leads to confusion in Box 2 in terms of the type of relief an unrepresented applicant should request. If a person	Request for Specific Comments (1) CLAC agrees that form CR-187 should be simplified and has simplified the language.

			does not remember the amount of marijuana, or if the person does not know how that offense changed under Prop. 64 (i.e. to a misdemeanor, infraction or dismissal), how will they know which type of relief to request? While developing a universal form for the provisions of Prop. 64 may be a bit unwieldly, this form does not clarify any of that information for the unrepresented applicant. (2) Should JV-744 be modified to be like form CR-187 in terms of requesting information on the amount of marijuana involved in the offense? No. The form should be left as is because it is simple and clear. As you know, the resentencing aspects for juveniles are somewhat more straightforward. No matter the amount of marijuana involved in the offense, or the level of offense originally charged, a juvenile may only be resentenced to an infraction. Unlike for adults, the only variation is the amount of community service or drug education a youth may need to complete. A judge can determine this amount upon resentencing rather than require the youth to state that amount. (3) Should form CR-187 retain an integrated proof of service? Yes. This is very helpful and useful for unrepresented petitioners and applicants. Thank you again for the opportunity to provide feedback to Judicial Council on these forms. Please	(2) No response required. (3) CLAC declines the suggestion that form CR-187 retain an integrated proof of service. Separating the Proof of Service from the Petition/Application will allow courts to process more efficiently by eliminating the need for a second Petition/Application to be filed after the petitioner/applicant has served the prosecuting agency. The committee has

			let us know if we can provide any further explanation or suggestions. Sincerely, /s/ Joy Haviland Joy F. Haviland Staff Attorney jhaviland@drugpolicy.org (510) 679-2317	separated the Proof of Service for the Petition/Application.
3.	Donna Groman Judge, Superior Court of Los Angeles County		Bullet one: Yes, the proposal appropriately addresses the stated purpose Bullet 2: I suggest leaving the adult form as it is. I have a number of comments about the language on the JV application. Please see attached. The danger in using simplified language is that it may not accurately convey the law. No need to address quantity in juvenile cases. There is no distinction drawn by Prop 64 as to quantity when the offense is committed by a juvenile. Otherwise, the language in paragraph 2 should be adequate as modified [see JV form]. The court should be required to serve when the form is filed by the youth. If filed by an attorney, the attorney should serve the parties. In paragraph 2 of the JV application, form can be	No response required. Fam/Juv agrees with the proposed revisions and has modified the form. Fam/Juv agrees that it is not necessary to require that quantity be included on the juvenile form. Fam/Juv agrees with the proposed revisions and has modified the form. Fam/Juv agrees that the court should serve the form when it is filed by the youth, as the benefit of proper service outweighs the burden of rescheduling the hearing if the form is not properly served. Fam/Juv further agrees that if the form is filed by an attorney, the attorney should effectuate service. Fam/Juv agrees with the proposed revisions

			modified so it states "(check all that apply)." I have no comments with respect to the second paragraph and 4 bullets regarding cost savings and work load. *[This commentator lists numerous modifications to be made for consistency and clarity; those suggestions have been incorporated in the forms.]	and has modified the form. No response required. Fam/Juv agrees with the proposed revisions and has modified the form.
4.	Los Angeles Public Defender's Office By: Ron Brown Los Angeles Alternate Public Defender By: Janice Fukai		Dear Criminal Law Advisory Committee, We write in response to your invitation to comment on the above-referenced proposed forms relating to Proposition 64. As you know, Proposition 64 authorized defendants previously convicted of marijuana related offenses to seek reduction or dismissal of those prior convictions. With this in mind, this Committee has requested comment on the proposed forms for use by petitioners seeking reduction, dismissal or resentencing of their prior convictions under Proposition 64. Although we have no issue with the majority of the proposed forms, we believe proposed form CR-187 is substantially flawed. Specifically, CR-187 mistakenly places the burden on petitioners to establish facts establishing their eligibility for relief, when it is actually the court's obligation to presume that the petitioner qualifies for relief, absent evidence to the contrary. As discussed below, because the proposed form effectively reverses the burden of proof (and therefore misstates the law),	**Burden Comment / Los Angeles District Attorney's Form** CLAC recognizes the benefit of a simplified form and has simplifed the Petition/Application.

			we do not intend to use this form as currently written, and it is our strong position that this form should not be adopted. Instead, we would urge this Committee to adopt a form consistent with that written by the Los Angeles District Attorney's Office, included as Attachment A below. As you know, Proposition 64 permits a defendant to seek a education/dismissal/resentencing of various marijuana-related offenses. Proposition 64 also establishes that a petitioner is entitled to reduction/dismissal/resentencing provided that the petitioner's former conduct is now lawful or would qualify for less serious charges and/or sentences under the newly re-written marijuana laws. Proposition 64 specifically states that when considering an application for reduction/dismissal/resentencing, a court is required to presume that the petitioner qualifies for relief. The court shall presume the petitioner satisfies the criteria in subdivision (e) unless the party opposing the application proves by clear and convincing evidence that the petitioner does not satisfy the criteria in subdivision (e). Once the applicant satisfies the criteria in subdivision (e), the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid as now established under the Control, Regulate and Tax Adult Use of Marijuana Act. (Health and Safety Code § 11361.8(f). Emphasis added.) Consequently, unless a prosecutor establishes that the petitioner does not qualify for relief because, for	

			example, the petitioner possessed more marijuana than is legally permitted under the new statutes, the court must grant the petition. With that in mind, form CR-187 appears to erroneously place the burden on the petitioner to assert facts that establish that his or her conduct would have been lawful (or qualify as a lesser offense) under the new statutes. Specifically, CR-187 asks the petitioner to assert facts establishing his right to a reduction, including the petitioner's age at the time of the offense, the amount of marijuana the petitioner possessed, and the type of marijuana. As discussed above, because a Prop. 64 petitioner is not required to make any such assertions and it is the court's obligation to presume that the petitioner qualifies for relief absent evidence to the contrary, CR-187, as written, does not accurately reflect the petitioner's obligations under the law. Given the problem with this form, we would respectfully suggest that the Committee consider replacing CR-187 with a form similar to that developed by the Los Angeles District Attorney's Office, included below as Attachment A. Conclusion For the reasons stated above, the current version of CR-187 improperly asks petitioners to make factual assertions regarding their eligibility for relief, when they are not required to do so under the law. For these reasons, we respectfully urge that the form be modified.	

			ATTACHMENT A **CAPTION GOES HERE** **PETITION FOR RECALL/RESENTENCE/DISMISSAL PER HS 11368.1(a)** **APPLICATION FOR RE-DESIGNATION/DISMISSAL PER HS 11368.1(e)** On _____, petitioner/applicant was convicted in the above-captioned case for the following violations: □ 11357 □ 11358 □ 11359 □ 11360 □ Other (per HS 11362.1) □ APPLICATION: Applicant has completed his/her sentence in the above captioned case and now requests the court dismiss & seal/re-designate (circle all that apply) the conviction. □ PETITION: Petitioner is currently serving a sentence in the above captioned case in _____ (custodial facility) and now requests the court recall/re-sentence/dismiss (circle all that apply) the conviction. Date: _____ Signature: _____ (defendant or attorney for	

			defendant) _____ □ Prosecution objects to the petition/application. Matter is scheduled for a hearing on _____ at _____ a.m./p.m. in Dept. _____. Clerk to give notice. **ORDER** PETITION COUNT(S): _____ Petition granted- Sentence recalled, resentenced as an infraction COUNT(S): _____ Petition granted- Sentence recalled, resentenced as a misdemeanor The court elects one of the three options: □ Supervision for one year following the completion of petitioner/applicant's time in custody OR □ Whatever supervision time petitioner/applicant would have otherwise been subject to after release (whichever of the two is shorter) OR □ Releases petitioner/applicant from supervision COUNT(S): _____ Petition granted- Sentence recalled and dismissed COUNT(S): _____ Petition denied- Petitioner does not satisfy the criteria	

			COUNT(S): _____ Petition denied- Petitioner poses an unreasonable risk of danger to public safety <u>APPLICATION</u> COUNT(S): _____ Application granted- Conviction re-designated as an infraction COUNT(S): _____ Application granted- Conviction re-designated as a misdemeanor COUNT(S): _____ Application granted- Conviction dismissed and sealed COUNT(S): _____ Application denied- Applicant does not satisfy the criteria Date: _____ Signature: _____ (Judge)	
5.	Orange County Bar Association By: Michael L. Baroni President	AM	ATTACHMENT - W17-01 Request for Specific Comments • Does the proposal appropriately address the stated purpose? Both proposed forms CR-187 (adult) and JV-744 (Juvenile) and the accompanying orders adequately and appropriately address the stated purpose. • Should the criminal and juvenile forms should [sic] more closely parallel each other where	No response necessary.

			possible, including but not limited to: • Should form CR-187, the application/petition form for adults be in more plain language format like form JV-744 to make it easier for self-represented individuals to complete the form? Yes, the basic format of JV-744 is easier to understand and complete by a lay person. • Does section 2 of form JV-744 provide the court with sufficient information to take action on the request or should it be modified to be more like form CR-187 in terms of requesting information on the quantity of marijuana involved in the offense? Section 2 should be modified to request information on the quantity of marijuana involved but should be prefaced by the language, "If known". • Is it preferable for the juvenile court to route filed JV-744 requests for relief to the other stakeholders (probation and the prosecuting agency), or, similar to CR-187, should juvenile petitioners be required to serve the petition on those entities? Due to the anticipated use of JV-744 by	CLAC agrees that form CR-187 should be simplified and has simplified the language. Fam/Juv declines to include a request for the quantity involved as it is not required by the statute. Fam/Juv agrees that the court should serve form JV-744 when it is filed by a self-represented litigant. The instruction section of form JV-744 has been revised to clarify that if the form is filed by an attorney, that attorney is responsible for service.

			minors or young adults, it is preferable for the court to route the filed form to the other stakeholders. • Should form CR-187 and form JV-744 be that same in terms of whether they allow for a request for relief for multiple eligible convictions/offenses on a single petition/application or require separate petitions/applications for each conviction/offense? Both forms should allow a request for relief for multiple convictions/offenses on a single petition/application. • Should there be an attachment form for additional cases? For convenience sake and in order to avoid confusion by the petitioner and the court, separate attachment forms for additional cases would be helpful and efficient.	CLAC agrees that form CR-187 should allow multiple convictions/offenses on a single petition/application and has retained that aspect of the form. Using a single form for each case that permits petitioners/applicants to include all eligible convictions that apply to that case, will enable courts to efficiently process petitions/applications by case number while allowing the petitioner/applicant to consolidate multiple convictions on a single form. Like CLAC , Fam/Juv agrees that multiple offenses related to a single petition (in other words, each eligible offense is associated with the same petition number) may be filed on the same application. Unlike CLAC, the juvenile forms will utilize an attachment form to list multiple offenses. Separate petitions will be required for offenses related to different petition numbers or for offenses that are not eligible for the same relief. CLAC declines the request for separate attachment forms for additional cases on form CR-187. While a single form will apply to each case, petitioners/applicants may circle as many eligible convictions as apply to that case. This will allow courts efficiently

				to process them by case number while also allowing the petitioner/applicant to consolidate multiple convictions on a single form. The committee determined that this will allow courts most efficiently to process these forms.
			• Should form CR-187 retain an integrated proof of service? If not, why? An integrated proof of service is already part of many CR forms. For both the lay person and counsel, such integration is efficient and convenient. The integration also assists the court clerk in verifying that the petition/application may be properly filed and/or calendared for hearing.	CLAC declines the suggestion that form CR-187 retain an integrated proof of service. Separating the Proof of Service from the Petition/Application will allow courts to process more efficiently by eliminating the need for a second Petition/Application to be filed after the petitioner/applicant has served the prosecuting agency. The committee has separated the Proof of Service for the Petition/Application.
			• Should forms CR-187 and JV-744 include the prosecuting agency response, or should the response be on a separate form? Both forms should include the prosecuting agency response as it is anticipated that the majority of cases will not require a lengthy response. As with other court forms, the prosecuting agency is free to file an attachment to their response should additional explanation for an objection be necessary.	The committees agree that the prosecuting agency's response should be separated from CR-187 and JV-744, as a separate response form will streamline the filing process and eliminate the need for duplicate copies of the form in the court file. The prosecuting agency's response now contains an integrated proof of service, intended to ensure that the prosecution serves the petitioners/applicants, many of whom will be self-represented, with its response.
6.	Pacific Juvenile Defender Center East Bay Community Law Center By: Kate Weisburd	N/I	*Comments on behalf of the Pacific Juvenile Defender Center….Because of PJDC's expertise in juvenile law, this letter is limited and addresses only	

	Director & Clinical Instructor		the proposed JV forms. **Request for Specific Comments** **Does the proposal appropriately address the stated purpose?** Yes. The juvenile forms further the purpose of Proposition 64. However, PJDC strongly recommends that the Advisory Committee consider creating and distributing an information sheet about the Proposition and what it means for youth. For example, neither the application/petition (JV-744) or the order mentions or addresses automatic Invitation to Comment on JV Forms for Prop 64 Comments of Pacific Juvenile Defender Center February 14, 2017 Page 2 expungement. An information sheet could provide applicants with critical information about when their records will be expunged, what that means for purposes of answering questions about their record and whether it is necessary to seek resentencing if their records have been expunged. Alternatively, under the "instructions" section of JV-744, consider adding a bullet point that references and briefly explains record expungement. The language on page 2 of 2 is, at times, not user friendly, especially when considering that the	Fam/Juv agrees that there should be a reference to sealing on one of the juvenile forms. However, Welfare and Institutions Code sections 781 and 786 provide the only process for sealing of juvenile records; Proposition 64 does not provide for sealing. Either the juvenile record will already be sealed pursuant to the automatic process set forth in Welfare and Institutions Code section 786 or it will be sealed because the child requested sealing under Welfare and Institutions Code section 781. In this situation, the court will have to unseal the record to reduce the marijuana offense to an infraction and then reseal the record. Consequently, Fam/Juv recommends including a checkbox on form JV-746 (circulated as JV-746) that reads "The record was previously sealed pursuant to Welfare and Institutions Code sections 781 or 786 and it is ordered re-sealed." If the record is not sealed, it is likely that the subject of the record needs to apply for sealing under Welfare and Institutions Code section 781. Fam/Juv recommends including an instruction on form JV-744 that directs reader to the sealing page on the Judicial Council website. Fam/Juv recognizes the importance of

			audience for this form includes young people. For example, consider rewording question #3 to read as follows: "I am currently on probation for a marijuana offense. I ask that the offense be reclassified as an infraction, pursuant to H & S Code section 11361.8(b)" Relatedly, #4 could read: "I am no longer on probation and my juvenile case is over for the marijuana offense listed in question #2. I request that the court orders be changed to reflect that the findings are now considered infractions." Finally, questions 6 and 7 (on page 2 of JV-744) are confusing because youth may not know if they should request a hearing even if there is no opposition and whether they should waive their appearance at a hearing. In both the instructions section and in the questions themselves consider adding a sentence that encourages youth to consult with their attorney (or the public defender in their county) before requesting a hearing or waiving their appearance. **Should the criminal and juvenile forms more closely parallel each other?** Yes. The adult criminal application should more closely track the juvenile application. As detailed by the LA County Public Defender in their letter to this Advisory Committee, the adult petition improperly imposes a burden on the petitioner. Proposition 64 makes clear that the burden is on the prosecutor. The JV-744 however, does not impose a burden and is more streamlined than the adult version.	ensuring that the juvenile forms are accessible to the intended audience (juveniles). This concern must be balanced against the concern that simplifying the language too much will compromise the accuracy of the forms. For this reason, Fam/Juv declines to make the suggested change to the language The choice to waiver the hearing or request it despite the prosecuting agency's position is included on the form because Health and Safety Code section 11361.8 specifically allows the applicant to request a hearing, even when the prosecuting agency agrees with the request. As this is a straightforward statement of the young person's options, Fam/Juv does not believe it is necessary to suggest contacting an attorney. Burden Comment Please see CLAC's response to the Los Angeles Public Defender and Alternate Public Defender's joint comment. Los Angeles District Attorney's Form Please see CLAC's response to the Los Angeles Public Defender and Alternate Public Defender's joint comment. Fam/Juv agrees that it is not necessary to

			The JV-744 form should not be modified to require more information from the petitioner (such as the quantity of marijuana). This would constitute impermissible burden shifting, which we agree with the LA Public Defender, is inconsistent with the mandate of the proposition. Juvenile petitioners should not be required to serve the petition on the prosecutor or probation. The juvenile petitioner should file the petition with the court clerk's office and the clerk's office should be responsible for serving the prosecutor and probation. The JV-744 should be modified so that petitioners can use only one petition to ask for relief on all eligible findings. The form could be easily modified so that there is space for a petitioner to list all case numbers and all dates. This would help streamline the process and make it easier for youth to complete. Requiring separate JV-744 forms for each case makes it unnecessarily complicated, especially given the more limited abilities of youth applicants. We very much appreciate the opportunity to help to improve this form based on our experiences in the field. Please let us know if we can provide further explanations about any of the comments or suggestions in this document.	require that quantity be included on the juvenile form Fam/Juv agrees that the court should serve form JV-744 when it is filed by a self-represented litigant. The instruction section of form JV-744 has been revised to clarify that if the form is filed by an attorney, that attorney is responsible for service. Fam/Juv agrees that multiple offenses related to a single petition (in other words, each eligible offense is associated with the same petition number) may be filed on the same application. However, Fam/Juv has determined that offenses related to different petitions should be filed on separate applications, rather than be handled via attachments to one application
7.	State Bar of California, Standing Comm. on the Delivery of Legal Services	A	**W17-01 (Criminal Procedure and Juvenile Law: Judicial Council Forms Under Proposition 64)** *(Agree with proposal; suggestions provided to*	

	By: Sharon Ngim Program Dev. & Staff Liaison		*improve the proposed forms)* **Specific Comments** • Does the proposal appropriately address the stated purpose? Yes. • Should the criminal and juvenile forms more closely parallel each other where possible, including but not limited to: Should form CR-187, the application/petition form for adults be in more plain language format like form JV-744 to make it easier for self-represented individuals to complete the form? Yes, we recommend that CR-187 and JV-744 more closely parallel one another in order to improve self-represented litigants' access to the courts, and ease the burden of prosecuting agencies and the courts. Specifically, SCDLS believes proposed CR-187 would be improved by: a) applying a low-literacy format throughout the Petition/Application that more closely reads like JV-744; b) providing a short descriptor of each Health &Safety Code, as done in JV-744;	No response needed. CLAC: No response needed. Fam/Juv drafted the juvenile forms with the self-represented litigant in mind, using simplified language and including instructions to guide the users. a) CLAC agrees that form CR-187 should be simplified and has simplified the language. b) CLAC agrees that a short descriptor of each Health & Safety Code would improve the form and has incorporated that change.

			c) omitting information that the individual is not likely to know or easily obtain and that can be easily obtained by the prosecuting agency (e.g., nature and quantity of the substance);	c) CLAC agrees that the "nature of the substance which resulted in the conviction" is not a required field and has removed it from the form.
			d) rewriting section headings to make it easier to understand which sections to complete (e.g., 1. Conviction Information, A. Persons Currently Serving a Sentence: Resentencing/Dismissal, B. Persons Who Have Completed a Sentence: Redesignation/Dismissal/Sealing);	d) CLAC agrees that form CR-187 should be simplified and has simplified the language.
			e) omitting Section 3: Waiver of Hearing by Original Sentencing Judge and adding a sentence in the instructions stating that filing the petition/application automatically waives hearing by original sentencing judge [and similarly omitting Section 5 of JV-744];	e) CLAC and Fam/Juv decline to delete the boxthat permits the applicant/petitioner to waive the hearing by the original sentencing judge.Health & Safety Code section 11361.8 subdivisions (a) and (e) provide the petitioner/applicant with the right to file "before the trial court that entered the judgment of conviction." Subdivision (i) allows a presiding judge to designate another judge to make the ruling only when the judge that originally sentenced the petitioner is not available. In all other cases, the petitioner/applicant must waive his/her right for review by the original sentencing judge before a different judge is authorized to rule on the petition/application. The waiver box provides courts with the flexibility to assign different judges on these cases, expediting

				the relief.
			f) adding a new "Court Hearing" section that merges the Court Hearing and Waiver of Personal Appearance boxes, and more closely mirrors JV-744 (e.g., individuals may check boxes to request a personal appearance regardless if prosecuting agency objects, request a hearing only when prosecuting agency objects, or waive a hearing with personal appearance;	f) CLAC declines the suggestion to merge the hearing and appearance waivers because they are distinct rights.
			g) omitting "Other" under Request for Relief; and	g) CLAC has omitted the Request for Relief section in the body of form CR-187 to simplify the pleading requirements.
			h) Integrating a one-sentence proof of service that reads, "I have served a copy of this Petition/Application on [name of Prosecuting Agency]."	h) CLAC declines the suggestion that form CR-187 integrate a one-sentence proof of service. Separating the Proof of Service from the Petition/Application will allow courts to process more efficiently by eliminating the need for a second Petition/Application to be filed after the petitioner/applicant has served the prosecuting agency. The committee has separated the Proof of Service for the Petition/Application.
			SCDLS proposes adding within the "Relief Requested" sections that convictions be specifically changed from Felony/Misdemeanor to Misdemeanor/Infraction. We recognize, however, that this may require that only one offense be listed on the form; therefore, this proposal only applies if the offenses are limited.	CLAC declines the suggestion to add to the "Relief Requested" sections because the committee has removed that section from the forms to simplify the pleading requirements.

			Does section 2 of form JV-744 provide the court with sufficient information to take action on the request or should it be modified to be more like form CR-187 in terms of requesting information on the quantity of marijuana involved in the offense? Yes, we believe that the court will have sufficient information with Section 2 of JV-744, as the probation/prosecuting agency will access the entire docket when taking action on the request. We agree that juveniles, especially self-represented individuals, will be unable to easily obtain quantity information.	Fam/Juv agrees that form JV-744 is sufficient in this regard and does not need to be revised to include information regarding the quantity of marijuana involved.
			Is it preferable for the juvenile court to route filed JV-744 requests for relief to the other stakeholders (probation and the prosecuting agency), or, similar to CR-187, should juvenile petitioners be required to serve the petition on those entities? SCDLS recommends that the juvenile court route the requests for relief to the other stakeholders, in order to ensure that all juvenile petitioners are able to access the benefits of Proposition 64's relief.	Fam/Juv agrees that the court should serve the form when it is filed by the youth, as the benefit of proper service outweighs the burden of rescheduling the hearing if the form is not properly served.
			Should form CR-187 and form JV-744 be that same in terms of whether they allow for a request for relief for multiple eligible convictions/offenses on a single petition/application or require separate petitions/applications for each conviction/offense? We propose that the court allow for multiple offenses specific to one case number on a	CLAC agrees with the suggestion to allow multiple convictions/offenses on a single petition. Using a single form for each case that permits petitioners/applicants to include all eligible convictions that apply to that case, will enable courts to efficiently process petitions/applications by case number while

			petition/application, so long as it remains clear which request for relief applies to which offense. • Should there be an attachment form for additional cases? No, while this may ease some burden for applicants/petitioners, it will likely lead to prosecuting agencies and courts receiving applications/petitions for convictions outside their jurisdiction. • Should form CR-187 retain an integrated proof of service? If not, why? Yes, SCDLS believes CR-187 should be amended to include a one-sentence checkbox that states, "I have served a copy of this Petition/Application on [name of Prosecuting Agency]." • Should forms CR-187 and JV-744 include the prosecuting agency response, or should the response be on a separate form? We believe the forms should include the prosecuting agency response.	allowing the petitioner/applicant to consolidate multiple convictions on a single form. Like CLAC, Fam/Juv agrees that multiple offenses related to a single petition (in other words, each eligible offense is associated with the same petition number) may be filed on the same application. Unlike CLAC, the juvenile forms will utilize an attachment form to list multiple offenses. Separate petitions will be required for offenses related to different petition numbers or for offenses that are not eligible for the same relief. CLAC declines the suggestion that form CR-187 retain an integrated proof of service. Separating the Proof of Service from the Petition/Application will allow courts to process more efficiently by eliminating the need for a second Petition/Application to be filed after the petitioner/applicant has served the prosecuting agency. The committee has separated the Proof of Service for the Petition/Application. CLAC and Fam/Juv acknowledge that there appear to be some efficiencies in including the prosecuting agency response on forms CR-187 and JV-744; however, after discussion, the committees concluded that the response by the prosecuting agency should be filed on a separate form. Separate

W17-01
Criminal Procedure and Juvenile Law: Judicial Council Forms Under Proposition 64 (Approve forms CR-187, CR-188, JV-744, and JV-745.)

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

			Additional Comments Regarding proposed CR-188, we suggest the following: 1) add a section where the court affirmatively acknowledges the petitioner/applicants hearing option (e.g., Petitioner/Applicant requested personal appearance and appeared at this hearing, Petitioner/Applicant waived personal appearance), and 2) in addition to the checkboxes under "Reasons for Denial," add a sentence that makes it mandatory for the court to include a reason(s) when the application/petition is denied, (e.g., "3. RESENTENCING/REDESIGNATION DENIED: [In italics] The Court must include reason(s) for denial.").	forms will facilitate the court clerk's processing of the forms. 1) CLAC agrees with this comment and has added a hearing information section notifying the petitioner/applicant to his/her right to a hearing. 2) CLAC declines the suggestion to require express reasons for the court's denial of relief because it is not required under Health & Safety Code section 11361.8.
8.	Superior Court of California, Los Angeles	AM	**W17-01 Criminal Procedure and Juvenile Law: Judicial Council Forms Under Proposition 64 Proposed Modifications:** **Form CR-187** Adult Crime(s) form: Prosecuting Agency Response (page 2 of 3) - add a box to indicate that the petitioner does not meet the criteria for relief. Proof of Service (page 3 of 3), item 2 - remove the	CLAC declines the suggestion to add a box to the Prosecuting Agency Response indicating that the petitioner does not meet the criteria for relief because the prosecution does not determine eligibility under Health & Safety Code section 11361.8. CLAC agrees with the suggestion to remove

			words "to Infraction." The form's purpose is broader.	the words "to infraction" from the proof of service.
			Form JV-744 Instructions 1st bullet - change first sentence to "Use this form if you went to court and were found to have committed a marijuana-related offense when you were under the age of 18 and you want to reduce the charge on your record to an infraction."	Fam/Juv agrees with the language changes proposed and has made the suggested revisions.
			Instructions 3rd bullet - change to read "You may contact the attorney who last represented you on the marijuana-related offense. If you cannot locate that attorney, the public defender's office can assist you."	This proposed revision places a duty on private attorneys that is not supported by Proposition 64; therefore, Fam/Juv declines to make the suggested revision.
			Instructions 4th bullet C. - add sentence at the end "The clerk of the court in the county where the case was heard will help you if you do not have all the information."	This proposed revisions places a duty on the court clerk that is not supported by Proposition 64; therefore, Fam/Juv declines to make the suggested revisions.
			Instructions 4th bullet E. - delete the sentence "So, if it was a misdemeanor or a felony, it will now be classified like a traffic ticket."	Fam/Juv agrees with the language changes proposed and has made the suggested revisions.
			Item 2 - after "On (date):" leave more room for multiple dates. Change "(*check one)*" to "(*check all that apply).*"	Fam/Juv agrees that the date information needs to be revised. The form has been revised to read "check all that apply" rather than "check one" and will include a space for the date after each code section.
			Item 4 - change the second sentence to "I request the court's dispositional order be recalled and the	Fam/Juv agrees with the language changes proposed and has made the suggested

			offense be redesignated as an infraction in accordance with Health and Safety Code section 11361.8(f)."	revisions.
			Form JV-746 (circulated as JV-745) Item 2 first box - change the last sentence to "The court hereby redesignates the following offense(s) (indicate offense(s))."	Fam/Juv agrees that the last sentence needs to be revised and recommends that it read: "The court hereby redesignates the following offenses as infractions (indicate offense(s))."
			Request for Specific Comments: **Does the proposal appropriately address the stated purpose?** Yes, the proposal appropriately addresses the stated purpose.	No response necessary.
			Should the criminal and juvenile forms more closely parallel each other where possible including but not limited to: **Should form CR-187, the application/petition form for adults be in more plain language format like form JV-744 to make it easier for self-represented individuals to complete the form?** The language in the adult form, CR-187 is clear and follows the language used for other forms in this area of litigation. We have a number of comments about the language on the Juvenile forms. Please see the proposed modifications above. The danger in using simplified language is that it may not accurately convey the law.	CLAC: No response necessary. Fam/Juv agrees that the suggested revisions to the juvenile forms increase the clarity and accurancy of the forms and has incorporated the suggestions.
			Does section 2 of form JV-744 provide the court with sufficient information to take action on the request or should it be modified to be more like	Fam/Juv agrees that it is not necessary to require that quantity be included on the juvenile form.

			form CR-187 in terms of requesting information on the quantity of marijuana involved in the offense? There is no need to address quantity in juvenile cases. There is no distinction drawn by Prop 64 as to quantity when the offense is committed by a juvenile. Otherwise, the language in item 2 should be adequate as modified in the above proposed modifications to form JV-744.	
			Is it preferable for the juvenile court to route filed JV-744 requests for relief to the other stakeholders (probation and the prosecuting agency), or, similar to CR-187, should juvenile petitioners be required to serve the petition on those entities? The court should be required to serve when the form is filed by the youth. If filed by an attorney, the attorney should serve the parties.	Fam/Juv agrees that the court should serve the form when it is filed by the youth, as the benefit of proper service outweighs the burden of rescheduleing the hearing if the form is not properly served. Fam/Juv further agrees that if the form is properly filed by an attorney, the attorney should effectuate service and the instructions have been revised to make that clear.
			Should form CR-187 and form JV-744 be that same in terms of whether they allow for a request for relief for multiple eligible convictions/offenses on a single petition/application or require separate petitions/applications for each conviction/offense? Both forms should allow for multiple convictions/offenses on a single petition/application. Please see proposed modifications above for both forms.	CLAC agrees that form CR-187 should allow multiple convictions/offenses on a single petition/application and has retained that aspect of the form. Using a single form for each case that permits petitioners/applicants to include all eligible convictions that apply to that case, will enable courts to efficiently process petitions/applications by case number while allowing the petitioner/applicant to consolidate multiple convictions on a single form.
			Should there be an attachment form for	CLAC declines the request for separate

			additional cases? Yes. We recommend that for the adult form CR-187 there should be an attachment for additional cases and counts. We also recommend that for the Juvenile form JV-744 the additional eligible offenses should be listed on an attachment to the form. **Cost and Implementation Matters:** Although minimal training is required to process these applications/petitions, new codes have been added to the case management system to track Proposition 64 events and new processing procedures were created.	attachment forms for additional cases. While a single form will apply to each case, petitioners/applicants may circle as many eligible convictions as apply to that case. This will allow courts efficiently to process them by case number while also allowing the petitioner/applicant to consolidate multiple convictions on a single form. The committee determined that this will allow courts most efficiently to process these forms. In contrast, Fam/Juv recommends using an attachment form for offenses that have the same petition (case) number because juvenile cases are assigned case numbers in such a way that a juvenile applicant could have many offenses related to one petition number. Fam/Juv agrees that separate petitions should be used for different petition (case) numbers and when different types of relief are requested No response needed.

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

9.	Cynthia Beltran Family Law & Juvenile Court Operations Managers Superior Court of Orange County	AM	***Request to Reduce Juvenile Marijuana Offense (JV-744)*** • On page 2, we recommend adding a *Request for Sealing* section. Pursuant to 11361.8(e), a person may file an application to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as an infraction.	The Family and Juvenile Law Committee (Fam/Juv)[1] agrees that there should be a reference to sealing on one of the juvenile forms. However, Welfare and Institutions Code sections 781 and 786 provide the only process for sealing of juvenile records; Proposition 64 does not provide for sealing. Either the juvenile record will already be sealed pursuant to the automatic process set forth in Welfare and Institutions Code section 786 or it will be sealed because the child requested sealing under Welfare and Institutions Code section 781. In this situation, the court will have to unseal the record to reduce the marijuana offense to an infraction and then reseal the record. Consequently, Fam/Juv recommends including a checkbox on form JV-746 (circulated as JV-745) that reads "The record was previously sealed pursuant to Welfare and Institutions Code sections 781 or 786 and it is ordered re-sealed." If the record is not sealed, it is likely that the subject of the record needs to apply for sealing under

[1] The Criminal Law Advisory Committee (CLAC) reviewed and responded to comments on the criminal law forms while the Family and Juvenile Law Committee (Fam/Juv) reviewed and responded to comments on the juvenile law forms. The responses in this document reference the specific committee responding, unless a joint response is appropriate; in those instances, the response will refer to the "committees."

				Welfare and Institutions Code section 781. Fam/Juv recommends including an instruction on form JV-744 that directs reader to the sealing page on the Judicial Council website.
			• On page 2, we recommend removing the *Prosecuting Agency Response* section and creating a separate form or allowing the prosecuting agency to submit their response on pleading paper. By removing the agency's response from this form, it eliminates courts from having to replace the image of the previously filed JV-744 with the JV-744 that has the prosecuting agency's response in their case management systems.	Fam/Juv agrees that the response by the prosecuting agency should be submitted on a separate form and has created a form for the prosecuting agency response.
			Juvenile Order After Request to Reduce Marijuana Offense (JV-746) (circulated as JV-745) • On page 1, we recommend removing the *For New Disposition* and *Redesignation* checkboxes in the title section. The form already indicates if the request is a *New Disposition* or *Redesignation* in sections 1-3. Removing the checkboxes would help ensure the selection made would not differ from what was granted or denied.	Fam/Juv agrees that the checkboxes in the caption section may lead to confusion. The checkboxes have been deleted from the caption.

			On page 2, section 4, we recommend adding a hearing section. On the petition/request (JV-744), the petitioner has the option to request a hearing whether or not the prosecuting agency opposes their application. Adding this section would achieve consistency between the two forms.	Fam/Juv has considered including a hearing box on either the request or the order form; however, it is believed that most of these requests will go forward on the papers, without a hearing. Including a hearing box may suggest that a hearing is necessary, when, in fact, it is not.
10.	Superior Court of California, Riverside By: Susan Ryan Chief Deputy of Legal Services	N/I	**Criminal Procedure and Juvenile Law: Judicial Council Forms Under Proposition 64** • *Comment:* The order does not allow the judicial officer to order a hearing set. The court suggests that the form be amended to include an area where the judicial officer orders a hearing set. • *Comment:* The court suggests that the language be consistent throughout the order. #1 states "The petition is GRANTED," #2 states "The application is GRANTED," and #3 states "The request…." The court suggests that the word "request" be used instead of application and petition so that the wording corresponds to the JV-744	CLAC agrees with the suggestion to add a hearing date on form CR-188 (Order for Petition/Application) and has added one. Fam/Juv has considered including a hearing box on either the request or the order form; however, it is believed that most of these requests will go forward on the papers, without a hearing. Including a hearing box may suggest that a hearing is necessary, when, in fact, it is not. CLAC declines the suggestion to change form CR-187 from a Petition/Application to a Request because it tracks the statutory descriptions in Health & Safety Code section 11361.8 and its plain language is readily understandable to an adult audience.

			form. • *Comment:* The proposal does not address the time frame for the submission of the prosecuting agency's response. • *Comment:* Petitioners should be responsible for serving the stakeholders (e.g. probation and District Attorney) and providing the court with a proof of service. • *Comment:* A petition should be filed for each conviction. This will provide a clear and accurate record, and there will be less confusion for the court, stakeholders and petitioner when addressing/filing a writ for a conviction reduction.	The committees decline the suggestion to add a time frame for the prosecuting agency's response because it is not required under Health & Safety Code section 11361.8. CLAC agrees with the suggestion that the petitioner/applicant serve the prosecuting agency with the Petition/Application and has retained that requirement. Fam/Juv determined that the court should serve the juvenile form JV-744 when it is filed by the youth, as the benefit of proper service outweighs the burden of rescheduling the hearing if the form is not properly served. CLAC declines to require a separate petition/application form for each conviction/offense. Using a single form for each case that permits petitioners/applicants to include all eligible convictions that apply to that case, will enable courts to efficiently process petitions/applications by case number while allowing the petitioner/applicant to consolidate multiple convictions on a single form. Like CLAC, Fam/Juv agrees that multiple offense bearing the same case number and

			• *Comment:* The prosecuting agency response should be a separate pleading as it will eliminate any confusion on the record as to what is being filed. If the document is left in its current format, confusion may occur when processing the prosecuting agency's response. A separate document will ensure that the record is clear and accurate.	seeking the same relief should be filed on a single petition. Separate petitions should be used for different petition (case) numbers and when different types of relief are requested The committees agree that the prosecuting agency's response should be separated from the petition/application, as a separate response form will streamline the filing process and eliminate the need for duplicate copies of the form in the court file. The prosecuting agency's response now contains an integrated proof of service, intended to ensure that the prosecution serves the petitioners/applicants, many of whom will be self-represented, with its response.
11.	Superior Court of California, San Diego Mike Roddy Executive Officer	AM	• Does the proposal appropriately address the stated purpose? *Yes*. • Should the criminal and juvenile forms should more closely parallel each other where possible, including but not limited to: o Should form CR-187, the application/petition form for adults be in more plain language format like form JV-744 to make it easier for self-represented individuals to complete the form? *Yes*. o Does section 2 of form JV-744 provide the court	No response needed. CLAC agrees that form CR-187 should be simplified and has simplified the language. Fam/Juv declines to include a request for the

			with sufficient information to take action on the request or should it be modified to be more like form CR-187 in terms of requesting information on the quantity of marijuana involved in the offense? *It should be modified.*	quantity involved as it is not required by the statute.
			o Is it preferable for the juvenile court to route filed JV-744 requests for relief to the other stakeholders (probation and the prosecuting agency), or, similar to CR-187, should juvenile petitioners be required to serve the petition on those entities? *The former is preferable, as it is more likely to result in actual, proper service.*	Fam/Juv agrees that the court should serve the form when it is filed by the youth, as the benefit of proper service outweighs the burden of rescheduling the hearing if the form is not properly served. If the form is filed by an attorney, the attorney should effectuate service.
			o Should form CR-187 and form JV-744 be that same in terms of whether they allow for a request for relief for multiple eligible convictions/offenses on a single petition/application or require separate petitions/applications for each conviction/offense? *Form CR-187 should require separate petitions/applications for each conviction/offense.*	CLAC declines to require a separate petition/application form for each conviction/offense. Using a single form for each case that permits petitioners/applicants to include all eligible convictions that apply to that case, will enable courts to efficiently process petitions/applications by case number while allowing the petitioner/applicant to consolidate multiple convictions on a single form.
			• Should there be an attachment form for additional cases? *Yes*.	CLAC declines to require an attachment form to CR-187 for each conviction/offense for the reasons stated above. After consideration, the committees decided that records processing requires that offenses related to different case numbers be filed on separate petitions/applications, rather than be

				handled via attachments to one application. While the criminal law form will allow for multiple offense with the same case number to be listed on a single petition/application, the juvenile forms will utilize an attachment form to list multiple offenses. Separate petitions will be required for offenses related to different petition numbers or for offenses that are not eligible for the same relief.
			• Should form CR-187 retain an integrated proof of service? *Yes*. If not, why?	CLAC declines the suggestion that form CR-187 retain an integrated proof of service. Separating the Proof of Service from the Petition/Application will allow courts to process more efficiently by eliminating the need for a second Petition/Application to be filed after the petitioner/applicant has served the prosecuting agency. The committee has separated the Proof of Service for the Petition/Application.
			• Should forms CR-187 and JV-744 include the prosecuting agency response, or should the response be on a separate form? *They should include the response.*	CLAC and Fam/Juv decline the suggestion to retain the prosecuting agency's response in the petition/application. A separate response form will streamline the filing process and eliminate the need for duplicate copies of the form in the court file.
			The advisory committees also seek comments from *courts* on the following cost and	No response needed.

			implementation matters: • Would the proposal provide cost savings? If so please quantify. *Unknown*. • What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems. *Training staff (court clerks, back office clerks, clerk supervisors—hours of training unknown) and creating procedures.* • Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? *Yes*. • How well would this proposal work in courts of different sizes? *Unknown*. **FORM CR-187** • All pages – Change footer to: **PROPOSITION 64 PETITION/APPLICATION** **ADULT CRIMES** • Page 1 - Third box from top of form (left side) – title of form: **PROPOSITION 64 - ADULT CRIMES** ☐**PETITION FOR RESENTENCING**	CLAC has simplified the language on form CR-187.

			OR DISMISSAL **(Health & Saf. Code, § 11361.8(b))** ☐ **APPLICATION FOR REDESIGNATION OR DISMISSAL/SEALING** **(Health & Saf. Code, § 11361.8(f))** • Page 1 - Fourth box from top of form ("INSTRUCTIONS"): Suggestions to make the form more user-friendly for unrepresented litigants: • Before filing this form, ~~petitioner/applicant should~~ consult local court rules and court staff to ~~determine~~ find out if a formal hearing on the petition~~/~~ or application will be scheduled. • If the petitioner is currently serving a sentence for a qualified crime, please fill out sections 1 and 2(a). • If the applicant has completed the sentence for a qualified crime, please fill out sections 1 and 2(b). • Complete sections 3 and 4 as necessary. • Upon ~~the~~ filing, a copy of the petition~~/~~ or application~~, the petitioner/applicant is required to~~ must be immediately served on the office of the prosecuting agency (the district attorney or city attorney, as appropriate)~~ with a copy of the~~	

			~~petition/application~~. It may be served personally or by mail; the signed Proof of Service, attached to this form, must be filed with the court. • Page 1 – Item 1: On *(date):* _____, Petitioner/Applicant, the defendant in the above-entitled criminal action, was convicted of violating ~~the following~~ Health and Safety Code section ☐11357 ☐11358 ☐ 11359 ☐11360, which has been reclassified under Proposition 64. Petitioner/Applicant further states that, when committing the conduct resulting in the conviction, he/she was: ☐18 to 20 years of age; ☐21 years ~~old~~ of age or older. Date of birth: _____ Petitioner/Applicant further states that the ~~nature of the~~ substance which resulted in the conviction was: . . . Petitioner/Applicant further states that the quantity of the substance which resulted in the conviction was: ☐~~not more~~ less than 28.5 grams of marijuana not in the form of concentrated cannabis; ☐~~not more~~ less than 4 grams of marijuana in the form of concentrated cannabis; ☐~~not more~~ less than 8 grams of marijuana in the form of concentrated cannabis;	

W17-01

Criminal Procedure and Juvenile Law: Judicial Council Forms Under Proposition 64 (Approve forms CR-187, CR-188, JV-744, and JV-745.)

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

			☐ ~~not more~~ less than 6 marijuana plants. • Page 2 – Item 2: If this form will continue to allow information for more than one conviction in Item 1, as opposed to requiring separate petitions/applications for each conviction/offense, the following changes are suggested: Petitioner is currently serving the sentence for the crime(s) noted above, and requests the sentence(s) be recalled and that he/she be resentenced or the charge(s) be dismissed as required by law. Applicant has completed the sentence(s) for the crime(s) noted above, and requests the sentence(s) be recalled and the conviction(s) be redesignated or dismissed. If the conviction(s) is/are dismissed, applicant requests the court's record of conviction(s) be sealed. • Page 2 – Item 3: Petitioner/applicant ~~waives~~ gives up the right to have this matter heard by the original sentencing judge. • Page 2 – Item 4: Petitioner/applicant understands ~~there is~~ he/she has a right to personally attend any hearing held in this matter. Petitioner/applicant gives up that right; the matter may be heard without his/her ~~appearance~~ presence. • Page 2 - Below item 4: Add verification? (I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.)	CLAC declines the suggestion to require the petitioner/applicant's signature to be under penalty of perjury because it is not required by Health & Safety Code section 11361.8.

			Page 2 – Signature lines: For consistency with JV-744 (and other forms, e.g., CR-300), use all capitals for SIGNATURE OF PETITIONER/APPLICANT and SIGNATURE OF PROSECUTING ATTORNEY. • Page 2 - Below signature of petitioner/applicant: For consistency with JV-744, add TO BE FILLED OUT BY THE PROSECUTING AGENCY above the horizontal line demarcating the prosecuting agency's response. • Page 2 - PROSECUTING AGENCY RESPONSE: Re-order the responses to mirror the order of responses on the JV-744. That is, the second response should be "The prosecuting agency does not object to the petitioner/applicant's eligibility for relief, but requests a hearing on the issue of resentencing" (currently the last response), and the box/line for "Other:" should be underneath "Petitioner is eligible for relief, but relief should be denied..." (currently positioned between the two specified reasons for objecting). • Page 3 - Third box from top of form (left side) – title of form: **PROOF OF SERVICE** **~~Check~~ Method of Service (*check only one*):**	CLAC has aligned the formatting of the adult forms to extent possible with the juvenile forms. CLAC has deleted the word "Check" in the title of the Proof of Service but will retain it next to the check boxes in item number three to conform to other Judicial Council Proof of

			• Page 3 – Item 2: I served a copy of the Petition/Application for Resentencing or ~~Reduction to Infraction~~ Redesignation on the person(s) ~~or persons~~ listed below as follows: (1) Name of person served: (2) Address where served: (3) Date served: (4) Time served: AM PM • Page 3 – Item 3: ~~By~~ **Personal service.** I personally delivered the document~~s~~ to the person(s) at the address(es) listed in item 2. Delivery was made (a) to the attorney personally; or (b) by leaving the document~~s~~ at the attorney's office, in an envelope or package clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office; or (c) if there was no person in the office with whom the ~~notice or papers~~ document could be left, by leaving ~~them~~ it in a conspicuous place in the office between the hours of ~~nine in the morning~~ 9:00 a.m. and ~~five in the evening~~ 5:00 p.m. ~~By~~ **United States mail.** I enclosed the document~~s~~ in a sealed envelope or package addressed to the person(s) at the address(es) in item 2 and *(~~specify~~ check one)*: I am a resident of or employed in the county where the mailing occurred. . . .	Service forms.

			• Page 3 – Verification (insert period at end of sentence): I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct**.**	CLAC declines the suggestion to require the petitioner/applicant to sign under penalty of perjury because it is not required by Health & Safety Code section 11361.8
			FORM CR-188 • All pages – Change footer to: **PROPOSITION 64 ORDERS** **ADULT CRIMES**	CLAC declines the suggestion to change the footer on form CR-188 to maintain consistency with other Judicial Council forms.
			• Page 1 - Third box from top of form (left side) – title of form: **PROPOSITION 64 ORDERS- ADULT CRIMES** ☐**AFTER PETITION FOR RESENTENCING OR DISMISSAL (Health & Saf. Code, § 11361.8(b))** ☐**AFTER APPLICATION FOR REDESIGNATION OR DISMISSAL/SEALING (Health & Saf. Code, § 11361.8(f))** • Page 1 – Item 1: Change "indicate crime(s))" to	CLAC has changed the word "indicate" to "specify" on form CR-188.

			"(*specify crime(s)*)." • Page 1 – Item 2: Change "indicate crime(s))" to "(*specify crime(s)*)" and move to beginning of next line (see, e.g., item 1). • Page 2 – Item 3: Delete indent for the first check box (the order). Keep indents for the following check boxes (reasons for the order). Change first paragraph to: The petitioner/applicant is ineligible for the requested relief. The request for resentencing/redesignation/dismissal/sealing is **DENIED** as to the following crime(s): _____ _____ for the following reasons: • Page 2 – Item 5: Change "§11590" to "section 11590." **FORM JV-744** • Page 1 – INSTRUCTIONS • Use this form if you went to court for a marijuana-~~related~~ offense when you were under the age of 18 and you want your record changed. You need to use a different form if you were 18 or older at the time of the offense. • ~~You need to u~~Use a separate form for each juvenile marijuana offense on your record. • If this form asks for information that you do not have, you can contact your attorney. If you don't have an attorney, the public defender's office or the	CLAC has changed "§11590" to "section 11590" on form SR-188. Fam/Juv agrees with the language changes proposed and has revised the forms accordingly, unless otherwise noted below.

			court in the county where you went to court can probably help you get ~~these records~~ the information. • How to fill out the form without an attorney: A. ~~Put~~ Print your name and contact information in the box at the top of the form and in item 1 below. B. ~~Put~~ Print the address of the court from your court papers ~~here~~ in the box below your address. This form must be filed in the same county where you went to court for this offense. C. Fill out ~~number~~ item 2 about the marijuana offense. D. If you are on probation now for the marijuana offense, ~~also~~ check ~~number~~ item 3 to ask the judge to make new dispositional orders (a new sentence) based on the new law. The new orders cannot be more severe than ~~your~~ the original ~~sentence~~ orders. E. If you have completed probation for the marijuana offense, check ~~number~~ item 4 to ask the judge to redesignate your offense ~~to~~ as an infraction. So, if it was a misdemeanor or a felony, it will ~~now~~ be classified like a traffic ticket. F. You can check ~~number~~ item 5 if you are willing to have any available judge hear your request. If you check that box, the presiding judge may have a different judge hear your request. G. A hearing is not required unless you request it. You can check one of the boxes in ~~number~~ item 6 if you want the court to set a hearing. H. You can check ~~number~~ item 7 if you do not want to come to court if there is a hearing. • Page 1 – Item 1: Insert blank lines after each	

			sentence (as opposed to blank spaces). • Page 1 – Item 2: Insert blank line after On (*date*): and change: ~~This offense~~ Proposition 64 has ~~been~~ reclassified this offense as an infraction when committed by a person under the age of 18 ~~under Proposition 64~~. • Page 2 – Item 3: **REQUEST FOR A NEW DISPOSITIONAL ORDER ~~(RESENTENCING)~~** I am ~~currently~~ subject to a dispositional order (on probation) for the ~~marijuana~~ offense checked in ~~number~~ item 2. I request that the order be recalled and relief be granted in accordance with Health and Safety Code section 11361.8(b) so that I will be ~~resentenced~~ subject to a new dispositional order. • Page 2 – Item 4: I am no longer a ward of the court (probation is completed) for the ~~marijuana-related~~ offense checked in ~~number~~ item 2. I request the court's dispositional order be recalled and relief be granted in accordance with Health and Safety Code section 11361.8(f) so that the offense will be redesignated as an infraction. • Page 2 – Item 5: I know that I have the right to have this matter heard by the judge who originally sentenced me. I am willing to have any available judge hear ~~the case~~	

			this request. • Page 2 – Item 6: I request a hearing if the prosecuting agency opposes my ~~application~~ request. I understand that, if I check ~~by checking~~ this box, the court will ~~set~~ hold a hearing only if ~~it~~ my request is opposed by the ~~Prosecution/Prosecution Agency~~ prosecuting agency. I request that the court ~~set~~ hold a hearing even if my ~~application~~ request is not opposed by the ~~Prosecution/Prosecution Agency~~ prosecuting agency. • Page 2 – Item 7: I understand that I have a right to ~~personally~~ attend any hearing held in this matter and argue on my behalf. I give up that right. The case may be heard without my ~~appearance~~ presence. • Page 2 – Signature line for prosecuting agency: For consistency with CR 187, change SIGNATURE OF PROSECUTING ~~AGENCY~~ ATTORNEY. **FORM JV-746 (circulated as JV-745)** • Both pages – Footer: **~~JUVENILE~~ ORDER AFTER REQUEST**	Fam/Juv agrees with the language changes proposed and has revised the forms accordingly.

			TO REDUCE **JUVENILE MARIJUANA OFFENSE** • Page 1 – Fourth box from top of form (left side) – title of form: **~~JUVENILE~~ ORDER AFTER REQUEST TO REDUCE JUVENILE MARIJUANA OFFENSE** **(Prop. 64–Health ~~and Safety~~ & Saf. Code, § 11361.8(m))** **~~FOR~~ NEW DISPOSITION** **REDESIGNATION** **(Health & Saf. Code, § 11361.8(b)) (Health & Saf. Code, § 11361.8(f))** • Page 1 – Item 1: Change (indicate offense) to (*specify*), and replace blank spaces with blank lines. _____ hours of drug education and counseling and/or _____ hours of community service, within _____ days from the date of this order. • Page 1 – Item 2: The ~~petitioner~~ applicant is eligible for the requested relief. The application is **GRANTED**. The court hereby redesignates the following offense for which	No response required.

			the child was found to be within the jurisdiction of the court under Welfare and Institutions Code section 602 as an infraction (~~indicate offense~~ *specify*): _____. • Page 1 – Item 3: The petitioner/applicant is ineligible for the requested relief. The request for a new dispositional order~~/~~ or redesignation is **DENIED** for the following reasons: The offense for which the petitioner/applicant was found to be within the jurisdiction of the court under Welfare and Institutions Code section 602 is not eligible for the requested relief under Health and Safety Code section 11361.8. Although the petitioner/applicant is eligible for relief, for reasons set forth on the record, the court finds that modifying ~~the petitioner's~~ his/her disposition would pose an unreasonable risk of danger to public safety. Additional Comments: 1) Our court has our own local form (SDSC JUV-265) and support the proposed new Judicial Council forms being optional. 2) In our county, the Public Defender is filing most of these applications. The JV-744 does not seem to	No response required. The JV-744 does allow for filing by an attorney, as the address information has a

			allow for that. 3) In our county, the DNA issue is still alive in these cases. These forms do not allow a petitioner to request expungement of DNA.	box for state bar number and attorney address. It is anticipated that many self-represented litigants will file requests; as such, form JV-744 was drafted in simpler language. Proposition 64 does not address DNA expungement.
12.	TCPJAC/CEAC Joint Rules Subcommittee Judicial Council of California By: Claudia Ortega	AM	The following comments are submitted by the TCPJAC/CEAC Joint Rules Subcommittee (JRS), on behalf of the Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC). W17-01 Criminal Procedure and Juvenile Law: Judicial Council Forms Under Proposition 64 (Approve forms CR-187, CR-188, JV-744, and JV-745) Recommended JRS Position: Agree with proposed changes if modified. Regarding the impact on existing automated systems: There will be an impact on existing systems, although it is not necessarily known to what extent. The level of impact depends upon the sophistication of changes necessary to distinguish any new forms, as well as the actions or events for these requests. This will cause courts to incur costs internally or externally depending upon whether they have in-house IT staff or contract for this	No response needed. The committees acknowledge that Proposition 64 will have, and has likely already had, a work load impact on the courts. With that in mind, the committees drafted forms intended to ease the work load impact of the legislation.

			service. Regarding additional training: Training for court staff will be necessary in the areas of (1) processing of the forms, potential interaction with agencies, and any necessary internal courtroom hearings. Regarding increases to court staff's workload: Additional forms and process will increase court staff workload. It is too early to determine if the impact will be significant. Regarding the impact on local or statewide justice partners: There will be an impact on justice partners given the influx of forms and the process required of them. Regarding whether the proposed date for implementation is feasible or problematic: The first implementation date of January 23, 2017 is not feasible. However, the second implementation date of September 1, 2017 for revised forms does provide for some consistency among courts so that a permanent solution can be reached. Suggested Modifications: 1. The JRS recommends the addition of a third form for both juveniles and adults. For both juveniles and adults, there should be a total of three separate forms – one for the	 Again, the committees are aware that Proposition 64 may impact court work load. Consequently, the committees have endeavored to create forms that are simple to use and will have minimal impact on the courts and court staff. See response above. The criminal and juvenile law forms have been drafted with an eye toward simple and efficient processes for both the courts and justice partners. Because of the immediate need for these optional forms, the committees determined that an implementation date of January 23, 2017, during the comment period, would allow those courts and persons who needed the forms to have access to them, while still considering comments for modifications effective September 1, 2017. The committees agrees that the prosecuting agency's response should be separated from the petition/application, as a separate response form will streamline the filing

			petition, one for the District Attorney or Prosecuting Agency Response, and a third for the Court Order. Having three separate forms for both juveniles and adults will greatly facilitate the processing of the forms.	process and eliminate the need for duplicate copies of the form in the court file. The prosecuting agency's response now contains an integrated proof of service, intended to ensure that the prosecution serves the petitioners/applicants, many of whom will be self-represented, with its response. CLAC also separated the Proof of Service from the Petition/Application. Separating the Proof of Service from the Petition/Application will allow courts to process more efficiently by eliminating the need for a second Petition/Application to be filed after the petitioner/applicant has served the prosecuting agency. The committee has separated the Proof of Service for the Petition/Application.
			2. Regarding Form CR-187, the JRS recommends adding to the "Instructions" section an additional instruction that instructs petitioners/applicants to use a separate form for each case that they have. Having one form per case will make it easier for court clerks to file the forms accurately.	CLAC declines the suggestion to add language to the instructions section. However, the committee agrees that form CR-187 should allow multiple convictions/offenses on a single petition/application and has retained that aspect of the form. Using a single form for each case that permits petitioners/applicants to include all eligible convictions that apply to that case, will enable courts to efficiently process petitions/applications by case number while allowing the petitioner/applicant to consolidate multiple convictions on a single form.

			3. Regarding From CR-187, Section 1 "Conviction Information", the JRS recommends replacing "Conviction A" and "Conviction B" to "Count A" and "Count B." Request for Specific Comments: • Does the proposal appropriately address the stated purpose? Comment: Yes. • Should the criminal and juvenile forms should more closely parallel each other where possible, including but not limited to: ➢ Should form CR-187, the application/petition form for adults be in more plain language format like form JV-744 to make it easier for self-represented individuals to complete the form? Comment: Bullet 1 on Adult Petition is unnecessary. It could be troublesome and there is a box for a hearing if necessary. At the time of filing the clerk does not know if there may or may not be a hearing. Initially there may not be a hearing; however, if the judicial officer discovers a reason given the	CLAC declines the suggestion to change "Conviction" to "Count" in the Conviction Information section. The committee has restructured the Conviction Information section but retained the term "conviction" as it is readily understandable to an adult audience. No response needed. CLAC agrees that form CR-187 should be simplified and has simplified the language.

			response from the DA or Probation, there could potentially be a hearing. ➢ Should form CR-187 and form JV-744 be that same in terms of whether they allow for a request for relief for multiple eligible convictions/offenses on a single petition/application or require separate petitions/applications for each conviction/offense? Comment: Separate petitions for each conviction/offense make for a cleaner record and can be problematic for many case management systems if not separate. • Should there be an attachment form for additional cases? Comment: N/A. See above. • Should form CR-187 retain an integrated	CLAC declines to require a separate petition/application form for each conviction/offense. Using a single form for each case that permits petitioners/applicants to include all eligible convictions that apply to that case, will enable courts to efficiently process petitions/applications by case number while allowing the petitioner/applicant to consolidate multiple convictions on a single form. Like CLAC , Fam/Juv agrees that multiple offenses related to a single petition (in other words, each eligible offense is associated with the same petition number) may be filed on the same application. Unlike CLAC, the juvenile forms will utilize an attachment form to list multiple offenses. Separate petitions will be required for offenses related to different petition numbers or for offenses that are not eligible for the same relief. CLAC declines the suggestion that form CR-

			proof of service? If not, why? Comment: POS is fine. Other forms have them. • Should forms CR-187 and JV-744 include the prosecuting agency response, or should the response be on a separate form? Comment: The response and POS for the response should be on a separate form. The court cannot file the original petition if the response is on the same form. The POS becomes a problem for the response and the onerous work becomes the court's rather than the petitioner's and/or the appropriate respondent.	187 retain an integrated proof of service. Separating the Proof of Service from the Petition/Application will allow courts to process more efficiently by eliminating the need for a second Petition/Application to be filed after the petitioner/applicant has served the prosecuting agency. The committee has separated the Proof of Service for the Petition/Application. The committees agree that the prosecuting agency's response should be separated from the petition/application, as a separate response form will streamline the filing process and eliminate the need for duplicate copies of the form in the court file. The prosecuting agency's response now contains an integrated proof of service, intended to ensure that the prosecution serves the petitioners/applicants, many of whom will be self-represented, with its response. CLAC also agrees with the suggestion that the Proof of Service be on a separate form. Separating the Proof of Service from the Petition/Application will allow courts to process more efficiently by eliminating the need for a second Petition/Application to be filed after the petitioner/applicant has served the prosecuting agency. The committee will separate the Proof of Service for the Petition/Application.

			• Would the proposal provide cost savings? If so please quantify. Comment: Cost savings are not identifiable.	No response needed.
			• What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems. Comment: Already identified. Updating CMS systems with forms, events, actions.	No response needed.
			• Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Comment: Yes. The JRS actually recommends an effective date of one month from Judicial Council approval because the refined forms are needed by the courts as soon as possible.	While the version of the forms approved for use on January 23, 2017, remain available for court use, the committees agree that the forms are needed by the courts as soon as possible. Because of the immediate need for these optional forms, the committees are proposing that the new and revised forms be made effective July 1, 2017.
			• How well would this proposal work in courts of different sizes? Comment: This will likely work well in both small and large courts since small courts must train more staffing given the workforce is smaller. CMS tends to be more manageable given	No response needed.

			often there is only one case management system and agency communication is likely less cumbersome given the small community. Larger courts may have two case management systems (criminal and juvenile) to update yet have in-house IT staff (less identifiable outside costs), specific staff devoted to both criminal matters and juvenile matters (easier to train and less staff to train). So either way there will be impacts just likely shown in different ways.	

Item number: 02

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (September 1 cycle)**

RUPRO Meeting: December 15, 2016

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
JJuvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.664, 5.766, 5.768, and 5.770; repeal rule 5.772; revise forms JV-600, JV-635, JV-642, JV-710, and JV-735)

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee
Hon. Jerilyn Borack, Co-Chair
Hon. Mark A. Juhas, Co-Chair

Staff contact (name, phone and e-mail): Tracy Kenny, 916-263-2838, tracy.kenny@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: December 15, 2016
Project description from annual agenda:
Develop rule and form proposal to implement Proposition 57: The Public Safety and Rehabilitation Act of 2016 which substantially amends the process by which juvenile offenders may be transferred to the jurisdiction of the criminal court by eliminating the authority of prosecutors to directly file petitions in criminal court and requiring that the juvenile court hold a hearing and determine if a transfer is appropriate.

If requesting July 1 or out of cycle, explain:
New statutory provisions went into effect on November 9, 2016 via voter approval of Proposition 57. Need to bring rules and forms into compliance.

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

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: May 18–19, 2017

Title
Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 4.116, 5.664, 5.766, 5.768, and 5.770; repeal rule 5.772; revise forms JV-600, JV-635, JV-642, JV-710, and JV-735

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn Borack, Cochair
Hon. Mark A. Juhas, Cochair

Agenda Item Type
Action Required

Effective Date
May 22, 2017

Date of Report
March 29, 2017

Contact
Tracy Kenny, 916-263-2838
tracy.kenny@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council amend or repeal six California Rules of Court and revise five forms to be consistent with the recently enacted provisions of Proposition 57, the Public Safety and Rehabilitation Act of 2016. Proposition 57, which became effective on November 9, 2016, substantially amends the process by which juvenile offenders may be transferred to the jurisdiction of the criminal court by (1) eliminating the authority of prosecutors to directly file petitions in criminal court, and (2) requiring that the juvenile court hold a hearing and determine if a transfer is appropriate.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effectiveMay 22, 2017:

1. Amend rule 4.116 of the California Rules of Court concerning certification to juvenile court to delete obsolete statutory references;

2. Amend rule 5.664 of the California Rules of Court concerning training for children's counsel in delinquency proceedings to update terminology from "fitness" to "transfer of jurisdiction to criminal court";

3. Amend rules 5.766, 5.768, and 5.770 of the California Rules of Court concerning the procedures for transfer of cases from juvenile to criminal court jurisdiction to conform them to the revisions in Proposition 57;

4. Repeal rule 5.772 of the California Rules of Court concerning specified juvenile fitness hearings because its provisions are obsolete;

5. Revise *Promise to Appear–Juvenile Delinquency (Juvenile 14 Years or Older)* (form JV-635) to replace the words "police officer" with "peace officer" to be consistent with the authorizing statute;

6. Revise and retitle *Juvenile Fitness Hearing Order* (form JV-710) to *Order to Transfer Juvenile to Criminal Court Jurisdiction (Welfare and Institutions Code, § 707)* to conform the form to the changes enacted by Proposition 57; and

7. Revise *Juvenile Wardship Petition* (form JV-600), *Initial Appearance Hearing—Juvenile Delinquency* (form JV-642), and *Juvenile Notice of Violation of Probation* (form JV-735) to delete obsolete statutory references and references to juvenile fitness hearings.

The text of the amended and repealed rules, and the revised forms are attached at pages 11–28.

Previous Council Action

The Judicial Council adopted rules 5.766, 5.768, 5.770, and 5.772 effective January 1, 1991, as rules 1480, 1481, 1482, and 1483 respectively, and they were renumbered effective January 1, 2007. Rule 4.116 was adopted effective January 1, 1991, as rule 241.2, and renumbered and amended January 1, 2001. These rules have been amended numerous times, most substantially effective January 1, 2001, to implement the changes enacted by Proposition 21.

The Judicial Council adopted *Juvenile Wardship Petition* (form JV-600) effective January 1, 1993, and it has been revised numerous times, most recently effective July 1, 2016, to reflect changes in record sealing law. *Promise to Appear–Juvenile Delinquency (Juvenile 14 Years or Older)* (form JV-635) was adopted effective January 1, 2006. *Initial Appearance Hearing—Juvenile Delinquency* (form JV-642) was adopted for mandatory use, effective January 1, 2006. It was made optional effective January 1, 2012, and last revised effective January 1, 2016. *Juvenile Fitness Hearing Order (Welfare and Institution Code, § 707)* (form JV-710) was

adopted by the council effective January 1, 2006, and made optional effective January 1, 2012. *Juvenile Notice Of Violation Of Probation* (form JV-735) was adopted effective January 1, 2006, and changed from an attachment to the JV-600 petition to a standalone notice form effective January 1, 2012.

Rationale for Recommendation

Proposition 57 changes process for transfer to criminal court

Proposition 57 amends existing law to require that the juvenile court consider a motion by the district attorney or other appropriate prosecuting officer to transfer the minor to the jurisdiction of the criminal court before a juvenile can be prosecuted in a criminal court. To accomplish this, the proposition repeals all of Welfare and Institutions Code section 602(b), which provided that certain serious and violent felonies were to be prosecuted in criminal court, as well as all of section 707(d), which authorized the district attorney to directly file an accusatory pleading involving certain minors in criminal court. Because the proposition eliminates the ability of the prosecutor to direct file a case in criminal court, it also makes obsolete the reverse remand provisions of Penal Code section 1170.17 that allow a criminal court to consider whether a minor convicted of an offense that was not eligible for direct file should be sentenced under the juvenile court law. However, it may be relevant to cases currently pending that were direct filed in criminal court before Proposition 57 was enacted.

In addition, the proposition substantially simplifies the existing standards for the juvenile court to employ when determining whether a minor's case should be heard in the criminal court. The prior version of section 707 required the juvenile court to evaluate whether the minor is "a fit and proper subject to be dealt with under the juvenile court law." The revisions to section 707 enacted by Proposition 57 instead ask the court to consider simply whether "the minor should be transferred to a court of criminal jurisdiction." Thus, in section 707, the concept of fitness has been eliminated and replaced with the term "transfer."

Under the prior statutory scheme, some minors were subject to a presumption of unfitness for juvenile court adjudication based on their age and/or prior offense history. Proposition 57 eliminates all of those presumptions and provides the court with one set of criteria to apply in a determination of whether "the minor should be transferred to a court of criminal jurisdiction." The criteria are those currently found in section 707(a), with broad discretion given to the court to evaluate and weigh each factor. Minors who may be subject to a motion to transfer jurisdiction to criminal court are those who are either:

- Alleged to have committed a felony when 16 years of age or older; or
- Alleged to have committed an offense listed in section 707(b) at age 14 or 15.

If the juvenile court orders that jurisdiction over the minor be transferred to the criminal court, the court must "recite the basis for its decision in an order entered upon the minutes." In

addition, the court may not take a plea in any case in which a hearing has been noticed to hear a motion for the transfer of jurisdiction.

Recent legislation provides guidance for the court on evaluating transfer criteria

Senate Bill 382,[1] enacted in 2015, amended section 707 to add guidance on each of the statutory criteria that were to guide the decision on whether to transfer jurisdiction, and while that guidance remains in the amended version of section 707 enacted by Proposition 57, it has not been incorporated into the council's rules and forms to implement section 707. The guidance added by SB 382 directs the court to focus on the unique developmental capacity of young people and to examine the extent to which prior system involvement has been adequate at meeting the child's needs. While Proposition 57 significantly streamlined section 707, it left this guidance in place.

Amended and repealed rules on transfer to criminal court

The current rules that govern the procedures to be followed when the juvenile court is asked to determine whether a child's case should be heard in juvenile or criminal court are rules 5.766, 5.768, 5.770, and 5.772. Three of these rules (5.766, 5.768, and 5.770) need to be amended to reflect the new terminology and provisions of Proposition 57. The key recommended changes to the rules would:

- Eliminate references to fitness and amenability to handling under the juvenile court law and replace them with a focus on whether the child should be retained under juvenile court jurisdiction or transferred to criminal court jurisdiction;
- Clarify that the court has broad discretion to weigh the existing statutory criteria in making its order;
- Require the court to set forth its reasons for making a transfer order in its minute order; and
- Add the requirement that no plea be taken after a motion for transfer has been noticed, and that no plea that has been entered be considered as evidence at a transfer hearing.

Rule 5.772 would be revoked in its entirety since the provisions of law that it seeks to implement have been repealed by Proposition 57, and it is therefore obsolete.

Amended criminal law rule

Rule 4.116, which addresses when a case is filed in criminal court and the court determines that the defendant is a minor—and thus the case needs to be certified to juvenile court—needs to be amended to eliminate some obsolete statutory references in subdivision (a) of the rule.

[1] Sen. Bill 382 (Lara); Stats. 2015, ch. 234.

Updated order form for transfer to criminal court

The current optional order form for use after a hearing under section 707 is form JV-710, *Juvenile Fitness Hearing Order*. This form would be retitled *Order to Transfer Juvenile to Criminal Court Jurisdiction (Welfare and Institutions Code, § 707)*, and would be revised to:

- Eliminate obsolete statutory references;
- Replace references to fitness with the new transfer terminology;
- Reframe the court's findings and orders to reflect and reference the amended statutory text of section 707; and
- Provide space for the court to set an appearance date in criminal court and provide that dismissal of the juvenile petition occurs on that date.

The revised form would be available to courts to document their findings and orders consistent with the requirements of the amended provisions of section 707.

Correcting outdated statutory references and terminology

Optional forms *Juvenile Wardship Petition* (form JV-600), *Initial Appearance Hearing—Juvenile Delinquency* (form JV-642), and *Juvenile Notice of Violation of Probation* (form JV-735) all include statutory references that are obsolete because of Proposition 57 and need to be updated to reflect the current statutory numbering scheme. In addition, forms JV-600 and JV-642 both reference juvenile fitness hearings and need to be revised to reflect the new transfer terminology. Similarly, rule 5.664, which lists the topics that must be covered in training for court-appointed counsel for children in delinquency cases, uses the term "fitness" and needs to be updated. Finally, optional form *Promise to Appear—Juvenile Delinquency (Juvenile 14 Years or Older)* (JV-635), uses the term "police officer" to refer to the person authorized to release a minor 14 years or older charged with a felony, but the underlying statute, section 629, uses the term "peace officer." Because peace officer is the statutory term with a legal definition, the committee is proposing to revise this form to reflect the statute.

Comments, Alternatives Considered, and Policy Implications

External comments

This proposal circulated for comment as part of the winter 2017 invitation-to-comment cycle, from December 16, 2016, to February 14, 2017, to the standard mailing list for family and juvenile law proposals. Included on the list were appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks, attorneys, social workers, probation officers, and other juvenile law professionals. Fourteen organizations and individuals, and the Joint Rules Subcommittee of the Trial Court Presiding Judges and Court Executives Advisory Committees provided comment: five agreed with the proposal if modified, two disagreed, and eight did not indicate a position but provided comments. A chart with the full text of the comments received and the committee's responses is attached at pages 29–96.

Optional writ petition form is unnecessary. The committee sought specific comment on the value of the council approving an optional writ petition form to be used to seek review of the court's decision on a transfer motion. While some commentators favored the petition, more felt it was unnecessary and potentially counterproductive as it would lead to the filing of insufficiently detailed and supported writ petitions for review. Based on this feedback, the committee eliminated this proposed form from the proposal and instead modified rule 5.770 to include a requirement that the court advise the parties of their rights and the procedures and deadlines for seeking review of the court's decision on a transfer of jurisdiction motion.

Premature to repeal reverse remand rule. The proposal circulated for comment proposed repealing a criminal court rule that implements Penal Code section 1170.17. This section allows for certain cases that were direct filed under the pre-Proposition 57 version of section 707 to be sent back to juvenile court if the child is convicted of an offense that is not eligible for transfer to criminal court jurisdiction. The repeal was proposed because, while Proposition 57 did not repeal Penal Code section 1170.17, it did eliminate the mechanism by which it could be invoked. The committee asked for specific comment on whether the repeal should be delayed to take into account cases that were filed before the enactment of Proposition 57. There was broad consensus that it was premature to repeal the rule, and the committee ultimately concluded that the rule should remain in place as long as Penal Code section 1170.17 remains in statute.

Clarifications needed in rule 5.766 concerning hearing timing requirements when transfer motion is denied. Several commentators noted that rule 5.766 needed to be clarified to provide deadlines for moving to the jurisdictional phase of the case after the court decides to retain jurisdiction in the juvenile court. The committee agreed and clarified the rule to require that the court apply the timelines in place for delinquency cases at the point that the motion is denied, unless the child waives those timelines.

Probation report provisions need updating to reflect recent changes in law. The rules revised in this proposal were all adopted prior to the passage of SB 382 in 2015, as well as Proposition 57. Several commentators noted that provisions in rule 5.768 do not sufficiently reflect the intent of these two measures with regard to the probation officer's report. Specifically, , it was suggested that there is guidance in the rule on what may be included in the probation officer's report that is not in the statute, and that the rule does not include the guidance that was added by SB 382. The committee concurred that the statutory requirements should guide what is included in the probation officer's report and revised its proposed amendments to the rule to delete the nonstatutory guidance and direct the probation department to address all of the criteria that are in section 707(a)(2). In addition, the proposal now includes amendments to the rule to delete a prior requirement that the probation officer's report include a recommendation and instead provide that a recommendation is required only when the court orders it. Finally, the committee agreed with a number of commentators who suggested that the parties be provided with the probation officer's report at least two court days before the transfer hearing, as a 24-hour deadline did not allow sufficient time to prepare. In addition, the committee clarified that if this deadline is not

met, a continuance of at least 24 hours must be provided when the rule previously required just 24 hours.

Statutory provisions should guide court's evaluation of transfer motion. The commentators who were concerned that the probation report provisions of the rule did not reflect the current language and intent of section 707 had similar concerns about the provisions of the rule guiding the court in its evaluation of the transfer motion, and similarly suggested that the full statutory text be included in the rule. The committee, as has been its recent practice, declined to recommend that the statute be restated in the rule but did revise the proposal to clarify in the rule that the court should apply the criteria as they are defined in the statute. The committee also added a proposed Advisory Committee Comment to rule 5.770 that highlights the intent behind SB 382 and Proposition 57, and offers guidance to juvenile courts evaluating these motions. In addition, the committee is recommending revising optional form JV-710 to remove the list of criteria and check boxes to emphasize that the court is evaluating the motion based on the totality of the circumstances, and not looking at each criterion in isolation when assessing a transfer motion.

Best practice for the court is to state the basis for its decision on the record whether granting or denying the transfer motion. Two commentators representing district attorneys' offices objected that rule 5.770 only requires the court to set forth the basis for granting a transfer motion—and not for denial of a motion—thus placing the parties at a disadvantage when seeking writ review. The rule was drafted in that manner to reflect the text of section 707 as amended by Proposition 57, which expressly requires such a statement of the basis for the order only when it is being granted. The committee concluded that it was best for the rule to reflect this statutory requirement and thus decided not to change this aspect of the proposal as it was circulated for comment. The committee did try and address the issue raised by the commentators by adding a proposed Advisory Committee Comment stressing that it should be the best practice of all juvenile courts to state the basis for their ruling on the motion in all cases, and not only when the motion is granted.

Juvenile court should set appearance date in criminal court and dismiss jurisdiction on that date to prevent jurisdictional uncertainty. Some commentators suggested that when the juvenile court grants a transfer motion, it should not immediately dismiss the juvenile petition, since until a criminal complaint has been filed there is no other court with clear jurisdiction over the child. It was suggested that the juvenile court should set an appearance date in criminal court and order the child to appear and order the petition dismissed only upon that date. In addition, it was suggested that the juvenile court order the prosecuting attorney to file a criminal complaint on or before that date. The committee agreed that the juvenile court should set an appearance date and delay the dismissal of the juvenile court petition until that date and revised the proposal accordingly. The committee felt there was not authority for the juvenile court to order the prosecuting agency to file a complaint and thus did not revise the proposal to address this.

Right to a prima facie hearing on the allegations. The proposal circulated for public comment included deleting rule 5.772 in its entirety as this rule specifically addresses cases in which statutory presumptions repealed by Proposition 57 were applied. However, several commentators noted that rule 5.772(b) requires the court, on a motion by the child, to determine whether there is a prima facie showing that the offense alleged was a felony or specified in section 707(b). They noted that this requirement should remain in place in order to protect the due process rights of the child to only be subject to a transfer motion if the prosecution makes a prima facie showing that the child has committed an eligible offense. The committee agreed with these commentators. Rather than retaining rule 5.772, however, the committee revised the proposal to add this provision from rule 5.772 to rule 5.770.

Need for consistent terminology. The Joint Rules Subcommittee (JRS) of the Trial Court Presiding Judges and the Court Executives Advisory Committees submitted a comment asking for a consistent use of terms in the rules and forms. Currently the criminal court rules use the term minor (as does section 707), while the juvenile court rules use the term child, and form JV-710 uses the term youth. The JRS recommended that the committee look at this issue globally and use one term and suggested that in this context the committee follow the statute and use the term minor.

The committee notes that throughout the juvenile court rules and forms, there is a consistent practice of using the term child and that this term is clearly defined in rule 5.502. The committee considered whether it would be preferable to achieve consistent terminology across the juvenile and criminal rules and forms relating to the transfer of jurisdiction by using the term minor rather than using child. In their discussion of whether it was preferable to use the term child, youth, or minor, the committee weighed the benefits of using the statutory term "minor" against the concerns raised that doing so would be inconsistent with typical council practice in juvenile rules and forms, which largely use the term child. The committee agreed that youth was not sufficiently specific, but noted that the terms child and minor are defined in statute[2] and the term child is also defined in rule 5.502. Ultimately the committee chose to use the term child as (1) it is defined clearly in statute and the rule of court; and (2) it is a reminder to all in the system that juvenile offenders are developmentally distinct from adults, and transfer motions need to be analyzed in that context as directed by section 707. Consistent with this decision, the committee also recommends revising the terminology on the transfer of jurisdiction order form to use the term child rather than youth.

Internal comments

The proposal that was circulated for public comment indicated that the effective date of the proposed changes to the rules and forms would be September 1, 2017. Committee members, many of whom are in the process of trying to implement the new provisions of Proposition 57, discussed whether it would be preferable to make these amended rules and revised forms

[2] See section 101(b): "Child or minor means a person under the jurisdiction of the juvenile court pursuant to section 300, 601, or 602."

effective earlier than September 1. Because the new law has been in effect since the November 2016 election and courts are struggling with implementation, the committee discussed whether the rules should go into July 1, 2017, or whether they should become effective the first court day after the May 19 council meeting, Monday, May 22. Because all but one of the forms in the proposal are all optional, the committee concluded that courts that needed more time to implement use of these forms could take that time even if the proposal became effective immediately. Moreover, the rule changes simply implement the statutory changes and thus should not require any additional time to implement, but may be of value in providing guidance to the courts who are applying the new law. For these reasons, the committee concluded that making the proposal effective on the first court day after the meeting —May 22—was the preferred option.

Alternatives

Leaving the rules and forms unchanged. The committee considered not taking action to revise and amend the existing rules and forms that govern the process for transferring jurisdiction from the juvenile to the criminal courts, but determined that courts who are trying to implement the new provisions of Proposition 57 need accurate rules and forms that reflect the recent changes in the law.

Incorporating statutory requirements and guidance into rules of court. As described above, when reviewing the comments, the committee considered some other approaches to the rules and forms. Most prominently, the committee considered whether to amend the rules to reflect best practice suggestions that were not required by the statute such as (1) requiring the court to state the reasons for its decision regardless of whether it grants or denies transfer, and (2) requiring probation to make a recommendation on transfer although the statute does not require this. While the committee had consensus that these best practices would improve the process, it concluded that it was preferable for the rule to adhere closely to the express text of the statute and thus left whether to follow these best practices to the discretion of the court. The committee also considered the necessity of restating significant portions of section 707 in the rules to provide guidance to the probation agencies and the court on how to evaluate transfer motions. While the committee agreed with commentators about the significance of the statutory text, it ultimately disagreed that the rules must include that text in order to accomplish the statutory objectives. The committee's view is that it is sufficient to include statutory references and an Advisory Committee Comment to highlight the need to follow the statutory directives and guidance.

Expediting the effective date of the proposal. As discussed above, the committee considered recommending that this proposal become effective September 1, 2017, with the other Winter Cycle proposals, and similarly discussed making it effective July 1, 2017. Both of these options would have left courts with more time to prepare for implementation, but left them without rules and forms to implement Proposition 57.

Implementation Requirements, Costs, and Operational Impacts

The committee does not anticipate that the rule and form changes it is recommending will have appreciable implementation requirements, costs or impacts, but notes that the statutory changes made by Proposition 57 are likely to have significant impact on the courts. As a result of these statutory changes, it is likely that juvenile courts will receive more requests for hearings from the district attorney seeking to transfer jurisdiction of a child to criminal court under section 707 as direct file is no longer an option, resulting in more of these hearings in the juvenile court. This workload will be most pronounced in those jurisdictions that used the direct file mechanism regularly. Thus, the increase may not be spread evenly across the courts and may be quite substantial in some jurisdictions. Proposition 57 also changed the nature of the court's assessment in these cases, and several commentators suggested that as a result, these proceedings will take longer and require substantially more juvenile court time to look at all of the criteria holistically and make a determination without evidentiary presumptions and bright line rules, and will require that training on these procedures be revised and updated. These changes may need to be incorporated into future juvenile court workload models developed by the council since existing models are premised on the prior process for evaluating a request to transfer jurisdiction to the criminal court.

If the implementation of Proposition 57 results in the juvenile courts retaining jurisdiction over children that would have otherwise been tried in criminal court, the result will be to reduce the number of juvenile cases transferred to criminal court jurisdiction, and thus there may be some workload savings in those courts. Moreover, there is some evidence that involvement in the adult criminal justice system can lead to more negative lifetime outcomes, and thus there may be savings to the state and the public if fewer children are transferred to criminal court jurisdiction.

As noted above, all of these impacts are as a result of the changes in the underlying statutes and are thus unavoidable. The committee has made every effort in recommending changes to the rules and forms to implement the statutes to make the process as clear as possible and to provide courts with the tools needed to comply with the changes in the law.

Attachments and Links

1. Cal. Rules of Court, rules 4.116, 5.664, 5.766, 5.768, 5.770, and 5.772, at pages 11–19
2. Judicial Council forms JV-600, JV-635, JV-642, JV-710, and JV-735, at pages 20–28
3. Chart of comments, at pages 29–96
4. Link A: Proposition 57 text
   https://www.gov.ca.gov/docs/The_Public_Safety_and_Rehabilitation_Act_of_2016_(00266261xAEB03).pdf

Rule 5.772 of the California Rules of Court is repealed, and rules 4.116, 5.664, 5.766, 5.768, and 5.770 are amended, effective May 22, 2017, to read:

Rule 4.116. Certification to juvenile court

(a) Application

This rule applies to all cases not filed in juvenile court in which the person charged by an accusatory pleading appears to be under the age of 18, except ~~(1) when the child has been found not a fit and proper subject to be dealt with under the juvenile court law or (2) when the prosecution was initiated as a criminal case under Welfare and Institutions Code section 602(b) or 707(d)~~ when jurisdiction over the child has been transferred from the juvenile court under Welfare and Institutions Code section 707.

(b)–(d) * * *

Rule 5.664. Training requirements for children's counsel in delinquency proceedings (§ 634.3)

(a) * * *

(b) Education and training requirements

(1) * * *

(2) Attorney training must include:

(A)–(P) * * *

(Q) ~~Fitness~~ Transfer of jurisdiction to criminal court hearings and advocacy in adult court;

(R)–(S) * * *

(c)–(d) * * *

Rule 5.766. General provisions

(a) ~~Fitness hearing~~ Hearing on transfer of jurisdiction to criminal court (§ 707)

A child who is the subject of a petition under section 602~~(a)~~ and who was 14 years or older at the time of the alleged felony offense may be considered for prosecution under the general law in a court of criminal jurisdiction. The ~~prosecuting attorney~~ district attorney or other appropriate prosecuting officer may ~~request a hearing to determine whether the child is a fit and proper subject to be dealt with under the juvenile court law~~ make a motion to transfer the child from juvenile court to a court of criminal jurisdiction, in one of the following circumstances:

~~(3)~~(1) ~~Under section 707(c), the~~ The child was 14 years or older at the time of the alleged offense listed in section 707(b).

~~(1)~~(2) ~~Under section 707(a)(1), the~~ The child was 16 years or older at the time of the alleged felony offense ~~if the offense is not listed in section 707(b)~~.

~~(2) Under section 707(a)(2), the child was 16 years or older at the time of the alleged felony offense not listed in section 707(b) and has been declared a ward of the court under section 602 on at least one prior occasion and:~~

~~(A) The child has previously been found to have committed two or more felony offenses; and~~

~~(B) The felony offenses in the previously sustained petitions were committed when the child was 14 years or older.~~

(b) Notice (§ 707)

Notice of the ~~fitness~~ transfer hearing must be given at least five judicial days before the ~~fitness~~ hearing. In no case may notice be given following the attachment of jeopardy.

(c) Prima facie showing

On the child's motion, the court must determine whether a prima facie showing has been made that the offense alleged is an offense that makes the child subject to transfer as set forth in subdivision (a).

~~(c)~~(d) Time of ~~fitness~~ transfer hearing—rules 5.774, 5.776

The ~~fitness~~ transfer of jurisdiction hearing must be held and the court must rule on the ~~issue of fitness~~ the request to transfer jurisdiction before the jurisdiction hearing begins. Absent a continuance under rule 5.776 or the child's waiver of the statutory time period to commence the jurisdiction hearing, the jurisdiction hearing must begin within the time limits under rule 5.774.

Rule 5.768. Report of probation officer

(a) Contents of report (§ 707)

The probation officer must ~~investigate the issue of fitness~~ prepare and submit to the court a report on the behavioral patterns and social history of the child being considered. The report must include information relevant to the determination of whether ~~or not~~ the child ~~would be amenable to the care, treatment, and training program available through the facilities of the juvenile court, including information~~

~~regarding all of the criteria listed in rules 5.770 and 5.772~~ should be retained under the jurisdiction of the juvenile court or transferred to the jurisdiction of the criminal court, including information regarding all of the criteria in section 707(a)(2). The report must also include any written or oral statement offered by the victim pursuant to section 656.2. ~~The report may also include information concerning:~~

~~(1) The social, family, and legal history of the child;~~

~~(2) Any statement the child chooses to make regarding the alleged offense;~~
~~(3) Any statement by a parent or guardian;~~

~~(4) If the child is or has been under the jurisdiction of the court, a statement by the social worker, probation officer, or Youth Authority parole agent who has supervised the child regarding the relative success or failure of any program of rehabilitation; and~~

~~(5) Any other information relevant to the determination of fitness~~.

(b) Recommendation of probation officer (§§ 281, 707)

If the court, under section 281, orders the probation officer to include a recommendation, ~~T~~the probation officer must make a recommendation to the court as to whether the child ~~is a fit and proper subject to be dealt with under the juvenile court law~~ should be retained under the jurisdiction of the juvenile court or transferred to the jurisdiction of the criminal court.

(c) Copies furnished

The probation officer's report on the behavioral patterns and social history of the child must be furnished to the child, the parent or guardian, and all counsel at least ~~24 hours~~ two court days before commencement of the ~~fitness~~ hearing on the motion. A continuance of at least 24 hours must be granted on the request of any party who has not been furnished the probation officer's report in accordance with this rule.

Rule 5.770. Conduct of ~~fitness~~ transfer of jurisdiction hearing under section 707~~(a)(1)~~

(a) Burden of proof (§ 707~~(a)(1)~~)

In a ~~fitness~~ transfer of jurisdiction hearing under section 707~~(a)(1)~~, the burden of proving that ~~the child is unfit~~ there should be a transfer of jurisdiction to criminal court jurisdiction is on the petitioner, by a preponderance of the evidence.

(b) Criteria to consider (§ 707~~(a)(1)~~)

Following receipt of the probation officer's report and any other relevant evidence, the court may ~~find that~~ order that the child ~~is not a fit and proper subject to be dealt with under juvenile court law~~ be transferred to the jurisdiction of the criminal court if the court finds:

(1) The child was 16 years or older at the time of ~~the~~ any alleged felony offense, ~~and~~ or the child was 14 or 15 years at the time of an alleged felony offense listed in section 707(b); and

(2) The child ~~would not be amenable to the care, treatment, and training program available through facilities of the juvenile court,~~ should be transferred to the jurisdiction of the criminal court based on an evaluation of all of the ~~following~~ criteria in section 707(a)(2) as provided in that section.~~:~~

~~(A) The degree of criminal sophistication exhibited by the child;~~

~~(B) Whether the child can be rehabilitated before the expiration of jurisdiction;~~

~~(C) The child's previous delinquent history;~~

~~(D) The results of previous attempts by the court to rehabilitate the child; and~~

~~(E) The circumstances and gravity of the alleged offense.~~

(c) ~~Findings under section 707(a)(1)(2)~~ Basis for order of transfer

~~The findings must be stated in the order.~~

~~(1) *Finding of fitness*~~

~~The court may find the child to be fit and state that finding.~~

~~(2) *Finding of unfitness*~~

~~If the court determines the child is unfit, the court must find that:~~

~~(A) The child was 16 years or older at the time of the alleged offense; and~~

~~(B) The child would not be amenable to the care, treatment, and training program available through the juvenile court because of one or a combination of more than one of the criteria listed in (b)(2).~~

If the court orders a transfer of jurisdiction to the criminal court, the court must recite the basis for its decision in an order entered upon the minutes.

~~**(d) Maintenance of juvenile court jurisdiction**~~

~~If the court determines that one or more of the criteria listed in (b)(2) apply to the child, the court may nevertheless find that the child is amenable to the care, treatment, and training program available through the juvenile court and may find the child to be a fit and proper subject to be dealt with under juvenile court law.~~

~~**(e)Extenuating circumstances**~~

~~The court may consider extenuating or mitigating circumstances in the evaluation of each relevant criterion.~~

~~(f)~~(d) Procedure following findings

(1) If the court finds the child ~~to be fit~~ should be retained within the jurisdiction of the juvenile court, the court must proceed to jurisdiction hearing under rule 5.774.

(2) If the court finds the child ~~to be unfit~~ should be transferred to the jurisdiction of the criminal court, the court must make orders under section 707.1 relating to bail and to the appropriate facility for the custody of the child, or release on own recognizance pending prosecution. The court must set a date for the child to appear in criminal court, and dismiss the petition without prejudice upon the date of that appearance.

(3) When the court rules on the request to transfer the child to the jurisdiction of the criminal court, the court must advise all parties present that appellate review of the order must be by petition for extraordinary writ. The advisement may be given orally or in writing when the court makes the ruling. The advisement must include the time for filing the petition for extraordinary writ as set forth in subdivision (g) of this rule.

~~(g)~~(e) Continuance to seek review

If the prosecuting attorney informs the court orally or in writing that a review ~~of a finding of fitness~~ of the court's decision not to transfer jurisdiction to the criminal court will be sought and requests a continuance of the jurisdiction hearing, the court must grant a continuance for not less than two judicial days to allow time within which to obtain a stay of further proceedings from the reviewing judge or appellate court.

~~(h)~~(f) Subsequent role of judicial officer

Unless the child objects, the judicial officer who has conducted a ~~fitness~~ hearing on a motion to transfer jurisdiction may participate in any subsequent contested jurisdiction hearing relating to the same offense.

~~(i)~~(g) Review of ~~fitness~~ determination on a motion to transfer jurisdiction to criminal court

An order ~~that a child is or is not a fit and proper subject to be dealt with under the juvenile court law~~ granting or denying a motion to transfer jurisdiction of a child to the criminal court is not an appealable order. Appellate review of the order is by petition for extraordinary writ. Any petition for review of a judge's order ~~determining the child unfit~~ to transfer jurisdiction of the child to the criminal court, or denying an application for rehearing of the referee's determination ~~of unfitness~~ to transfer jurisdiction of the child to the criminal court, must be filed no later than 20 days after the child's first arraignment on an accusatory pleading based on the allegations that led to the ~~unfitness determination~~ transfer of jurisdiction order.

(h) Postponement of plea prior to transfer hearing

If a hearing for transfer of jurisdiction has been noticed under section 707, the court must postpone the taking of a plea to the petition until the conclusion of the transfer hearing, and no pleas that may have been entered already may be considered as evidence at the hearing.

Advisory Committee Comment

Subdivision (b). This subdivision reflects changes to section 707made by Senate Bill 382 (Sen. Bill 382 [Lara]; Stats. 2015, ch. 234) in 2015, and Proposition 57: the Public Safety and Rehabilitation Act of 2016. SB 382 was intended to clarify the factors for the juvenile court to consider when determining whether a case should be transferred to criminal court by emphasizing the unique developmental characteristics of children and their prior interactions with the juvenile justice system. Proposition 57 provided that its intent was to promote rehabilitation for juveniles and prevent them from reoffending, and to ensure that a judge makes the determination that a child should be tried in a criminal court. Consistent with this intent, the committee urges juvenile courts—when evaluating the statutory criteria to determine if transfer is appropriate—to look at the totality of the circumstances, taking into account the specific statutory language guiding the court in its consideration of the criteria.

Subdivision (c). While this rule and section 707 only require the juvenile court to recite the basis for its decision when the transfer motion is granted, the advisory committee believes that juvenile courts should, as a best practice, state the basis for their decisions on these motions in all cases so that the parties have an adequate record from which to seek subsequent review.

~~**Rule 5.772. Conduct of fitness hearings under sections 707(a)(2) and 707(c)**~~

~~**(a) Presumption (§§ 707(a)(2), 707(c))**~~

~~In a fitness hearing under section 707(a)(2) or 707(c), the child is presumed to be unfit, and the burden of rebutting the presumption is on the child, by a preponderance of the evidence.~~

~~**(b) Prima facie showing**~~

~~On the child's motion, the court must determine whether a prima facie showing has been made that the offense alleged is a felony or is specified in section 707(b).~~

~~(c) Criteria to consider (§ 707(a)(2))~~

~~Following receipt of the probation officer's report and any other relevant evidence, the court must find that the child is not a fit and proper subject to be dealt with under the juvenile court law, unless the court finds:~~

~~(1) The child was under 16 years of age at the time of the alleged felony offense;~~

~~(2) The child had not been declared a ward at the time of the alleged offense or any time previously;~~

~~(3) The child has not previously been found to have committed two or more felony offenses;~~

~~(4) The prior felony offenses were committed before the child had reached the age of 14 years; or~~

~~(5) The child would be amenable to the care, treatment, and training program available through the juvenile court, based on evaluation of each of the following criteria:~~

~~(A) The degree of criminal sophistication exhibited by the child;~~

~~(B) Whether the child can be rehabilitated before the expiration of jurisdiction;~~

~~(C) The child's previous delinquent history;~~

~~(D) The results of previous attempts by the court to rehabilitate the child; and~~

~~(E) The circumstances and gravity of the alleged offense.~~

~~(d) Findings under section 707(c)~~

~~Following receipt of the probation officer's report and any other relevant evidence, the court must find that the child is not a fit and proper subject to be dealt with under the juvenile court law, unless the court finds:~~

~~(1) The child was under 14 years of age at the time of the offense specified in section 707(b);~~

~~(2) The offense alleged is not listed in section 707(b); or~~

~~(3) The child would be amenable to the care, treatment, and training program available through the juvenile court, based on evaluation of each of the criteria described in (c)(5).~~

~~(e) Extenuating circumstances~~

~~The court may consider extenuating or mitigating circumstances in the evaluation of each relevant criterion.~~

~~(f) Findings (§§ 707(a)(2), 707(c))~~

~~The findings must be stated in the order.~~

~~(1) *Finding of unfitness (§ 707 (a)(2))*~~

~~If the child has failed to rebut the presumption of unfitness, the court must find that:~~

~~(A) The child has previously been found to have committed two or more offenses listed in section 707(b) and was 14 years of age or older at the time of the felony offenses; and~~

~~(B) The child would not be amenable to the care, treatment, and training program available through the juvenile court because of one or a combination of more than one of the criteria in (c)(5).~~

~~(2) *Finding of unfitness (§ 707(c))*~~

~~If the child has failed to rebut the presumption of unfitness, the court must find that:~~

~~(A) The child was 14 years or older at the time of the alleged offense and the offense is listed in section 707(b); and~~

~~(B) The child would not be amenable to the care, treatment, and training program available through the juvenile court because of one or a combination of more than one of the criteria in (c)(5).~~

~~(3) *Finding of fitness (§§ 707(a)(2), 707(c))*~~

~~In order to find the child fit, the court must find that the child would be amenable to the care, treatment, and training program through the juvenile court on each and every criterion in (c)(5), and the court must state that finding of amenability under each and every criterion.~~

~~(g) Procedure following findings~~

~~(1) If the court finds the child to be unfit, the court must make orders under section 707.1 relating to bail, and to the appropriate facility for the custody of the child, or release on own recognizance pending prosecution. The court must dismiss the petition without prejudice.~~

~~(2) If the court finds the child to be fit, the court must proceed to jurisdiction hearing under rule 5.774.~~

~~(h) Continuance to seek review~~

~~If the prosecuting attorney informs the court orally or in writing that a review of a finding of fitness will be sought and requests a continuance of the jurisdiction hearing, the court must grant a continuance for not less than 2 judicial days to allow time within which to obtain a stay of further proceedings from the reviewing judge or appellate court.~~

~~(i) Subsequent role of judicial officer~~

~~Unless the child objects, the judicial officer who has conducted a fitness hearing may participate in any subsequent contested jurisdiction hearing relating to the same offense.~~

~~(j) Review of fitness determination~~

~~An order that a child is or is not a fit and proper subject to be dealt with under the juvenile court law is not an appealable order. Appellate review of the order is by extraordinary writ. Any petition for review of a judge's order determining the child to be unfit or denying an application for rehearing of the referee's determination of unfitness must be filed no later than 20 days after the child's first arraignment on an accusatory pleading based on the allegations that led to the unfitness determination.~~

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **NOT APPROVED BY THE JUDICIAL COUNCIL**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
JUVENILE WARDSHIP PETITION ☐ § 601(a) ☐ § 601(b) ☐ § 602	CASE NUMBER:

1. Petitioner on information and belief alleges the following:

a. ☐ The child named below comes within the jurisdiction of the juvenile court under the following sections of the Welfare and Institutions Code *(check applicable boxes; see attachments for concise statements of facts):*
☐ 601(a) ☐ 601(b) ☐ 602 Violation *(specify code section):*

b. ☐ Under a previous order of this court, dated , the child was declared a ward under Welfare and Institutions Code section ☐ 601(a) ☐ 601(b) ☐ 602

c. Child's name and address:	d. Age:	e. Date of birth:	f. Sex:

g. Name:
Address:
☐ mother ☐ father ☐ guardian ☐ unknown
If mother or father *(check all that apply):*
☐ legal ☐ biological ☐ presumed ☐ alleged

h. Name:
Address:
☐ mother ☐ father ☐ guardian ☐ unknown
If mother or father *(check all that apply):*
☐ legal ☐ biological ☐ presumed ☐ alleged

i. Name:
Address:
☐ mother ☐ father ☐ guardian ☐ unknown
If mother or father *(check all that apply):*
☐ legal ☐ biological ☐ presumed ☐ alleged

j. Other *(name, address, and relationship to child):*

☐ No known parent or guardian resides within this state. This adult relative lives in this county or is closest to this court.

k. Attorney for child *(if known):*
Address:

Phone number:

l. Child is
☐ not detained. ☐ detained.
Date and time of detention *(custody):*
Current place of detention *(address):*

(See important notices on page 2.)

CHILD'S NAME:	CASE NUMBER:

2. Petitioner requests that the court find these allegations to be true.

3. ☐ Petitioner requests a hearing to determine whether the child should be transferred to the jurisdiction of the criminal court under Welfare and Institutions Code section 707 for the following alleged offense(s) *(specify code section):*

I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PETITIONER)

☐ *Indian Child Inquiry Attachment* (form ICWA-010(A)) is completed and attached.

☐ Number of pages attached: _____

TO PARENTS OR OTHERS LEGALLY RESPONSIBLE FOR THE SUPPORT OF THE CHILD

You and the estate of your child may be jointly and severally liable for the cost of the care, support, and maintenance of your child in any placement or detention facility, the cost of legal services for your child or you by a public defender or other attorney, the cost of supervision of your child by order of the juvenile court, and the cost of any restitution owed to the victim.

RECORD SEALING

The court may seal your records at the conclusion of your case or you may request sealing at a later date. Please see form JV-595-INFO, *How to Ask the Court to Seal Your Records*, and form JV-596-INFO, *Sealing of Records for Satisfactory Completion of Probation*, available through your attorney or *www.courts.ca.gov/forms.htm*, for more information about record sealing.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council**
CASE NAME:	
PROMISE TO APPEAR—JUVENILE DELINQUENCY **(Juvenile 14 Years or Older)**	
LAW ENFORCEMENT AGENCY: REPORT NUMBER:	

Name of child:

Date of birth of child:

Address of child:

Phone number of child:

Name of parent, legal guardian, or adult relative:

Address of parent, legal guardian, or adult relative *(if different from that of child):*

Phone number of parent, legal guardian, or adult relative *(if different from that of child):*

1. I have been arrested for one or more of the following felony offenses *(list code violations alleged):*

2. The ☐ peace officer ☐ probation officer is releasing me to *(name):*
   who is my ☐ mother ☐ father ☐ legal guardian ☐ relative *(state relationship):*

3. **I PROMISE TO APPEAR**

   on *(date):* at *(time):* in Dept.: Room:

   located at ☐ courthouse address above ☐ other *(specify address):*

4. I understand that if I do not come to court on the date and at the time indicated, the court may order that a warrant be issued for my arrest.

Date:

(TYPE OR PRINT NAME)

(TYPE OR PRINT NAME)

Witnessed by:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF CHILD)

▶ (SIGNATURE OF ☐ PARENT ☐ LEGAL GUARDIAN ☐ RELATIVE)

▶ SIGNATURE OF ☐ PROBATION OFFICER
☐ PEACE OFFICER *(agency):*

Request for Accommodations
Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you are ask at least five days before the proceeding. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Order* (form MC-410. (Civil Code, § 54.8.)

Form Adopted for Mandatory Use
Judicial Council of California
JV-635 [Rev. May 22, 2017]

PROMISE TO APPEAR—JUVENILE DELINQUENCY
(Juvenile 14 Years or Older)

Welfare and Institutions Code, § 629
Penal Code, § 830–830.6
www.courts.ca.gov

• ORIGINAL—Transmitted to court • Copy to youth • Copy to parent, guardian, or relative • Copy to probation

CHILD'S NAME:	CASE NUMBER:

INITIAL APPEARANCE HEARING—JUVENILE DELINQUENCY

☐ Out-of-Custody Appearance ☐ In-Custody Appearance and Detention

THE COURT MAKES THE FOLLOWING FINDINGS AND ORDERS:

1. ☐ Notice has been given as required by law.
2. ☐ The child's date of birth is *(specify)*:
3. ☐ The child is to remain out of custody pending the next hearing.
4. ☐ The child was taken into custody at: ☐ a.m. ☐ p.m. on *(specify date):*
5. ☐ The petition or notice of probation violation was filed at: ☐ a.m. ☐ p.m. on *(specify date):*
6. ☐ Counsel is appointed for the child as follows:
   Counsel is to represent the child until relieved by the court in accordance with California Rules of Court, rule 5.663.
7. ☐ The information on the face of the petition was ☐ confirmed ☐ corrected as follows:
8. a. ☐ The court inquired of ☐ the mother ☐ others *(names and relationships):*

   as to the identities and addresses of all presumed or alleged fathers.

   b. ☐ The court finds *(name):* to be the ☐ legal ☐ biological ☐ presumed ☐ alleged father.
9. The ☐ mother ☐ father ☐ legal guardian ☐ other *(specify):*
   were provided with a *Parental Notification of Indian Status* (form ICWA-020) and ordered to complete the form and submit it to the court before leaving the courthouse today.
10. a. ☐ The child ☐ is ☐ may be an Indian child, and the county agency must provide, as required by law, notice of the proceeding and of the tribe's right to intervene. Proof of such notice must be filed with the court.
    b. ☐ There is reason to believe that the child may be of Indian ancestry, and the county agency must provide notice of the proceedings to the Bureau of Indian Affairs as required by law. Proof of such notice must be filed with this court.
11. ☐ The court advised the child and parent or legal guardian of *(check all that apply)*
    a. ☐ the contents of the petition.
    b. ☐ the nature and possible consequences of juvenile court proceedings.
    c. ☐ the purpose and scope of the initial hearing.
    d. ☐ the hearing rights described in rule:
    e. ☐ the reason the child was taken into custody.
    f. ☐ the parent or legal guardian's financial obligation and right to be represented by counsel.
    g. ☐ other:
12. ☐ Reading of the petition and advice of rights were waived by ☐ the child ☐ the child's counsel.
13. ☐ The prosecutor has requested that a hearing be set to determine whether the child should be transferred to the jurisdiction of the criminal court under Welfare and Institutions Code section 707.
14. ☐ The child ☐ through counsel
    a. ☐ denied the allegations of the petition dated:
    b. ☐ asked the court to take no action on the petition at this time.
15. ☐ For the reasons stated on the record, the petition is dismissed ☐ in the interests of justice ☐ because the child does not need treatment or rehabilitation.
16. ☐ After inquiry, the court finds that the child understands the nature of the allegations and the direct consequences of admitting or pleading no contest to the allegations of the petition, and understands and waives the hearing rights, which were explained *(check all that apply):*
    a. ☐ The right to have a hearing.

CHILD'S NAME:	CASE NUMBER:

16. b. ☐ The right to cross-examine and confront witnesses.
c. ☐ The right to subpoena witnesses and present a defense.
d. ☐ The right to remain silent.

17. ☐ The child ☐ through counsel
a. ☐ admitted the petition ☐ as filed ☐ as amended on *(date):*
b. ☐ pleaded no contest to the petition ☐ as filed ☐ as amended *on (date):*
c. ☐ The child's counsel consents to the admission or plea of no contest.
d. ☐ The admission or plea of no contest is freely and voluntarily made.
e. ☐ There is a factual basis for the admission or plea of no contest.
f. ☐ The court finds that the child was under 14 years old at the time of the offense but the child knew the wrongfulness of his or her conduct at the time the offense was committed.

18. a. ☐ The following allegations are admitted and found to be true:

Count number	Statutory violation	Misdemeanor	Felony	To be specified at disposition	Enhancement *(if applicable)*
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	
		☐	☐	☐	

b. ☐ As to any offense that could be considered a misdemeanor or felony, the court is aware of and exercises its discretion to determine the offense, as stated in 18a.

c. ☐ The following allegations are dismissed:

Count number	Statutory violation

19. ☐ The child is described by section ☐ 601 ☐ 602 of the Welfare and Institutions Code.
20. ☐ The maximum confinement time is:
21. ☐ The child's residence is in: County.
22. ☐ The matter is transferred to: County for disposition and further proceedings.
Juvenile Court Transfer Orders (form JV-550) will be completed and transmitted immediately.
23. ☐ The child waives his or her right under *People v. Arbuckle* to have the disposition heard by this judicial officer.

CHILD IN CUSTODY

24. ☐ The court has considered the detention report prepared by probation
☐ and the following documents *(specify):*
☐ and the testimony of *(name):*
☐ and the examination by the court of *(name):*
☐ and takes judicial notice of the entire court file.

25. ☐ The child is released from custody ☐ to the home of *(name, address, and relationship to child):*
☐ on home supervision ☐ on electronic monitoring
☐ the terms of which are stated in the attached *Terms and Conditions* (form JV-624).

26. ☐ The child is a dependent of the court under section 300 and is ordered released from custody. The child welfare services department must either ensure that the child's current caregiver take physical custody of the child or take physical custody of the child and place the child in a licensed or approved placement.

CHILD'S NAME:	CASE NUMBER:

27. ☐ A prima facie showing has been made that the child's disposition is by section 601 or 602.

28. ☐ Based on the facts stated on the record, the child is detained in secure custody on the following grounds *(check all that apply):*

a. ☐ The child has violated an order of the court.

b. ☐ The child has escaped from a court commitment.

c. ☐ The child is likely to flee the jurisdiction of the court.

d. ☐ It is a matter of immediate and urgent necessity for the protection of the child.

e. ☐ It is reasonably necessary for the protection of the person or property of another.

29. ☐ Based on the facts stated on the record, continuance in the child's home is contrary to the child's welfare.

30. ☐ Based on the facts stated on the record, there are no available services that would prevent the need for further detention.

31. ☐ Temporary placement and care is the responsibility of the probation department.

32. ☐ Reasonable efforts to prevent or eliminate the need for detention of the child ☐ have ☐ have not been made.

33. ☐ Probation is ordered to provide services that will assist with reunification of the child and the family.

34. ☐ Probation is granted the authority to authorize medical, surgical, or dental care under Welfare and Institutions Code section 739.

35. ☐ The child and the parent or legal guardian have been advised that if the child cannot be returned home within the statutory timelines, a proceeding may be scheduled to determine an alternative permanent home, including an adoptive home after parental rights are terminated.

36. ☐ The ☐ mother ☐ father ☐ legal guardian is/are ordered to supply the names and contact information of adult relatives to probation so they can be notified of the child's removal and of their options to be included in the child's life.

37. ☐ The probation officer must file a case plan within 60 days.

38. ☐ Probation is authorized to release the minor ☐ at its discretion ☐ under the following circumstances:

39. ☐ The court accepts transfer from the County of:

40. ☐ Other orders:

41. ☐ Child ☐ Counsel waives time for *(check all that apply)*
☐ jurisdiction hearing ☐ disposition hearing ☐ other:

42. ☐ **The next hearings will be**

Date:	Time:	Dept:	Type of hearing:
Date:	Time:	Dept:	Type of hearing:

43. ☐ The child

a. ☐ is ordered to return to court on the above date(s) and time(s).

b. ☐ remains detained.

44. All prior orders not in conflict, including any terms and conditions of probation, remain in full force and effect.

45. ☐ All appointed counsel are relieved.

Date:

☐ JUDGE ☐ JUDGE PRO TEMPORE ☐ COMMISSIONER ☐ REFEREE

Countersignature for detention orders (*if necessary*):

Date:

JUDICIAL OFFICER

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
Case Name:		
ORDER TO TRANSFER JUVENILE TO CRIMINAL COURT JURISDICTION (Welfare and Institutions Code, § 707)		CASE NUMBER:

DRAFT

NOT APPROVED BY THE JUDICIAL COUNCIL

1. a. Date of hearing: Dept.: Room:
   b. Judicial officer *(name):*
   c. Persons present: ☐ Child ☐ Child's attorney *(name):*
   ☐ Deputy District Attorney *(name):*
   ☐ Other:

2. ☐ The court has read and considered: ☐ The petition and report of the probation officer.
   ☐ Other relevant evidence.

3. **THE COURT FINDS** *(check one):*
   Welfare and Institutions Code section 707
   a. ☐ The child was 16 years old or older at the time of the alleged felony offense; or
   b. ☐ The child was 14 or 15 years of age at the time of the alleged offense, and the current alleged offense is an offense listed in Welfare and Institutions Code section 707(b).

4. **THE COURT ALSO FINDS AND ORDERS**
   The court has considered all of the criteria in section 707(a)(2) and makes the following findings and orders on the motion to transfer jurisdiction to the criminal court for the reasons stated on the record:
   a. ☐ The transfer motion is denied. The child is retained under the jurisdiction of the juvenile court.
   The next hearing is on *(date):* at *(time):*
   for *(specify):*

   b. ☐ The transfer motion is granted. The prosecutor has shown by a preponderance of the evidence that the child should be transferred to the jurisdiction of the criminal court.
      1. ☐ The matter is referred to the District Attorney for prosecution under the general law.
      2. ☐ The child is ordered to appear in criminal court on *(date):* at *(time):*
      in Department:
      3. ☐ The petition filed on *(date):* is dismissed without prejudice on the appearance date in 2.
      4. ☐ The child is to be detained in ☐ juvenile hall ☐ county jail (section 207.1).
      5. ☐ Bail is set in the amount of: $
      6. ☐ The child is released ☐ on own recognizance.
      ☐ to the custody of:

Date:

JUDICIAL OFFICER

Form Approved for Optional Use
Judicial Council of California
JV-710 [Rev. May 22, 2017]

ORDER TO TRANSFER JUVENILE TO CRIMINAL COURT JURISDICTION (Welfare and Institutions Code, § 707)

Welfare and Institutions Code, §§ 207.1, 389(c), 707, 781(d);
Cal. Rules of Court, rules 5.504, 5.770
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):		**DRAFT** **Not approved by** **the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
CASE NAME:		
JUVENILE NOTICE OF VIOLATION OF PROBATION ☐ § 725 ☐ § 777(a)		CASE NUMBER:

1. Petitioner on information and belief alleges the following:

a. ☐ Under a previous order of this court, dated , the child was declared a ward under Welfare and Institutions Code section ☐ 601(a) ☐ 601(b) ☐ 602.

b. ☐ Under a previous order of this court, dated , the child was NOT declared a ward and was placed on summary probation under Welfare and Institutions Code section 725(a).

c. Child's name and address	d. Age:	e. Date of birth:	f. Sex:

g. Name:
Address:
☐ mother ☐ father ☐ guardian ☐ unknown

If mother or father *(check all that apply):*
☐ legal ☐ biological ☐ presumed ☐ alleged

h. Name:
Address:
☐ mother ☐ father ☐ guardian ☐ unknown

If mother or father *(check all that apply):*
☐ legal ☐ biological ☐ presumed ☐ alleged

i. Name:
Address:
☐ mother ☐ father ☐ guardian ☐ unknown

If mother or father *(check all that apply):*
☐ legal ☐ biological ☐ presumed ☐ alleged

j. Other *(state name, address, and relationship to child):*

☐ No known parent or guardian resides within this state. This adult relative lives in this county or is closest to this court.

k. Attorney for child *(if known):*
Address:

Phone number:

l. Child is
☐ not detained ☐ detained

Date and time of detention *(custody):*
Current place of detention *(address):*

(See important notice on page 2.)

Form Approved for Optional Use
Judicial Council of California
JV-735 [Rev. May 22, 2017]

Welfare and Institutions Code, § 600 et seq.;
Cal. Rules of Court, rule 5.504
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

2. The child is a: ☐ probationer or ☐ ward of the court under Welfare and Institutions Code section
☐ 601 ☐ 602 ☐ 725(a) and the child has violated a condition of probation or order of the court.
(State supporting facts concisely, and number them 1, 2, etc.)
☐ See Attachment 2.

3. The recommended ☐ modification ☐ consequence is:
   a. ☐ Removal from the custody of a ☐ parent ☐ guardian ☐ relative ☐ friend
   b. ☐ Placement in a foster home or relative's home
   c. ☐ Commitment to a private institution
   d. ☐ Commitment to a county institution
   e. ☐ Commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities
   f. ☐ To be determined
   g. ☐ Other *(specify):*

4. ☐ The child violated nonwardship probation. Petitioner requests a hearing be set under Welfare and Institutions Code section 725(a) to decide if the child should be a ward and determine the appropriate disposition.

5. ☐ Number of pages attached: _____

TO PARENTS OR OTHERS LEGALLY RESPONSIBLE FOR THE SUPPORT OF THE CHILD

You and the estate of your child may be jointly and severally liable for the cost of the care, support, and maintenance of your child in any placement or detention facility, the cost of legal services for your child or you by a public defender or other attorney, the cost of supervision of your child by order of the juvenile court, and the cost of any restitution owed to the victim.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
	David Broady Senior Deputy District Attorney Placer County District Attorney's Office	AM	Please accept my public comment concerning the implementation of Proposition 57 regarding the transfer of juvenile offenders to courts of adult criminal jurisdiction per Welfare and Institutions Code Section 707. I applaud the committee for its work on this challenging issue and the necessary extensive re-write of the applicable Court Rules and Judicial Council Forms. I would ask for one change to the Rule and Forms, regarding a requirement that the juvenile court specify it reasons for denying a transfer to adult court, much the same as the proposed rule requires the juvenile court to specify its reasons for granting a transfer to adult court. The current proposed language, that I would slightly modify is: *If the court denies a transfer of jurisdiction to the criminal court, the court must recite the basis for its decision in an order entered upon the minutes.* This would require a change to Rule 5.770(c), and Form JV-710, heading 5(a). The Form JV-710 (5)(a) would require additional language mirroring that already proposed for a granting of a 707 motion, to require the juvenile court to specify the statutory criteria upon which court relied in deciding to deny the 707 transfer to adult court.	The committee agrees that it is a best practice for the juvenile court to provide its reasons for granting or denying a transfer motion, but the text of the statute only requires findings when the motion is granted. The committee concluded that it was best for the rule to adhere closely to this statutory requirement. However, the committee has added an Advisory Committee comment identifying this as a best practice and urging courts to follow it. The committee has reworked the form to delete the criteria and the check boxes and instead refer to the statute and require the reasons to be stated on the record.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			I request the committee consider this change to allow both parties equal footing in requesting writ or appellate review of a juvenile court's decision on a 707 motion. This additional detail and required findings would permit a reviewing court meaningful review of the juvenile court's exercise of discretion and consideration of the facts and law present in each case. Without requiring the juvenile court to specify the basis of its finding in denying a 707 motion, the People will lack a detailed record of review for a reviewing court to assess the lower court's exercise of discretion. This result will unfairly prejudiced the prosecution, and realistically make the juvenile court denial of transfer the final word on the issue. Though the juvenile court does exercise tremendous discretion in these decisions, there must be some reasonable means to review 707 transfer decision under the statutory criteria implemented pursuant to Proposition 57.	
	California Judges Association Lexi Howard Legislative Director	N	Does the proposal appropriately address the stated purpose? Partially. Prop.57, and 2016's SB 382, follows the line of U.S. and California Supreme Court cases that require youth to be treated differently than adults due to the developmental differences and immaturity inherent in young people. In addition to the procedural changes, the proposed	The committee has addressed the specific suggestions for additional guidance below and included an Advisory Committee comment that reflects the intent language in Proposition 57.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			rules should provide guidance for adopting the new jurisprudence that accompanies the new transfer of jurisdiction hearings. Would the proposal provide cost savings? No. Prop. 57 will result in additional costs to the court, primarily due to the increase in Transfer of Jurisdiction Hearings, including likely expert witness fees. The proposal is helpful to the implementation of the new rules and providing standardized forms to record the court's findings. To that extent there may be cost savings because courts will be well-prepared to handle the new hearings and thereby reducing delays. What would the implementation requirements be for the courts? In addition to training staff on the procedures for the new hearings, courts will need to create time and courtroom space to conduct the new hearings and train juvenile bench officers on adolescent development. Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes. How well would this proposal work in courts of different sizes? The proposed rules will encourage consistent	The committee has taken note of this comment and others like it and has revised accordingly its estimate of the impacts of Proposition 57 in its report to the Judicial Council. The committee has included these impact of the Proposition in its report to the council. The committee has opted to make the proposal effective May 22, 2017. The committee has retained the forms as optional.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			procedures in all counties, regardless of size. The JV-600, JV-642, JV-710 and other hearing forms should continue to be optional to allow flexibility for courts of different sizes. The JV-824 form is not necessary.	The committee agrees and has removed the JV-824 from the proposal and amended rule 5.770 to include a requirement that the parties be advised of their rights to have the court's decision reviewed.
			We offer the following additional comments: Rule 4.116: Certification to Juvenile Court; we support this revision.	No response required.
			Rule 4.510: Reverse Remand Should the date for repeal of rule 4.510 be delayed beyond September 1, 2017 to accommodate cases that precede the enactment of Prop. 57? Yes. If so, what should be the effective date of the repeal? January 1, 2019 Any sunset date needs to provide sufficient time for pending cases and writs to resolve, which could take at least a year or longer.	Given the uncertainty, the committee has opted not to repeal rule 4.510 as long as Penal Code section 1170.17 remains in the law.
			Rule 5.766: General Provisions Regarding Rule 5.766(a), we recommend this be clarified to add "felony", as follows: "(a)(2) The child was 14 years or older at the time of the alleged felony offense listed in section 707(b)." This proposed change takes into account that a wobbler 707(b) offense must	The committee agrees that this change would clarify the rule and has made clear in the opening of the rule that at a minimum there must be a felony alleged.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			be alleged as a felony to qualify for transfer to adult court. See In re Sim J. (1995) 38 Cal.App.4th 94 ["Section 707(b) is reserved for the most serious offenses and does not include misdemeanor violations."] Regarding Rule 5.766(c), we recommend this be revised as follows: "The transfer of jurisdiction hearing must be held and the court must rule on the issue of the request to transfer jurisdiction before the jurisdiction hearing begins. Absent a continuance under rule 5.776 or the child's waiver of the statutory time period to commence the jurisdiction hearing, the jurisdiction hearing must begin within the time limits under rule 5.774." Rule 5.768: Report of probation officer (a) Contents of Report We think that the short statement "… including information regarding all of the criteria in section 707(a)(2)" does not accomplish the stated purpose of reflecting the new terminology. The rule should clearly reflect the changes by Prop 57 and SB 382 to acknowledge the developmental differences between youth and adults (Miller/Roper/Graham). This paragraph should be amended to specify the complete language of each criteria, including the "clarifications," described in WIC 707(a)(2) to emphasize that the report must analyze the	The committee has adopted this proposed revision to clarify the timeline for the jurisdiction hearing to begin. The committee has concluded that a statutory reference is preferable to restating the text of the statute in the rule, but has opted to delete provisions from the rule that do not reflect the statute.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			child's developmental status and maturity. (c) Copies Furnished We recommend this be revised as follows: "The probation officer's report on the behavioral patterns and social history of the child must be furnished to the child, the parent or guardian, and all counsel at least ~~24 hours~~ two court days before commencement of the hearing on the motion. A continuance of <u>at least</u> 24 hours must be granted on the request of any party who has not been furnished the probation officer's report in accordance with this rule." - The two court day requirement is similar to the due date for the social study prior to a disposition hearing (Rule 5.785). Given the stakes of a transfer hearing, it is important to provide all parties with at least the same amount of time to review a disposition report. - Likewise, the parties must be provided with adequate time to review an untimely filed probation officer's report. Rule 5.770: Conduct of transfer of jurisdiction hearing (a) Burden of Proof Proposition 57 eliminated the requirement that the court must find fitness under each and every one of the criteria for any child pending a transfer of jurisdiction hearing. To reflect this change, the rule should be modified to make clear that the court must consider the totality of	The committee agrees that two court days is a more appropriate deadline for the provision of the probation report and has clarified that the continuance period for failure to meet this deadline should be <u>at least</u> 24 hours. Since there is nothing in the rule requiring findings on each of the criteria, it does not appear to the committee that clarification is required.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			the circumstances and that denying the motion to transfer need not be based on findings on each of the criteria. (b) Criteria to Consider This section should also be amended to specify that although the court must consider all of the criteria in Section 707(a)(2), the court does not need to find that juvenile court jurisdiction should be retained based on each and every criteria. Also, the list of the criteria should include all of the language from Section 707(a)(2), not just the language of the historical five criteria.	The committee has deleted the list of criteria from the rule and replaced it with a statutory reference and specifically cited the statutory guidance added by SB 382. In addition, the committee has added an Advisory Committee comment highlighting the intent of SB 382 and Proposition 57 and directing the court to apply the criteria as that statute requires.
			Deletion of 5.772(b): Prima facie showing This paragraph should be included under Rule 5.770. Courts may need guidance whether the prosecution must still establish a prima facie case. Although fitness hearings have been eliminated, the Edsel P. analysis suggests that a youth is still entitled to challenge the sufficiency of the evidence at a transfer of jurisdiction hearing. The Edsel P. decision was based not only on the issue of fitness, but also on constitutional considerations and the issue of detention. Edsel P. v. Superior Court (1985) 165 Cal.App.3d 763.	The committee agrees that the right to a prima facie finding that the alleged offense is an offense that is eligible for transfer of jurisdiction is a burden the prosecuting agency should bear before the court holds the transfer hearing and has adapted the existing language from rule 5.772(b) and added it rule 5.766(c).
			Form JV-600 On page 2, Box 3 is unclear whether checking this box satisfies the required notice of the motion and the motion. The prosecutor's	This item has been modified to require that the prosecution specify the alleged offense(s) that will be the subject of the transfer motion.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			motion should be filed separately from the petition. This language should be changed to make clear that by checking the box, the prosecutor is merely providing notice of the motion. Form JV-642 Box 13 should likewise be modified to distinguish between the prosecutor's notice of the motion and the filing of the motion. Form JV-710 Does the revised JV-710 order form allow the court to accurately and comprehensively document its findings and orders? No. - Box 3 should be amended to include that the finding is by a preponderance of the evidence. - Because the court must consider all of the criteria, but need not make findings of fitness on each of the criteria, checking the boxes will not provide a sufficient "basis for its decision." Instead, a narrative section may be more appropriate for the court to recite how the totality of the criteria supports the decision. - Box 5: The order must show that the court ruled on the motion. The form should have boxes that show whether the motion was denied or granted, in addition to the order	The committee believes that this form is clear and does not need modification. See responses to specific suggestions below. The reworked form includes that the order to transfer is made based on a finding by a preponderance of the evidence. The committee has reworked the form to delete the criteria and the check boxes and instead refer to the statute and require the reasons to be stated on the record. The form has been changed to include whether the motion was denied or granted.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			retaining jurisdiction or transferring jurisdiction Form 735 We seek clarification about why this form included in the proposal. Form JV-824 Will the proposed new writ form improve the process for challenging transfer orders? No. While the JV-824, like the existing dependency equivalent JV-825, may be a helpful checklist, the form does not translate well to the delinquency and transfer of jurisdiction hearing format. The dependency writ from an order setting a Section 366.26 hearing is a statutory writ while the writ from a transfer of jurisdiction hearing is a writ of mandate. Rule 8.452, which governs the dependency writ, requires that a memorandum be attached to the petition. There is no similar guidance for the proposed JV-824. The proposed JV-824 form will at best result in unnecessary additional pages being filed with the writ, and at worst, lead to confusion and failure to preserve the writ. Additionally, it is highly unlikely that the youth or a non-attorney will ever directly file a writ following a transfer of jurisdiction hearing. A new form is not necessary. Instead of the new form, we recommend amending Rule of Court 5.990 to include an advisement of right to review a decision in a	This form needed a technical change to remove the letter (a) after section 602 in item 1.a. The committee agrees and has removed the JV-824 from the proposal and amended rule 5.770 to include a requirement that the parties be advised of their rights to have the court's decision reviewed.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			transfer hearing. Proposal: Rule 5.990(d) Advisement requirements when court rules on the request to transfer jurisdiction under section 707 When the court rules on the request to transfer the child to the jurisdiction of the criminal court pursuant to Welfare and Institutions Code section 707, the court must advise all parties present that appellate review of the order must be by petition for extraordinary writ. The advisement may be given orally or in writing when the court makes the ruling. The advisement must include the time for filing the petition for extraordinary writ.	The committee has added the advisement requirement to rule 5.770(d).
	California Public Defender's Association Martin F. Schwarz Juvenile Defense Committee	N/I	Does the proposal appropriately address the stated purpose? Yes, taking into consideration the responses to the specific comments below as well as the following: Proposed Amendments to rule 5.766 In part, subdivision (a), states "A child who is the subject of a petition under section 602(a) and who was 14 years or older at the time of the alleged offense may be considered for prosecution under the general law in a court of criminal jurisdiction." However, a child between the ages of 14 and 15 may only be transferred to a court of criminal jurisdiction for an offense listed in subdivision (b) of Welfare	No response required. The committee has clarified this language to make it clearer that 14 and 15 are only subject to transfer for a 707(b) by moving that language ahead of the provisions for those 16 and 17 and has corrected the outdated reference to fitness.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			and Institutions Code section 707 whereas a minor 16 years or older may be transferred for any felony offense. (Welf. & Inst. Code,§ 707, subd. (a)(l).) To avoid confusion, the language of the rule should include this distinction. The header to subdivision (c), reads "time of fitness hearing-rules 5.774, 5.776." The word "fitness" should be replaced with the word "transfer." Proposed Amendments to rule 5.768 In 2015, AB 382 greatly expanded the criteria that a court must look to determine whether a child should remain in the juvenile justice system. The bill, which amended Welfare and Institutions Code section 707, was an acknowledgment that this critical determination should be based on what we know about adolescent development and by having judicial officers examine the most relevant information in the area on which to base their decision. These criteria include maturity, intellectual capacity, physical, mental and emotional health, impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of familial, adult or peer pressure on the child's action, the effect of the child's environment and childhood trauma, the child's potential to grow and mature, and the adequacy of services previously provided. The proposed amendments to the rule do not require the probation report to consider these factors. The rule, specifically	The committee has concluded that a statutory reference is preferable to restating the text of the statute in the rule, but has opted to delete provisions from the rule that do not reflect the statute.

	Commentator	Position	Comment	Committee Response
			subdivision (a), should require probation to address these factors in its report so that the court can base its decision on the most relevant information available. Subdivision (b) requires the probation officer preparing the report to make a determination as to whether the child should be retained under the jurisdiction of the juvenile court or transferred to the jurisdiction of the criminal court. The header to the subdivision cites to Welfare and Institutions Code section 707 and 281 as authority for this proposition. However, section 707 does not contain a requirement that probation provide a recommendation. Section 281 is a general statute authorizing probation in juvenile cases to investigate, write reports and make recommendations "upon order of any court." Requiring probation to make a recommendation without a court order to do so is not supported by either statute. Moreover, since the probation officer will not have heard the evidence presented at the transfer hearing, he or she will not be in a position to make an informed recommendation at the time the report is filed with the court. Consequently, we recommend deleting this subdivision in its entirety. Alternatively, should a court find a recommendation helpful, the subdivision could be amended to indicate that a court could request probation make a recommendation under Welfare and Institution	The committee has clarified the rule to require a recommendation from probation only if it is specifically ordered by the court.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			Code section 281 but that probation is not required to make a recommendation absent such an order. Proposed Amendments to rule 5.770 With respect to subdivision (b), the concern is the same as indicated above for rule 5.768(a) in hat the "criteria to consider" does not include the factors related to adolescent development added to Welfare and Institutions Code section 707 by AB 382. The court is required to consider those factors and their exclusion from the "criteria to consider" might suggest otherwise to judicial officers and advocates. Subdivision (c) addresses "findings under section 707(a)" and reads "If the court orders a transfer of jurisdiction to the criminal court, the court must recite the basis for its decision in an order entered upon the minutes." While this is a true statement of law and is taken directly from Welfare and Institutions Code section 707, subdivision (a)(2) ["the court shall recite the basis for its decision in an order entered upon the minutes"], it does not include the critical language from the preceding sentence in the statute that requires the court to consider all the statutory criteria in their totality. That sentence reads, "In making its decision, the court shall consider the criteria specified in subparagraphs (A) to (E) below." Including clarifying language to this effect in the rule would remind trial courts that findings need to be based on an	The committee has deleted the list of criteria from the rule and replaced it with a statutory reference and specifically cited the statutory guidance added by SB 382. In addition, the committee has added an Advisory Committee comment highlighting the intent of SB 382 and Proposition 57 and directing the court to apply the criteria as that statute requires.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			evaluation of all factors as a whole and would avoid confusion.	
			Will the proposed new writ form improve the process for challenging transfer orders? No. In our experience, neither public defender offices nor district attorney offices typically file extraordinary writ petitions in the Court of Appeal using Judicial Council forms. There is no reason to believe this will change with a Judicial Council writ form in this specific instance. Instead, writ petitions challenging an order granting or denying transfer from juvenile court to adult court and that these writs of mandate will be filed in accordance with California Rule of Court, rule 8.490. To the extent the form will be used by some practitioners, its brevity contrasts sharply with the complexity of the subject matter at issue and its use will inevitably lead to sloppy drafting and a poorly articulated presentation of the issues in the Court of Appeal.	The committee agrees and has removed the JV-824 from the proposal and amended rule 5.770 to include a requirement that the parties be advised of their rights to have the court's decision reviewed.
			Does the revised JV-710 order form allow the court to accurately and comprehensively document its findings and orders? No. The concern is primarily the manner in which the court memorializes findings in support of a transfer order in section 3 of the form. That section contains the five factors the	The committee has reworked the form to delete the criteria and the check boxes and instead refer to the statute and require the reasons to be stated on the record.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			court must consider for transfer and then asks the court to check a box next to each factor on which transfer was based. This is an outdated holdover from pre-Proposition 57 fitness hearings and needs to be changed to conform with the change in the law. Prior to Proposition 57, a juvenile court judicial officer could declare a minor unfit for juvenile court by finding the minor unfit under a single factor. (Cal. Rules of Court, rule 5.770(c)(2)(B).) The amendments to Welfare and Institutions Code section 707, subdivision (a)(2), clarify that the court must now look to the totality of circumstances, not a single factor: "In making its decision, the court shall consider the criteria specified in subparagraphs (A) to (E) below." Moreover, this change in the law is recognized by the proposed amendments to rule 5. 770. There is an inherent and irreconcilable tension between asking the court to consider the totality of circumstances on the one hand and asking the court to check a box related to an individual circumstance in support of transfer.	
			Should the date for repeal of rule 4.510, which implements the reverse remand procedure in Penal Code section 1170.17 be delayed beyond September 1, 2017 to accommodate cases that precede the enactment of Prop. 57? If so, what should be the effective date of the repeal? Yes. Recently, in the case of People v. Superior Court of Riverside County (Jan. 19, 2017,	Given the uncertainty, the committee has opted not to repeal rule 4.510 as long as Penal Code section 1170.17 remains in the law.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			E067296) _Cal.App.5th_ [2017 Cal.App. LEXIS 35], the Court of Appeal ruled that Proposition 57 required that youth who were directly filed on in adult court prior to the passage of the proposition should be sent back to the juvenile court. However, until this issue is firmly settled, Penal Code section 1170.17 and rule 4.510 will continue to be viable. Accordingly, we propose a sunset clause extending the current rule to September 1, 2018.	
	Hon. Donna Quigley Groman Superior Court of Los Angeles County	AM	Does the proposal appropriately address the stated purpose? Yes Will the proposed new writ form improve the process for challenging transfer orders? Yes Does the revised JV-710 order form allow the court to accurately and comprehensively document its findings and orders? Yes Should the date for repeal of rule 4.510, which implements the reverse remand procedure in Penal Code section 1170.17 be delayed beyond September 1, 2017 to accommodate cases that precede the enactment of Prop. 57? If so, what should be the effective date of the repeal? Keep it in effect until the legislature repeals Pen Code section 1170.17	No response required. No response required. No response required. The committee concurs, and has opted not to repeal rule 4.510 as long as Penal Code section 1170.17 remains in the law.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			*The commentator suggested revisions to clarify the rules and forms. Many of these suggestions were also included in the comments from the Superior Court of Los Angeles and are addressed there. The remainder are summarized here:	
			Rule 5.768 Items 1-4 are no longer included in section 707	The committee has deleted these from the rule.
			In (c) delete the word fitness and add <u>on the motion for transfer of jurisdiction</u> after hearing.	The committee has deleted this provision.
			Rule 5.770 (d) This language was removed from section 707 by Prop. 57	The committee has deleted this subdivision from the rule.
			Form JV-600: Page, 2 item 3, "if the notice may be given in the petition, the DA should identify what offense(s) are alleged to be an offense under 707(b)."	The committee has added space for the eligible offense(s) to be listed.
			Form JV-642 Item 13: Add <u>and no plea should be taken until the transfer motion is decided</u> at the end of the item.	The committee notes that this language is in the rule and need not be added to the form as it constrains the court and not the child.
			Form JV-824: In the 5th instruction add <u>with the clerk of the reviewing court</u> at the end of the instruction. In item 4.b.: reword as <u>denying a motion to</u>	The committee has removed this form from the proposal.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			transfer jurisdiction from juvenile to criminal court.	
	Los Angeles County District Attorney's Office Mark Burnley Deputy-in-Charge	AM	Rule 5.766 – "Prosecuting attorney" should be changed to "the district attorney or other appropriate prosecuting office." Rule 5.768 – the proposed amendment to this rule fails to delete the word "fitness" in 5.768(a)(5). Also, none of the criteria set forth in 5.768(a)(1-5) are contained in the Prop. 57 amended language in 707(a)(2)(A-E), but that language is contained within the current version of 5.768. Rule 5.770 – the proposed version does not track Prop. 57's amendments. Here's our suggestions for 5.770: 5.770(b) Criteria to consider (707): Following submission and consideration of the probation officer's report and any other relevant that the petitioner or the minor may wish to submit, the court shall decide whether the minor should be transferred to a court of criminal jurisdiction. The court shall consider and address all of the criteria set forth in section 707(a)(2)(A-E). 5.770(c) If the court orders or denies a transfer of jurisdiction, the court shall recite the basis for	The committee agrees and has modified this language to track section 707. The committee has corrected this reference. The committee has deleted these criteria from the rule. The committee has deleted the list of criteria from the rule and replaced it with a statutory reference and specifically cited the statutory guidance added by SB 382. In addition, the committee has added an Advisory Committee comment highlighting the intent of SB 382 and Proposition 57 and directing the court to apply the criteria as that statute requires. The committee agrees that it is a best practice for the juvenile court to provide its reasons for

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			its decision in an order entered upon the minutes. Rationale - Per Proposition 57, the court shall recite the basis for its decision when it grants a motion to transfer. (WIC 707(a)(2).) However, the court should recite the basis for its decision whether the motion to transfer is denied or granted. Requiring the court to state its reasons for denying a motion to transfer could potentially reduce the number of writs filed by the People and a complete appellate record is always better than an incomplete record. Also, requiring the court to always make a complete record affords justice to all parties involved in the proceeding.	granting or denying a transfer motion, but the text of the statute only requires findings when the motion is granted. The committee concluded that it was best for the rule to adhere closely to this statutory requirement. However, the committee has added an Advisory Committee comment identifying this as a best practice and urging courts to follow it.
	Orange County Bar Association	N	**Does the proposal appropriately address the stated purpose?** Yes, taking into consideration the comments and suggestion presented below. **Will the proposed new writ form improve the process for challenging transfer orders?** No. In the County of Orange, neither defense counsel nor the district attorney's office typically file extraordinary writ petitions in the Court of Appeal using Judicial Council forms. It is anticipated this will hold true for writ petitions challenging an order granting or denying transfer from juvenile court to adult court and that these writs of mandate will be	No response required. The committee agrees and has removed the JV-824 from the proposal and amended rule 5.770 to include a requirement that the parties be advised of their rights to have the court's decision reviewed.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			filed in accordance with California Rule of Court, rule 8.490. Forms are typically used by self-represented litigants. Although Welfare and Institutions Code sections 634 and 700 allow minors to waive their right to counsel, it is a rare occurrence. To the extent attorneys representing minors will use the writ form, the brevity of the form is in sharp contrast to the complexity of the transfer criteria and will inevitably lead to poorly articulated and insufficient presentation of the issues for review. Therefore, we recommend the writ form not be adopted. **Does the revised JV-710 order form allow the court to accurately and comprehensively document its findings and orders?** Section 3 of the form contains the five factors the court must consider for transfer and then asks the court to check a box next to each factor on which transfer was based. This is an anachronistic remainder from fitness hearings and does not comport with the change in the law brought about by Proposition 57. Prior to Proposition 57, a juvenile court judicial officer could declare a minor unfit for juvenile court by finding the minor unfit under a single factor. (Cal. Rules of Court, rule 5.770(c)(2)(B).) The amendments to Welfare and Institutions Code section 707, subdivision (a)(2), clarify that the court must now look to the totality of circumstances, not a single factor: "In making its decision, the court shall consider the criteria	The committee has reworked the form to delete the criteria and the check boxes and instead refer to the statute and require the reasons to be stated on the record.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			specified in subparagraphs (A) to (E) below." Moreover, this change in the law is recognized by the proposed amendments to rule 5.770. **Should the date for repeal of rule 4.510, which implements the reverse remand procedure in Penal Code section 1170.17 be delayed beyond September 1, 2017 to accommodate cases that precede the enactment of Prop. 57? If so, what should be the effective date of the repeal?** Yes. We propose a sunset clause extending the current rule to September 1, 2018. Recognizing the issue of remand to juvenile court for cases which were direct filed was touched on in the recent case of *People v. Superior Court of Riverside County* (Jan. 19, 2017, E067296) __ Cal.App.5th __ [2017 Cal.App. LEXIS 35], until the issue is firmly settled, Penal Code section 1170.17 and rule 4.510 will continue to be viable.	Given the uncertainty, the committee has opted not to repeal rule 4.510 as long as Penal Code section 1170.17 remains in the law.
	Pacific Juvenile Defender Center Sue Burrell Policy Director	N/I	• Does the proposal appropriately address the stated purpose? Yes, with the understanding that certain changes to the proposed language should be made for consistency with the new changes to transfer hearings and for clarity. • Will the proposed new writ form improve the process for challenging transfer orders?	No response required.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			No. While we appreciate the desire to provide as much guidance as possible, we believe the form is unnecessary and that it will cause more confusion than it resolves. While writ forms may be useful in other areas of the law, such as habeas corpus, where there may be pro per petitions or writ practice is seldom used, such a form has little usefulness here. Writ practice in fitness/transfer cases is well-established. Moreover, since transfer writs are filed directly in the Court of Appeal and must comply with numerous rules of court, the form is unnecessary. Moreover, it can lend confusion to those who believe the merely filing the form even without an appropriately formatted writ will constitute compliance with the strict 20 day rule for filing transfer writs. We have done these kinds of writs for 40 years without a form. There are many sample writs available in training materials and through public defender offices. We are also concerned that the inevitable brevity of the form may cause users of the form to file writs that are missing essential elements, or that lack the in-depth treatment called for under the new transfer criteria. Providing a form for this kind of complex pleading will inadvertently encourage bad practice. Unlike habeas writs which are filed in trial courts, transfer writs do not need a form. It would be much more beneficial for	The committee agrees and has removed the JV-824 from the proposal and amended rule 5.770 to include a requirement that the parties be advised of their rights to have the court's decision reviewed.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			practitioners to refer to actual writs or consult the rules of court relating to writs to understand how to present the case and the issues regarding transfer. In addition, the form adds nothing substantive to the writ; but would instead have no useful purpose when appellate court staff or justices determine the merits of the writ petition. • Does the revised JV-710 order form allow the court to accurately and comprehensively document its findings and orders? No. The form falls back on the old bare bones fitness criteria, and fails to include the much more detailed criteria for transfer. Also, it fails to include some of the critically important procedural changes in the law. We have suggested changes to the form in our comments on specific language. • Should the date for repeal of rule 4.510, which implements the reverse remand procedure in Penal Code section 1170.17 be delayed beyond September 1, 2017 to accommodate cases that precede the enactment of Prop. 57? Yes. There may be cases playing out for some time to come that involve those sections. One way to handle this would be to place a sunset clause in the rule, repealing it as of a certain date unless a later amendment is made. We suggest a sunset clause extending the current	The committee has reworked the form to delete the criteria and the check boxes and instead refer to the statute and require the reasons to be stated on the record. The committee has opted not to repeal rule 4.510 as long as Penal Code section 1170.17 remains in law. The committee concurs that the rules and forms will not increase the costs of implementing Proposition 57, and will ease the burden on the courts but notes that overall juvenile court workload will be increased by the changes made by Proposition 57.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			rule to September 1, 2018. • Would the proposal provide cost savings? If so, please quantify. Yes, providing guidance to the courts in applying the new law, these rules may prevent unnecessary appellate litigation that would follow from application of the old fitness standards and criteria. Thus the rules may have a beneficial effect in preventing harm to young people, and in costs to the system. A recent analysis of the costs of wrongful conviction places the cost of judicial errors at $194,962 average cost per error. (Criminal Injustice: A Cost Analysis of Wrongful Convictions, Errors, and Failed Prosecutions in California's Criminal Justice System, UC Berkeley Law, Warren Institute on Law and Social Policy (2015), p. 36.) Of course, the cost of even one young person being unnecessarily relegated to the adult criminal system is enormous, both in terms of the life changing consequences for the youth, the cost of extended confinement for the taxpayers of California, and the lost opportunities to rehabilitate the young person in the juvenile system. If the rules save even a few youth from wrongful transfer, the cost savings will be immense. • What would the implementation requirements	The committee takes note of this cost and notes that ensuring court review of all transfer motions will take additional time in the juvenile court. The committee concurs that Proposition 57

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems. There may be some costs involved in promulgated new processes and procedures and in training, but they are not optional costs. The law has changed, and courts must adapt to those changes. Proposition 57 is the law, and the proposed rules and forms will help courts to implement the new laws. • Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes. Proposition 57 took effect on November 9, 2016, so the sooner the rules can go into effect, the better. Courts are already being asked to apply the new law. • How well would this proposal work in courts of different sizes? The rules do not appear to affect large versus small courts in different ways. / / **Rule 4.116 Certification to juvenile court.** –	implementation will impose costs on the courts. The committee agrees and has proposed that the effective date be moved up to May 22, 2017 directly after council approval. No response required. No response required.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			No comment. **Rule 4.510 Reverse remand.** Again, we believe there may be cases playing out for some time to come that involved reverse remand. Our suggestion is that there be a sunset clause for repeal of this rule, absent an intervening action to extend it. We suggest September 1, 2018 as the sunset date. **Rule 5.766. General Provisions.** **Recommendation:** We have a number of concerns on this one. First, the language in (a) with respect to eligibility appears to need some clarification. Second, we suggest an additional clarifying sentence in (b). Third, in (c), we request that the word "fitness" be replaced with "transfer. We also suggest a slight rewording of the last sentence in (c) to clarify that the young person may demand a hearing within the statutory time limits. **Suggested language for (a) (in red italics):** (a) ~~Fitness~~ Transfer of jurisdiction to criminal court hearing (§ 707) A child who is the subject of a petition under section 602(a) and who was 14 years or older at the time of ***an*** ~~***the***~~ alleged offense ***under section 707, subdivision (b), or 16 years of age or older***	Given the uncertainty, the committee has opted not to repeal rule 4.510 as long as Penal Code section 1170.17 remains in the law. The committee has clarified the language in this section of the rule to be consistent with the current statutory language.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			at the time of an alleged felony offense, may be considered for prosecution under the general law in a court of criminal jurisdiction. The prosecuting attorney may ~~request a hearing to determine whether the child is a fit and proper subject to be dealt with under the juvenile court law~~ make a motion to transfer the child from juvenile court to a court of criminal jurisdiction, in one of the following circumstances: No further comments on 5.766 (a). **Suggested addition to (b):** (b) Notice (§ 707) Notice of the ~~fitness~~ ***transfer*** hearing ~~***on transfer of jurisdiction***~~ must be given at least five judicial days before the ***transfer*** ~~***fitness***~~ hearing. ***In no case may notice be given following the attachment of jeopardy.*** **Suggested change in heading for (c):** (c) Time of ~~fitness~~ ***transfer*** hearing—rules 5.774, 5.776 The ~~***fitness***~~ ***transfer*** ~~***of jurisdiction***~~ hearing must be held and the court must rule on the issue of ~~***fitness the request to***~~ transfer ~~***jurisdiction***~~ before the jurisdiction***al*** hearing begins. ~~Absent a continuance~~, ***Unless the youth waives time,*** the jurisdiction***al*** hearing must begin within	The committee has adopted these suggested revisions. The committee has corrected this heading and text to substitute transfer for fitness. The committee has clarified this provision of the

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			the time limits under rule 5.774. **Rule 5.768. Report of the Probation Officer.** **Recommendation:**	rule to include the waiver.
			The proposed language for subdivision (a) on the contents of the probation officer's report should be substantially revised. Although it is mostly technically correct, it fails to provide guidance on the most important part of the new transfer laws in vastly expanding the factors that must be to be considered in transfer decisions. We are very concerned that, without specific guidance on the expanded factors, probation officers will simply fall back on their old template for reports, and fail to address the developmental and other factors contemplated by the legislation. The language in proposed (1) to (5) is truly insignificant compared with those factors, and surely, probation officers do not need the rule to tell them that they can include statements from various people.	The committee has concluded that a statutory reference is preferable to restating the text of the statute in the rule, but has opted to delete provisions from the rule that do not reflect the statute.
			Also, in (c), we recommend that the report be furnished 48 hours prior to the transfer hearing instead of only 24. That would bring the rule into conformity with the timeline for disposition social study reports. Also, we suggest removing the last sentence providing a continuance of 24 hours as a remedy for failure to comply with the rule. The provision seems to inadvertently	The committee agrees that more time to review the report is needed, and that two court days is a more appropriate deadline for the provision of the probation report. It has also clarified that the continuance period for failure to meet this deadline should be <u>at least</u> 24 hours.

	Commentator	Position	Comment	Committee Response
			suggest that failure to comply with providing the report may be a routine occurrence, so it seems stronger just to announce the rule as the expectation. If the remedy language is retained, it should also be increased to 48 hours. **Suggested language for (a)** (a) Contents of report (§ 707) The probation officer must ~~investigate the issue of fitness~~ prepare and submit to the court a report on the behavioral patterns and social history of the child being considered. The report must include information relevant to the determination of whether or not the child ~~would be amenable to the care, treatment, and training program available through the facilities of the juvenile court, including information regarding all of the criteria listed in rules 5.770 and 5.772~~ should be retained under the jurisdiction of the juvenile court or transferred to the jurisdiction of the criminal court. ***The report must consider any relevant factor and*** ~~including information regarding all of~~ the criteria ***specified*** in section 707(a)(2)***(A-E), including:***~~.~~ ***(1) The degree of criminal sophistication exhibited by the child. (707(a)(2)(A)).*** *This includes, but is not limited to, the child's age, maturity, intellectual capacity, and physical, mental, and emotional health at the*	See response above concerning the probation report.

	Commentator	Position	Comment	Committee Response
			time of the alleged offense, the child's impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of familial, adult, or peer pressure on the child's actions, and the effect of the child's family and community environment and childhood trauma on the child's criminal sophistication. ***(2) Whether the child can be rehabilitated prior to the expiration of the juvenile court's jurisdiction. (707(a)(2)(B)).*** *This includes, but is not limited to, the child's potential to grow and mature.* ***(3) The child's previous delinquent history. (707(a)(2)(C)).*** *This includes but is not limited to the seriousness of the child's previous delinquent history and the effect of the child's family and community environment and childhood trauma on the child's previous delinquent behavior.* ***(4) Success of previous attempts by the juvenile court to rehabilitate the child. (707(a)(2)(D)).*** *This includes, but is not limited to, the adequacy of the services previously provided to address the child's needs.* ***(5) The circumstances and gravity of the offense alleged in the petition to have been committed by the child. (707(a)(2)(E)).***	

	Commentator	Position	Comment	Committee Response
			This includes, but is not limited to, the actual behavior of the person, the mental state of the person, the person's degree of involvement in the crime, the level of harm actually caused by the person, and the person's mental and emotional development. The report must also include any written or oral statement offered by the victim pursuant to section 656.2. ~~The report may also include information concerning:~~ ~~(1) The social, family, and legal history of the child;~~ ~~(2) Any statement the child chooses to make regarding the alleged offense;~~ ~~(3) Any statement by a parent or guardian;~~ ~~(4) If the child is or has been under the jurisdiction of the court, a statement by the social worker, or probation officer, or Youth Authority parole agent who has supervised the child regarding the relative success or failure of any program of rehabilitation; and~~ ~~(5) Any other information relevant to the determination of fitness.~~ **Suggested language for (c):** (c) Copies furnished The probation officer's report on the behavioral patterns and social history of the child must be furnished to the child, the parent or guardian,	

	Commentator	Position	Comment	Committee Response
			and all counsel at least ***48*** ~~24~~ hours before commencement of the fitness hearing on the motion. ~~A continuance of 24 hours must be granted on the request of any party who has not been furnished the probation officer's report in accordance with this rule.~~ **Rule 5.770 Conduct of ~~fitness~~ transfer ~~*of jurisdiction*~~ hearing under section 707~~(a)(1)~~** In (b), we are concerned that the language provides only a pre-S.B. 382 and Pre-Prop 57 bare bones skeleton of the criteria to be considered by the court. Those measures have dramatically transformed and enriched the universe of factors to be considered by the court. Section 707 provides that the court shall consider this expanded universe of factors. In (c), there is a need to clarify that the previously existing language that required courts to find the young person fit on all five criteria has been removed from the law. Under the rules of statutory construction, the removal of something so important must be considered to be intentional and to have some meaning. The rule should reflect this change. The situation now is similar to many other areas of the law in which courts are asked to make decisions based on the totality of the circumstances. For example, courts must determine whether a juvenile statement is	See response on the timing of the provision of the probation report above. The committee has deleted the list of criteria from the rule and replaced it with a statutory reference and specifically cited the statutory guidance added by SB 382. In addition, the committee has added an Advisory Committee comment highlighting the intent of SB 382 and Proposition 57 and directing the court to apply the criteria as that statute requires.

	Commentator	Position	Comment	Committee Response
			voluntary based on a totality of the circumstances including age, education, and degree of intelligence, as well as upon his experience and familiarity with the law. (*In re Robert H.* (1978) 78 Cal.App.3d 894.) Similarly, the decision whether to seal a minor's records is based on a totality of the circumstances surrounding whether the child has been rehabilitated. (*In re J.W.* (2015) 236 Cal.App.4th 663.) We recommend that language to this effect be included in the rule. **Suggested language for (b) Criteria to consider (§ 707):** Following receipt of the probation officer's report and any other relevant evidence, the court may ~~find that~~ order that the child ~~is not a fit and proper subject to be dealt with under juvenile court law~~ be transferred to the jurisdiction of the criminal court if the court finds: (1) The child was 16 years or older at the time of the alleged felony offense, ~~and~~ or the child was 14 or 15 years at the time of an alleged offense listed in section 707(b); and (2) The child ~~would not be amenable to the care, treatment, and training program available through facilities of the juvenile court,~~ should	

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			be transferred to the jurisdiction of the criminal court based on an evaluation of all of the following criteria: (A) The degree of criminal sophistication exhibited by the child~~;~~. ***(707(a)(2)(A)).*** *This includes, but is not limited to, the child's age, maturity, intellectual capacity, and physical, mental, and emotional health at the time of the alleged offense, the child's impetuosity or failure to appreciate risks and consequences of criminal behavior, the effect of familial, adult, or peer pressure on the child's actions, and the effect of the child's family and community environment and childhood trauma on the child's criminal sophistication;* (B) Whether the child can be rehabilitated before the expiration of ***the juvenile court's*** jurisdiction~~;~~. ***(707(a)(2)(B)).*** *This includes, but is not limited to, the child's potential to grow and mature.* (C) The child's previous delinquent history~~;~~. ***(707(a)(2)(C)).*** *This includes but is not limited to the seriousness of the child's previous delinquent history and the effect of the child's family and community environment and childhood trauma on the child's previous delinquent behavior.*	

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			(D) S***uccess*** ~~The results~~ of previous attempts by the court to rehabilitate the child~~.~~ ***(707(a)(2)(D)).*** *This includes, but is not limited to, the adequacy of the services previously provided to address the child's needs; and* (E) The circumstances and gravity ~~of the alleged offense.~~ ***alleged in the petition to have been committed by the child. (707(a)(2)(E)).*** *This includes, but is not limited to, the actual behavior of the person, the mental state of the person, the person's degree of involvement in the crime, the level of harm actually caused by the person, and the person's mental and emotional development.* **Suggested language for (c):** (c) Findings under section 707~~(a)(1)(2)~~ ~~The findings must be stated in the order.~~ ~~*(1) Finding of fitness*~~ ~~The court may find the child to be fit and state that finding.~~ ~~*(2) Finding of unfitness*~~ ~~If the court determines the child is unfit, the court must find that:~~ ~~(A) The child was 16 years or older at the time of the alleged offense; and~~ ~~(B) The child would not be amenable to the care, treatment, and training program available~~	

	Commentator	Position	Comment	Committee Response
			~~through the juvenile court because of one or a combination of more than one of the criteria listed in (b)(2).~~ If the court orders a transfer of jurisdiction to the criminal court, the court must recite the basis for its decision in an order entered upon the minutes. ***The court's decision shall be based upon a totality of the circumstances, including the factors specified in Section 707(a)(2)A-E.*** **Rule 5.772. Conduct of fitness hearings under 707(a)(2) and 707(c).** **Recommendation:** We agree that most of this rule can be repealed because it has been changed by Proposition 57 or is covered elsewhere in the proposed rules, but the rules should retain a provision on prima facie showings. Even though *Edsel P. v. Superior Court* (1985) 165 Cal.App.3d 763, the case previously used to justify prima facie showings prior to fitness hearings, was based on the now defunct presumption of unfitness, youth facing transfer still retain a constitutional right to a prima facie showing that they committed the alleged offense. The U.S. Department of Justice has recently recognized the need for probable cause hearings	The committee agrees that the right to a prima facie finding that the alleged offense is an offense that is eligible for transfer of jurisdiction is a burden the prosecuting agency should bear before the court holds the transfer hearing and has taken the existing language from rule 5.772(b) and added it rule 5.766.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			prior to transfer as a matter of Fourteenth Amendment Due Process: The need for adversarial testing of probable cause lies in the Kent Court's recognition that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony." Kent, 383 U.S. at 554, as well as in principles of fundamental fairness. When a child is certified to be criminally tried in the adult court system, he or she suffers immediate harms even if the charges ultimately are dismissed. These harms include, among others, transfer to an adult jail, in which children suffer substantially higher rates of abuse and suicide than occur in juvenile facilities; elimination of the confidentiality protections that attach to juvenile proceedings and the concomitant stigmatization of a criminal charge; exposure to harsher disciplinary policies, including prolonged periods of isolation; and removal from educational and other programs that are available in juvenile detention centers but not offered in adult facilities." (U.S. Department of Justice, Civil Rights Division, *Investigation of the St. Louis County Family Court* (July 31, 2015), pages 26-28.) Moreover, the right to a full hearing on probable cause was already a right in California under *In re Dennis H.* (1971) 19 Cal.App.3d 350.	

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			Suggested language on prima facie showing: ***Rule 5.772. Prima facie showing.*** *On the child's motion, the court must determine whether a prima facie showing has been made that the child committed the offense alleged as a basis for transfer in the motion for transfer.* **Form for Juvenile Transfer to Criminal Court Jurisdiction Order (JV-710)** **Suggested Changes (following the numbers on the form):** 1. No changes suggested. 2. Should provide space as ask the court to describe the other relevant evidence considered. 3. The check boxes for the five criteria should be deleted because there is no longer a requirement in law that the child be found unfit on each of the five criteria. Moreover, each of the five criteria has a series of component elements which are not reflected on the form. Instead, the law contemplates a totality of the circumstance approach. We suggest leaving a modified version of the first sentence: "The court has considered ~~each of~~ the ~~following~~ criteria ***set forth in Section***	The committee adapted the existing language from rule 5.772(b) and placed that provision in rule 5.766(c). No response required. That information will be in the court record, and does not need to be on the form. The committee has reworked the form to delete the criteria and the check boxes and instead refer to the statute and require the reasons to be stated on the record.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			707(a)(2)(A-E) and has determined that ***the prosecutor has shown by a preponderance of the evidence*** youth should be transferred to the jurisdiction of the criminal court." 4. Consider using language consistent with the statute, for example, "16 years old or older," and "14 or 15 years of age." 5. We suggest just saying, "The motion for transfer is denied." **Form for Extraordinary Writ- Juvenile Transfer (JV824)** For the reasons stated in our responses to specific questions above, we do not believe this form should be promulgated.	The committee has adopted this suggestion. This item has been clarified to include denial of the order. The committee agrees and has removed the JV-824 from the proposal and amended rule 5.770 to include a requirement that the parties be advised of their rights to have the court's decision reviewed.
	P. N. Gaspar Schwartz	NI	California leaders should protect juveniles from overzealous state prosecutors who have no real solutions to offer the family in state. Putting juveniles in jail is not the solution. The state prosecutor is guilty of misconduct if he believes that children should be put away forever for carrying firearms or knives. If you are going to keep putting children inside prison with gang members, then that makes the new entrant, who is the juvenile, they must now become either more violent to make the many other persons not physically assault, deprive	No response required. No response required.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			them of rehabilitation, etc. If state prosecutors are scared, honestly scared, to tour the state detention facilities without having the detainees placed on lockdown in any state detention, then you need not call the state detention system a "rehabilitation system". We inspect federal detention facilities and without putting the facility on lockdown. Stop being scared to fire union workers who do not want prisoners rehabilitated. Guards need high detention numbers and a violent environment inside the facility to make the courts believe that detention guards' need a high wage payment. *The commentator then provided comments suggesting religious education for all that is not germane to this proposal ~~[Train, educate your grade, and junior, and high school and adults, that Jezus said, "Why callest thou me good? There is none good but one, that is, God: but if thou wilt enter into life, keep the commandments. Thou shalt not bear false witness, honor with care thy father and thy mother, do not lust after another's spouse, forgive, and love thy neighbor as thyself." Gospel Jezus Khrist Tablets]~~	No response required. No response required
	Eric Schweitzer	N/I	I have a concern about the proposed revocation of Rule 5.772 in its entirety. Perhaps, subdivision (b) should be kept in some form.	The committee agrees that the right to a prima facie finding that the alleged offense is an offense that is eligible for transfer of jurisdiction is a

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			Using the new language "transfer" rather than the old language "fitness is a distinction without a difference, when it comes to the constitutional aspects of having a contested detention hearing for its intended purpose. "Because the issues of probable cause and fitness are discrete, and because section 707 addresses only the latter issue, the statute must be interpreted as leaving intact the constitutional and statutory requirement that evidence of the prima facie case be presented when the minor challenges the sufficiency of the evidence to constitute probable cause. Elimination of this requirement, it deserves to be pointed out, would in effect permit prosecutors rather than judges to determine whether evidence is sufficient to constitute probable cause at a critical stage in the proceedings." Edsel P. v. Superior Court (1985) 165 Cal. App. 3d 763, 784. Unless the prima facie showing rule is retained, then, even if a minor should prevail at his or her rule 5.762(c) detention re-hearing, the District Attorney would still be able to proceed with transfer out proceedings based upon hearsay and conclusions based thereon. And, the minor who wins his or her detention re-hearing would probably not be released! Given the fact that many courts are ignoring W.I.C. Section 604(d) and applying W.I.C. Section 604's enabling of	burden the prosecuting agency should bear before the court holds the transfer hearing and has adapted the existing language from rule 5.772(b) and added it rule 5.766(c).

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			the "suspending adult proceedings" on Prop. 57 returnees, the incentive for a second bite at the apple while the un-detained child languishes on high bail in the "suspended" adult proceeding is great indeed. Furthermore, any minor treated thusly would have to hazard and appear in adult court to gain any comparable (Preliminary) hearing at a later date. And, given the changes to the law, it is questionable whether such a minor would have the opportunity to return to the protections of the Juvenile Court, even though the premise for his or her removal [felony or 707(b) offense] turns out to be absent any probable cause. This is simply untenable.	
	Superior Court of Los Angeles County Los Angeles County Superior Court	AM	Proposed Modifications: Rule 5.766 (a) - second sentence change “make a motion” to “file a motion.” To avoid confusion put new (a) (2) before (a) (1). Change “the” to “any” in new (a) (2): (1) The child was 14 years or older at the time of the alleged offense listed in section 707(b). (2) The child was 16 years or older at the time of <u>any</u> alleged felony offense. Rule 5.766 (c) First sentence delete “the issue of” and change “…before the jurisdiction hearing begins.” to “…before the court commences a jurisdiction	The committee has adopted many of these clarifying suggestions, but retained the word “make” consistent with section 707. The committee has adopted these clarifying suggestions.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			hearing under WIC 702." Second sentence after "Absent a continuance" add "based on a finding of good cause per WIC 682..."	
			Rule 5.768 (a) Second sentence change "must" to "shall" and delete "including information regarding all" and start a new sentence "<u>The report shall address each</u> of the criteria in section 707(a) (2)." Last sentence change "may" to "shall."	The Judicial Council style manual directs that rules of court use "must" and not "shall" for clarity.The committee has deleted the last sentence because it does not reflect section 707.
			Rule 5.770 (a) First sentence change "…the child should be transferred to criminal court jurisdiction…" to "…there should be a transfer of jurisdiction to criminal court jurisdiction…"	The committee has adopted this clarifying change.
			Rule 5.770 (b) First sentence change "…may order that the child be transferred to the jurisdiction of the criminal court…" to "…shall decide whether the minor should be transferred from juvenile court to a court of criminal jurisdiction..." First sentence add after "…alleged felony offense," add "<u>or alleged offense listed in section 707(b),</u>…"	The committee was concerned that adding this language might imply that 707(b) non-felonies were eligible for transfer and so has clarified by reversing the order to begin with the younger eligibility and added felony to that sentence.
			Rule 5.770 new (f) First sentence delete "order a" and "of" to read "...of the court's decision not to transfer	The committee has adopted this suggestion.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			jurisdiction <u>to the criminal court</u> will be sought…" Rule 5.770 new (g) After "…transfer jurisdiction" add "to the criminal court…"	The committee has adopted this suggestion.
			Form JV-710 Item 3 first box - Delete "based on" and change to read "The court has considered each of the criteria <u>listed below</u> and has determined that the youth should be transferred to the jurisdiction of the criminal court." There should not be check boxes for a through e.	The committee has reworked the form to delete the criteria and the check boxes and instead refer to the statute and require the reasons to be stated on the record.
			Item 4. a. - After "offense" add "or offense listed in WIC 707(b)…"	The committee does not find that language clarifying as all 707(b) offenses are felonies for transfer purposes.
			Item 5. b. 2. - To "is dismissed" add "without prejudice."	The committee has added this qualification.
			Item 5. b. 5. - add under "to the custody of:" two more boxes "the sheriff" and "or juvenile hall."	The form already allows for specifying the detention location and has room to specify custody.
			Request for Specific Comments: Does the proposal appropriately address the stated purpose? Yes	No response required.
			Will the proposed new writ form improve the	Based on other comments, the committee has removed the JV-824 from the proposal and

	Commentator	Position	Comment	Committee Response
			process for challenging transfer orders? Yes	amended rule 5.770 to include a requirement that the parties be advised of their rights to have the court's decision reviewed.
			Does the revised JV-710 order form allow the court to accurately and comprehensively document its findings and orders? Yes	No response required.
			Should the date for repeal of rule 4.510, which implements the reverse remand procedure in Penal Code section 1170.17 be delayed beyond September 1, 2017 to accommodate cases that precede the enactment of Prop. 57? If so, what should be the effective date of the repeal? Our recommendation is to keep it in effect until the legislature repeals Pen Code section 1170.17.	The committee concurs, and has opted not to repeal rule 4.510 as long as Penal Code section 1170.17 remains in the law.
			Cost and Implementation Matters: Staff training for both clerical/management and judicial assistants in juvenile operations is required. The Los Angeles Superior Court employs over 600 judicial assistant who could potentially need approximately 2 hours of training. There are approximately 48 clerical/management staff court-wide who will also require training. The training time for clerical/management staff is approximately 1 hour. Processes and procedures need to be updated and the estimated time to perform this work is	The committee has taken note of the workload impacts of Proposition 57 and has reported them to the Judicial Council.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			approximately 80 hours. In addition, minute orders, forms and docket code information must be changed in the case management system.	
	Superior Court of Orange County, Family and Juvenile Orange County Court Managers	N/I	Juvenile Transfer to Criminal Court Jurisdiction Order (JV-710): ☐ Section 3 and 5(b) both indicate the youth should be transferred to the jurisdiction of criminal court. We recommend combining these sections. ☐ In section 5(b), we recommend revising the form to include, the youth is ordered to appear for arraignment in criminal court on: hearing (date), time and department. ☐ In section 5(b)(2), we recommend revising the sentence to read, the petition filed on (date) will be dismissed upon the filing of a complaint in criminal court. Rule 5.768 - Report of probation officer ☐ Proposed rule 5.768(a)(5), mentions the term fitness. We recommend replacing fitness with transfer. Rule 5.770 – Conduct of transfer of jurisdiction hearing under section 707 ☐ Proposed rule 5.770(e)(2), requires the	 The committee has reworked the form to delete the criteria and the check boxes and instead refer to the statute and require the reasons to be stated on the record. The committee has added space to specify an appearance date. This item has been revised to provide that dismissal occurs on the appearance date in criminal court. The committee has deleted this provision from the rule because it does not reflect section 707. Absent statutory guidance, the committee does

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			court to dismiss the petition without prejudice if the court finds the child should be transferred to the jurisdiction of criminal court. What if the prosecuting agency does not file a complaint in adult court? If the petition is dismissed and the youth is released, how would the court retain jurisdiction if the youth failed to appear in criminal court? We recommend specifying a timeframe for which the prosecuting agency is required to file a complaint in criminal court and dismissing the petition upon confirmation of the complaint being filed. In the Implementation Requirements, Costs, and Operational Impacts section located on page 4, the paragraph references that because Prop. 57 significantly simplified what the court must consider when determining whether to order a transfer, these proceedings may be shorter, and the court may need less time to make its findings and orders. Since Prop. 57 became effective, we have received lengthy time estimates (multiple days) Transfer Hearings. Also, our local District Attorney direct filed all eligible cases to adult court prior to implementation of this proposition. Since the implementation, there has been a substantial increase in workload and an increase in time spent on these cases due to their complexity.	not believe it can order a timeframe for filing of the criminal complaint, but has revised the rule to require the setting of an appearance date in criminal court and dismissal of the petition on that date. The committee has taken note of the workload impacts of Proposition 57 and has reported them to the Judicial Council.
	Superior Court of Orange County, Juvenile Court	N/I	Comment No. 1: Implementation Requirements, Costs and Operational Impacts:	The committee has taken note of the workload

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
	Hon. Maria D. Hernandez Presiding Judge, Juvenile Court		Summary: We believe that the amendments to WIC 707 will result in a significant workload increase associated with the additional time that will be required to hear and decide a motion to transfer a youth to criminal court. The Invitation to Comment memorandum, at page four, states: "Because Prop. 57 significantly simplified what the court must consider when determining whether to order a transfer, these proceedings may be shorter, and the court may need less time to make its findings and orders." (Emphasis added.) We strongly disagree with this statement. Based upon the information we have gleaned in the three and one half months since the enactment of Prop. 57 and our analysis of the statutory amendments themselves, we believe that hearings on motions to transfer, pursuant to amended section 707(a)(2), will be longer and more complex than proceedings under the old statutory scheme. Consequently, we believe that (in addition to Comment No. 2, below) there will be a significant workload increase associated with the additional time that will be required to decide a motion to transfer. In our view, the statutory amendments did not simplify the judicial decision-making process, they made it more difficult, because of the deletion of the former statutory presumptions that in the past often governed the outcome of the former fitness hearings. Under the former statutory scheme, for youth that came under	impacts of Proposition 57 and has reported them to the Judicial Council.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			former section 707(a)(2) and section 707(c) (16 years of age or older with two prior felony offenses or 14 years of age or older committing a 707(b) listed offense), the youth was presumed to be unfit and the burden was on the youth to show that he or she was fit to be dealt with under the juvenile law, and the court had to find the youth fit under "each and every criterion" listed in subdivision (c)(5). (California Rules of Court, Rule 5.772(a) and (f).) Under the old law, the outcome of the hearing was often pre-ordained from the start, because of the youth's inability to rebut each and every criteria. The decision-making task for the judge was relatively straightforward – did the youth fail to rebut the presumption as to even one of the criteria? If so, then the court was required to make a finding of unfitness. Now, under the new law, the court must still consider each of the five criteria, but there are no presumptions dictating the judicial decision. The import of this change is that the petitioner and youth are free to offer more or less evidence on each of the five criteria. In the end, the parties will be able to argue that "in balance" or based upon the "totality of the evidence viewed as a whole", the youth should be transferred to criminal court or kept in juvenile court. Inasmuch as the new statute provides no priority or weight to be given each of the criteria, or no sense as to the recipe for mixing these five ingredients, it is left wholly to the judge's	

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			discretion to weight the evidence against the criteria and make a decision. While this task is the classical job of a trial judge, it does require more thought and weighing, as compared to the more mechanical application of former Rule 5.772. In Orange County, our Public Defenders office, Alternative Public Defenders and sophisticated defense counsel have realized the implications of the new statute. For cases that they believed were hopeless in the past, because the burden was on them to rebut each and every criteria, they now believe that they have a substantially greater chance of keeping the case in juvenile court. For instance, if defense counsel represent a youth who was personally involved in committing a serious and violent offense, but they have substantial evidence that the youth has no prior delinquency history, and who can be rehabilitated, they have every reason to believe that the case may remain in juvenile court, as compared to under the old law when the gravity of the offense alone would control the outcome. Compounding defense counsel's belief of greater odds of keeping a case in juvenile court is their recognition that the amount of custodial time that their clients may face for a juvenile court conviction is significantly different than a criminal court conviction – measured in terms of years versus decades. Consequently, defense counsel view the 707	

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			transfer motion hearing as the critical hearing and are devoting considerable resources to marshal evidence to present. More than one attorney has likened their preparation to preparing for the penalty phase of a capital murder case. We expect to receive expert witness testimony, mental health information, education history, family and other character testimony, and child welfare testimony. Consequently, we have been receiving multiple day time estimates for transfer hearings that previously may have been completed in one or two afternoons, and decided only on the probation report. Comment No. 2: Implementation Requirements, Costs and Operational Impacts: Summary: For some counties, such as Orange County, where the policy of the District Attorney was to directly file virtually all eligible cases in criminal court, the implementation of Prop. 57 will result in a marked increase in workload for the juvenile court. Statewide, under the old law, direct file practices by district attorneys varied widely from county to county. For some (San Diego), directly filing cases in criminal court was a relatively rare occurrence, and for others (Orange County) directly filing cases was the rule not the exception. For those counties in the latter category, the passage of Proposition 57 has, and will into the future, significantly	The committee has noted to the council in its report that there will be a substantial increase in the number of transfer hearings in some courts.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			increase the workload these county's juvenile courts will have to bear, in two respects. First, for counties where direct filing cases was the rule and not the exception, the juvenile courts in those counties are experiencing an immediate influx of currently pending cases sent by criminal courts for section 707 transfer hearings.1 This can be a significant "bubble" of cases. In Orange County there were approximately 100 cases pending in criminal court when Proposition 57 was passed which are in the process of being sent to juvenile court for transfer hearings. Accommodating these cases, with their expected multiple day transfer hearings into the existing case load, will greatly strain our existing resources. Secondly, in addition to addressing the bubble of pending direct file cases, eliminating the ability of the prosecution to direct file cases, into the foreseeable future, will result in an increased workload for the juvenile court, by virtue of the reality that all section 707(b) offenses will now be filed in juvenile court rather than directly into criminal court. Not only will the sheer numbers of cases filed increase, but because of the complexity of the crimes that fall under section 707(b), these cases will require an exponentially greater time investment on the part of the juvenile court. Comment No. 3: Implementation Requirements, Costs and Operational Impacts:	The committee has shared this comment with Judicial Council staff who work on the workload

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			Summary: the resource allocation implications of the increased workload for juvenile courts should be studied and addressed by individual courts and the Judicial Council. As our Comments No. 1 and 2 seek to point out, Proposition 57 will result in an increased future workload for juvenile courts, because of the sum of: (1) the increased time to needed to hear section 707 transfer motions; plus (2) processing the "bubble" of existing pending cases in criminal court being sent to juvenile court; plus (3) the increased number of 707(b) cases filed in juvenile court; plus (4) the time needed to process these complex cases (depending upon the pre-Prop 57 direct filing practices of each county). This increased workload will have resource allocation implications that Presiding Judges and Presiding Judges of Juvenile Court will have to confront, on a county by county basis. For instance, in Orange County, the JPJ has received the commitment from the PJ to call upon former juvenile court judges, who have moved on to different assignments, to act as safety valves and hear 707 transfer motions on the 100 cases that are being sent from adult court. Certainly this means that the work of these judges on their current assignments will suffer as a result. Perhaps more importantly, we believe that the Judicial Council should view any pre-Prop 57 resource allocation study models for juvenile courts with a note of caution. While we believe	methodology and included this feedback in its report to the council.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			that all juvenile courts will experience an increase in workload, the actual increase will vary from county to county depending upon each county's historical practices for prosecuting section 707(b) crimes. Comment No. 4: Proposed Rule 5.765: Subparagraph (a)(5) should delete the word "fitness" and substitute the word "transfer". Comment No. 5: Proposed Rule 5.766 – Time of transfer hearing: The title for proposed subparagraph (c) should be changed to "Time of transfer of jurisdiction hearing", substituting for the term "fitness" in the current proposed title. Comment No. 6: Proposed Rule 5.770 – Time for Setting Jurisdiction Hearing: Proposed subparagraph (e)(1) provides that if a youth is retained in juvenile court the jurisdiction hearing is to be set pursuant to Rule 5.774. We recommend that when there has been a waiver and/or continuance of the time for jurisdictional hearing under rule 5.774, and the transfer hearing has been conducted beyond 30 calendar days or 15 judicial days, proposed Rule 5.770(e)(1) should expressly state that the jurisdiction hearing is to be set within 30 calendar days (non-detained) or 15 judicial days (detained) from the date of the order denying	The committee has deleted this provision from the rule. The committee has made this change. The committee has clarified this rule to articulate that absent a continuance or waiver under rule 5.776, the jurisdiction hearing is subject to the timelines in 5.774.

	Commentator	Position	Comment	Committee Response
			the transfer motion. We believe that Rule 5.774, subparagraph (c), correctly requires that the transfer hearing and the jurisdictional hearing, occur within the 30/15 day limitations of Rule 5.774. However, there is not a rule controlling when the jurisdiction hearing is to be set after the transfer hearing, in the circumstance when there has been an initial time waiver and/or continuance beyond the 30/15 day time limitation. The proposed Rule 5.770, subparagraph (e), provides no guidance for this situation, because by its referring to Rule 5.774 the reference is to events that have long past. An analogous situation can arise when a defendant in a criminal case withdraws a general time waiver. In that circumstance, Penal Code, section 1382(a), guides the setting of the trial. In juvenile cases similar provisions appear not to exist. We recommend, at least in the case of the juvenile court's retention of jurisdiction after a transfer hearing, that the rules provide time limitations. Comment No. 7: Proposed Rule 5.770 – Date to Appear in Criminal Court: In the event that a transfer motion is granted, proposed subparagraph (e)(2) should provide: (1) for setting a date for the youth to appear in criminal court; (2) a date in which a criminal complaint is to be filed; and (3) an order for the youth to appear on the date, time and location	Absent statutory guidance, the committee does not believe it can order a timeframe for filing of the criminal complaint, but has revised the rule to require the setting of an appearance date in criminal court and dismissal of the petition on that date.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			set. Requiring the prosecution to file an action in criminal court within a fixed period of time avoids potential due process and speedy trial related issues. Without a fixed period of time and/or date to file, it is conceivable that a youth may "fall between the cracks" of the district attorney's juvenile prosecution and adult prosecution units. Days or weeks may pass while the youth languishes in custody awaiting the commencement of the adult criminal matter. In the case of an adult defendant being held to answer after preliminary examination, Penal Code, section 1382(a)(1), prevents this type of situation occurring by requiring the information be filed within 15 days. The provisions governing the transfer of cases from juvenile court to criminal court should provide for similar safeguards. Further, there are practical reasons for setting a date to appear and ordering the youth's appearance. First, under the proposed rule, the juvenile court sets bail when a transfer motion is granted. Without an order to appear, the youth will not be able to be released on bail, because a date, time and location to appear is required for bail forfeiture. (Penal Code, section 1269b(h).) Secondly, if a youth is released from custody, either on bail or on own-recognizance, and fails to appear, there is no basis to issue a bench warrant if there was no pre-existing order to appear. Lastly, for youth that remain in	

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			custody, it is our experience that custodial authorities (sheriffs or probation) require a transportation order commanding them to transport the in-custody youth to the next court appearance, at the date and time set. Again, without a date to appear in criminal court, the sheriffs or probation, whoever has custody of the youth, will not know when and where to bring the youth for criminal proceedings. Comment No. 8: Propose Rule 5.770 – Dismissal of Petition: Proposed subparagraph (e)(2) also provides that when a transfer motion is granted, the "court must dismiss the petition without prejudice." The rule should provide that the petition is dismissed after the appearance date in criminal court and/or the filing of the criminal court complaint. Dismissing the petition forthwith upon granting a motion to transfer a youth to criminal court, strips the court of jurisdiction at a time when the basis for adult court jurisdiction – the criminal complaint – has not been filed. Dismissing the petition may arguably place the youth in a jurisdictional limbo land, between the dismissal of the juvenile petition and the filing of the criminal complaint, putting into question under whose orders is the youth and those dealing with the youth operating under. For instance, assume that the youth is released on bail, and quickly thereafter the bond agent receives information causing the agent to want	The committee has revised the rule to require the setting of an appearance date in criminal court and dismissal of the petition on that date.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			to surrender the youth back to the court. (Penal Code, section 1300.) To whom should the youth be surrendered and to which court should he or she be taken? Comment No. 9: Proposed Juvenile Transfer to Criminal Court Jurisdiction Order: For the reasons set forth in Comment No. 6, paragraph 5.b. should include a date, time and location for the youth to appear in criminal court, and an order that the youth appear. Further, the paragraph should also order the district attorney to file a complaint, information or indictment on or before the appearance date. Paragraph 5.b.2. should require the setting of a date for the dismissal of the juvenile court petition, for the reasons stated in Comment No. 7.	
	Superior Court of Riverside County Susan Ryan Chief Deputy of Legal Services	N/I	The new writ form will make the process simpler for challenging transfer orders as it will assist the petitioner in preparing a writ with the required information	Based on the comments received, the committee has removed the JV-824 from the proposal and amended rule 5.770 to include a requirement that the parties be advised of their rights to have the court's decision reviewed.
	Superior Court of San Diego County Michael M. Roddy Executive Office	AM	• Does the proposal appropriately address the stated purpose? *Yes*. • Will the proposed new writ form improve the process for challenging transfer orders? *Probably*.	No response required. Based on the comments received, the committee has removed the JV-824 from the proposal and amended rule 5.770 to include a requirement that the parties be advised of their rights to have the court's decision reviewed.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			• Does the revised JV-710 order form allow the court to accurately and comprehensively document its findings and orders? *Yes*.	No response required.
			• Should the date for repeal of rule 4.510, which implements the reverse remand procedure in Penal Code section 1170.17 be delayed beyond September 1, 2017 to accommodate cases that precede the enactment of Prop. 57? *Yes*. If so, what should be the effective date of the repeal? At least another year until the issue is settled in the courts. The only Court of Appeal to rule on the issue so far held that Proposition 57 does apply to cases that were filed directly in the criminal division but have not yet gone to trial. That court specifically declined to address the procedure that should be used to get the case before the juvenile court. It would be helpful to have guidance on whether certification or reverse remand or some other procedure is appropriate.	The committee has opted not to repeal rule 4.510 as long as Penal Code section 1170.17 remains in the law. The committee has taken note of the recent appellate court holding, but finds it premature to specify a procedure for cases filed prior to the enactment of Proposition 57 given the high level of legal uncertainty about which cases are and are not subject to the new statute.
			• Would the proposal provide cost savings? If so, please quantify. *Unknown*.	No response required.
			• What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures	The committee has noted in its report to the council that implementation of Proposition 57 imposes a workload on the juvenile courts.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			(please describe), changing docket codes in case management systems, or modifying case management systems. *Training staff (judicial officers, court clerks, back office clerks, clerical supervisors—hours of training unknown), revising procedures (requires coordination with probation departments and prosecuting agencies), and changing codes in JCMS.*	
			• Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? *Unknown*.	The committee has opted to make the proposal effective May 22, 2017.
			• How well would this proposal work in courts of different sizes? *Unknown.*	No response required.
			Rule 4.116 • *Approve.*	No response required.
			Rule 5.766 **(a) Hearing on ~~T~~transfer of jurisdiction to criminal court ~~hearing~~ (§ 707)** … The prosecuting attorney may make a motion to transfer the child from juvenile court to a court of criminal jurisdiction~~,~~ in one of the following circumstances:	The committee has adopted these clarifying changes.
			(c) Time of fitness hearing—rules 5.774, 5.776 The transfer of jurisdiction hearing must be held and the court must rule on ~~the issue of~~ the	The committee has adopted this change.

	Commentator	Position	Comment	Committee Response
			request to transfer jurisdiction before the jurisdiction hearing begins. Absent a continuance, the jurisdiction hearing must begin within the time limits under rule 5.774. **Rule 5.768** **(a)** … The probation officer must prepare and submit to the court a report on the behavioral patterns and social history of the child being considered. The report must include information relevant to the determination of whether ~~or not~~ should be retained under the jurisdiction of the juvenile court or transferred to the jurisdiction of the criminal court, including information regarding all of the criteria in section 707(a)(2). … (5) Any other information relevant to the determination of ~~fitness~~ whether the child should be transferred to the jurisdiction of the criminal court. **Rule 5.770** **(b)** … (2) The child should be transferred to the jurisdiction of the criminal court based on an evaluation of all of the ~~following~~ criteria~~:~~ listed in section 707(a)(2). ~~(A) The degree of criminal sophistication exhibited by the child;~~	The committee has adopted this clarifying change. The committee has deleted this provision from the rule. The committee has clarified this subdivision in a manner similar to that suggested by this commentator.

	Commentator	Position	Comment	Committee Response
			~~(B) Whether the child can be rehabilitated before the expiration of jurisdiction;~~ ~~(C) The child's previous delinquent history;~~ ~~(D) The results of previous attempts by the court to rehabilitate the child; and~~ ~~(E) The circumstances and gravity of the alleged offense.~~ **(c) ~~Findings under section 707(a)~~ ~~(d)~~ Extenuating circumstances** The court may consider extenuating or mitigating circumstances in the evaluation of each relevant criterion. **(d) ~~Extenuating circumstances~~ Basis for order of transfer** If the court orders a transfer of jurisdiction to the criminal court, the court must recite the basis for its decision in an order entered upon the minutes. **(h) Review of determination on a motion to transfer jurisdiction to criminal court** An order ~~that a child should or should not be~~ granting or denying a motion to transfer~~red to the~~ jurisdiction ~~of the~~ to criminal court is not an	The committee has deleted this subdivision from the rule as it reflects obsolete statutory text, The committee has adopted this clarifying title for this subdivision of the rule. The committee has adopted this stylistic revision.

	Commentator	Position	Comment	Committee Response
			appealable order. Appellate review of the order is by petition for extraordinary writ. Any petition for review of a judge's order to transfer jurisdiction of the child, or denying an application for rehearing of the referee's determination to transfer jurisdiction of the child, must be filed no later than 20 days after the child's first arraignment on an accusatory pleading based on the allegations that led to the transfer of jurisdiction order. **(i)** ~~In any case in which~~ If a hearing for transfer of jurisdiction has been noticed under section 707, the court must postpone the taking of a plea to the petition until the conclusion of the transfer hearing, and no pleas that may have been entered already may be considered as evidence at the hearing. **FORM JV-600** • *Approve.* **FORM JV-642** • Page 3, item 36: The ☐ ~~mother~~ ☐ ~~father~~ ☐ ~~legal guardian~~ is/are ordered to supply the names and contact information of adult relatives to probation so ~~probation~~ they can ~~notify them~~ be notified of the child's removal and of their options to be included in the child's life.	The committee has reorganized the rule as suggested. No response required. The committee has adopted these clarifying changes.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			• Page 3, item 43.a.: is ordered to return to court on the above date(s) and time(s). **FORM JV-710** • Page 1 – Fourth box from top of form (left side) – title of form and footer (at bottom): **ORDER TO ~~JUVENILE~~ TRANSFER JUVENILE TO CRIMINAL COURT JURISDICTION ~~ORDER~~** **(Welfare and Institutions Code, § 707)** • Page 1 – Item 3: a. the degree of criminal sophistication ~~of~~ exhibited by the youth for the reasons stated on the record. b. whether the youth can be rehabilitated prior to the expiration of jurisdiction for the reasons stated on the record. c. the youth's previous delinquent history for the reasons stated on the record. d. the results of previous attempts by the court to rehabilitate the youth for the reasons stated on the record. e. the circumstances and gravity of the alleged offense(s) for the reasons stated on the record. • Page 1 – Item 4.b.: The youth was at least 14 years old at the time of the alleged offense, and the ~~current~~ alleged offense is ~~an offense~~ listed in Welfare and Institutions Code section 707(b). • Page 1 – Item 5.a.:	The committee has changed the name of this form as suggested and reworked the findings and orders to delete the specific statutory criteria. The committee has adopted these clarifying changes to the form.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			The youth ~~should be~~ is retained under the jurisdiction of the juvenile court. • Page 1 – Item 5.b.: The youth ~~should be~~ is transferred to the jurisdiction of the criminal court. **FORM JV-735** • Page 1 – Item 1.a.: Insert period at end of sentence (after "602"). **FORM JV-824** • Page 1 - Second box from top of form (left side) – title of case: Capitalize "i." ~~i~~ In re the Matter of: • Page 2 – Item 8: Summary of factual basis for petition (*~~P~~petitioner need not repeat facts as they appear in the record~~.~~, but ~~P~~petitioner must reference each specific portion of the record, its significance to the grounds alleged, and any disputed aspects of the record~~.~~):*	The committee has clarified this order. The committee has clarified this order. The committee has adopted this technical suggestion. The committee has removed this form from the proposal and replaced it with a requirement for an advisement to the parties.
	TCJPJAC/CEAC Joint Rules Subcommittee TCJPJAC/CEAC	AM	Regarding additional training: It will take time to train and educate staff on the new procedure required by law. Regarding the impact on local or statewide justice partners: Without direct filing, the court may need to conduct more hearings and probation may need to prepare more reports. However, the JRS members understand that this is necessary.	The committee concurs that Proposition 57 will have workload impacts on the courts.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			Suggested modifications: Regarding rule 5.766(c) – The title of subsection (c) still uses the word "fitness." The JRS recommends replacing "fitness" with the phrase "transfer of jurisdiction."	The committee has corrected this title.
			Regarding rule 5.768(a) – The language in subsections (1)-(5) is not reflected in Welfare and Institutions Code § 707. The JRS recommends removing it.	The committee has deleted these provisions from the rule.
			Regarding rule 5.770(b)(2)(B) – The JRS recommends adding the phrase "the juvenile court's" between "of" and "jurisdiction" for clarity and consistency with Welfare and Institutions Code § 707. The revised language would read, "Whether the child can be rehabilitated before the expiration of <u>the juvenile court's</u> jurisdiction;"	The committee has adopted this clarifying suggestion.
			Regarding Form JV-710 – The JRS recommends that the form's title be amended to "JUVENILE COURT ORDER TO TRANSFER CASE TO CRIMINAL COURT" as the current title is not clear.	The committee has clarified the title.
			Regarding Form JV-710, Section 3 a.-d. – The JRS recommends replacing the word "youth" with the word "minor."	The committee has adopted this suggested change.
			Regarding Form JV-710, Section 5 b.2. – The JRS recommends adding the phrase "without prejudice" after the phrase "is dismissed" for	The committee has reworked this form and has added the qualifier "without prejudice" to the dismissal order.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			clarity and consistency with Rule 5.770(e)(2). The revised language would read, "2. The petition filed on (date): is dismissed without prejudice."	
			Regarding Form JV-710, Section 5 – The JRS recommends that the title of Section 5 be amended to read as follows, "**THE COURT FURTHER~~ALSO~~ FINDS AND ORDERS."**	The committee is retaining the plain language formulation of "also".
			Regarding Form JV-710, Section 5 – The JRS recommends that "OR" be placed between options "a." and "b." for the purposes of clarity.	The committee reworked the form to better clarify the court's findings and orders.
			Regarding Form JV-824, Section 4, the JRS recommends adding new boxes "c" and "d." Specifically, the JRS recommends that new box "c" be added and that it set forth the following language, "c. ordering a transfer to juvenile court of a pending criminal case so that an order pursuant to Welfare and Institutions Code § 707 can be held." The JRS recommends that new box "d" be added and that it set forth the following language, "d. denying transfer of a pending criminal case to juvenile court." Existing box "c" would be converted to box "e."	The committee has removed this form from the proposal and replaced it with a requirement for an advisement to the parties.
			Generally, Welfare and Institutions Code § 707 uses the term "minor" but the rules use the term "child." The two words can have different legal meanings. The JRS recommends using the term "minor" for clarity and consistency with	The standard practice of the council is to use the term child in all juvenile rules and forms and the committee has revised this proposal consistent with that practice.

W17-02

Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016 (Amend Cal. Rules of Court, rules 4.116, 5.766, 5.768, and 5.770; repeal rules 4.510 and 5.772; revise forms JV-600, JV-642, JV-710, and JV-735; approve form JV-824)

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

	Commentator	Position	Comment	Committee Response
			Welfare and Institutions Code § 707. General Comment: The JRS members discussed how various forms and rules use "youth", "minor", and "child." This can be confusing for all involved parties. The JRS asks that the Family and Juvenile Law Advisory Committee consider recommending the use of just one of these terms throughout family and juvenile law related rules and forms in the long-term or that the committee provide additional guidance on why the three different terms are still being used.	As explained above there is a standard formulation in the juvenile rules and forms, and it is child. The use of minor appears in forms and rules for the criminal court, and the committee has no jurisdiction over their terminology. The JV-710 used the term "youth" but for consistency with other forms, this has been changed to "child."

Item number: 03

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 19, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Commitment to Department of Corrections and Rehabilitation

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Daniel Richardson, 415-865-7619, daniel.richardson@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: December 15, 2016
Project description from annual agenda: Revise Form JV-732: Revise Judicial Council form JV-732 to ensure the form reflects the legally accurate procedures related to the commitment of a youth to the California Department of Corrections and Rehabilitation. The form revisions would ensure that the court provides complete and accurate information needed for the acceptance of youth to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities thus avoiding unnecessary delays in the court's disposition orders.

If requesting July 1 or out of cycle, explain:
The form does does conform to current law and is causing delays in the commitment of youth to DJF.

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

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 May 18–19, 2017

Title
Juvenile Law: Commitment to Department of Corrections and Rehabilitation

Rules, Forms, Standards, or Statutes Affected
Revise form JV-732

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Agenda Item Type
Action Required

Effective Date
September 1, 2017

Date of Report
April 7, 2017

Contact
Daniel Richardson, 415-865-7619
daniel.richardson@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee proposes revising the Judicial Council order form for the commitment of a person found to be a ward eligible for commitment to the California Department of Corrections and Rehabilitation's Division of Juvenile Facilities (DJF) to ensure that the form reflects legally accurate commitment procedures. The form revisions would ensure that the court provides complete and accurate information needed for the acceptance of youth by the Division of Juvenile Facilities, thus avoiding unnecessary delays in the court's disposition orders.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective September 1, 2017, revise *Commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities* (form JV-732) to guide the court in providing complete and accurate information needed for the acceptance of youth by the California Department of Corrections and Rehabilitation's Division of Juvenile Facilities, thus avoiding unnecessary delays in the court's disposition orders.

A copy of the proposed revised form is attached at pages 10–11.

Previous Council Action

Effective January 1, 2003, the Judicial Council adopted form JV-732, then entitled "Commitment to the California Youth Authority," as a mandatory form because at that time there were no specific rules or forms establishing a procedure for commitment and because use of a mandatory statewide form would ensure that the state youth correctional agency, now known as the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities, would receive valuable information about youths in a uniform manner instead of on various local forms. The form was revised effective January 1, 2006, and January 1, 2009, to conform to the name change of the state agency, to comply with the statutory requirements of Welfare and Institutions Code section 731(c), and for other minor issues.

Effective January 1, 2012, the Judicial Council revised form JV-732 to change a portion of the title from "Division of Juvenile Justice" to "Division of Juvenile Facilities" to reflect the correct name of the division.[1] In addition, an item was added to enable the court to indicate if it is aware that the child has been in a foster placement. This information was added to help DJF comply with its requirement to notify former foster youth of their rights to assistance before being released.

Rationale for Recommendation

The proposed changes in this report are in response to concerns regarding the efficacy of form JV-732 in procuring the court's disposition orders in a commitment of a ward to DJF. Delays in commitment because of errors with the information on the form have been reported. Several modifications are needed to conform the form to statutory mandates and provide clarity as to sentencing and other information required by DJF to properly commit the youth to DJF and avoid delays while the youth is kept in a local holding facility. The committee also anticipates that the implementation of Proposition 57 will increase the amount of commitments to DJF, thus increasing the need for a more effectual form.[2]

---

[1] The statutory reference to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF), enacted under Penal Code section 6001, designates the legal title to the organization at issue in this form. DJF houses youth between the ages of 12 and 25 who have committed serious and/or violent felonies and require intensive treatment services conducted in a structured environment. DJF is often referred to as the DJJ (Division of Juvenile Justice), including in materials distributed by the California Department of Corrections and Rehabilitation itself. For purposes of this report, DJF refers to the facility and the jurisdictional body to which youth are transferred, and DJJ refers to the department and its representatives.

[2] Proposition 57: The Public Safety and Rehabilitation Act of 2016 [https://www.gov.ca.gov/docs/The_Public_Safety_and_Rehabilitation_Act_of_2016_(00266261xAEB03).pdf] requires that a minor have a hearing in juvenile court on a motion to transfer jurisdiction to the criminal court (Welfare and Institutions Code section 707(a)(1)), and eliminates the authority of the prosecuting agency to directly file a case involving a minor in criminal court. In addition, it eliminates statutory presumptions concerning which minors should be transferred to criminal court and provides the court with broad discretion to consider each statutorily eligible case individually. To the extent that juvenile courts order the transfer of fewer minors to criminal

On August 24, 2016, staff of the Judicial Council Center for Families, Children & the Courts received a formal letter form Mr. Anthony Lucero, director of the Division of Juvenile Justice (DJJ), suggesting updates and revisions to form JV-732, the mandatory Judicial Council form for ordering such commitments, to assist the court in providing the DJJ with complete and accurate information needed for the acceptance of youth to DJF facilities. Several edits were recommended, which the committee has incorporated into this proposal.

The committee also received correspondence from the Office of the Los Angeles County Public Defender raising concerns about the amount of time children are housed in local facilities because of errors related to form JV-732 as they await transfer to DJF. Specifically, youth who are sent to DJF for sex offenses are facing delays because the sexual recidivism risk assessment tool for youth is not ordered or the wrong assessment is ordered. Judicial officers from Los Angeles also suggested revisions to the form and concurred with the request of the Office of the Los Angeles County Public Defender. The revisions below are proposed by the Family and Juvenile Law Advisory Committee.

Adding check boxes for risk assessment tool for sex offenders

The committee proposes that the form be updated to conform to Welfare and Institutions Code section 706 and its requirements that the court use a State-Authorized Risk Assessment Tool for Sex Offenders (SARATSO) to assess a youth convicted of an offense requiring him or her to register as a sex offender.[3] Currently the form does not include an order that the court has considered the SARATSO in the appropriate case. When a youth is recommended transferred to DJF under an adjudication for an offense requiring him or her to register as a sex offender under section 290.008 of the Penal Code, the court is required to use a SARATSO selected under Penal Code section 290.04(d) or (e) to assess the youth and must receive the SARATSO into evidence. The committee proposes that a new item 16 be added that will provide for situations when a SARATSO is necessary and indicate which SARATSO score is to be selected: the JSORATT-II when the youth was under 18 years of age at the time of the assessment or offense, or the Static-99 when the youth was 18 years of age at the time of assessment and 16 or 17 at the time of the offense. Accurate completion of this item should eliminate delays in the commitment of youth to DJF related to selection of the wrong SARATSO.

Clarifying the sentencing formula

Section 731(c) limits the period of confinement that may be imposed for a ward committed to the DJF by granting the court discretion to impose either the equivalent of the "maximum period of imprisonment that could be imposed upon an adult convicted of the offense or offenses" committed by the youth or some lesser period based on the "facts and circumstances of the matter or matters that brought or continued" the youth under the court's jurisdiction. One of the

court as a result of these changes, they increase the likelihood that crimes that are more serious in nature will be heard in juvenile court, which may thus increase the number of commitments to DJF.

[3] All subsequent statutory references are to the Welfare and Institutions Code unless otherwise specified.

chief concerns about form JV-732 as it currently stands is that the maximum period of imprisonment that could be imposed on an adult and the maximum period of confinement ordered by the court for the juvenile are not sufficiently distinct from each other. DJJ has reported confusion related to sentences that are being imposed by the court, leading to delays and the form's return to the court because of mistakes. Revising this portion of the form will help to ensure that these delays are limited.

Maximum period of imprisonment for an adult. The committee proposes revising item 6 on form JV-732 to provide clarity regarding the maximum period of imprisonment that could be imposed on an adult. Revised item 6 lists the principal felony by code section, the maximum term, and enhancements, both by code section and length. The court would add the total of the maximum term and the enhancements to get the total maximum period of confinement for the principal felony. Below the principal felony, the court can add subordinate offenses, indicating whether they are felonies or misdemeanors, if appropriate. Because different offenses have different sentencing options, the committee elected to include a blank column to the right of the subordinate offense(s) to give the court the option of inserting the various applicable sentencing options. The court would then add the total of all these items together to get the total maximum period of imprisonment that could be imposed on an adult convicted of the offense or offenses that brought the youth before the court. Item 6 also specifies that the youth is committed only on the most recent offense under section 707(b) or Penal Code section 290.008, ensuring that ineligible offenses are not listed and thereby avoiding potential delays.

Maximum period of confinement for the juvenile. As noted above, section 731(c) requires that the juvenile court determine the maximum period of confinement to DJF based on the facts and circumstances of the matter or matters that brought or continued the ward under the jurisdiction of the juvenile court.[4] The committee proposes revising item 8 (item 7 in the revised form) to clarify the correct procedure for determining the maximum period of confinement for the juvenile and whether the court has used its discretion to modify the sentence under section 731(c).

Specifically, item 8 (item 7 in the revised form) is amended to read as follows:

> "After having considered the individual facts and circumstances of the case under section 731(c), the court orders that the maximum period of confinement is: _____. (If lower than the total in item 6, the court has used its discretion to modify the maximum confinement period under section 731(c)."

Reports indicate that courts are inconsistently checking the box in current item 8b to indicate that they have considered the facts and circumstances, which has led to complications in youths' commitment to DJF. The proposed language acknowledges that the analysis required under section 731(c) has been made when the court specifies the maximum period of confinement. The

[4] See *In re Alex N.* (2005) 132 Cal.App.4th 18, 25–27; *In re Carlos E.* (2005) 127 Cal.App.4th 1529, 1538.

form also indicates that if the amount is lower than the total confinement time listed in item 6, it is because the court used its discretion under section 731(c).

The committee also proposes switching the order of current item 7 and current item 8, as recommended by DJJ. It makes logical sense for the court to read the credited time the youth has secured in custody after it states the confinement period. This change should also reduce confusion around the maximum confinement time. In addition, the committee proposes that new item 8 distinguish between the credit for time served at DJF and for time served at a local holding facility, to ensure that the youth has not reached the maximum time allowed at DJF if he or she is returned for a modification under section 1767.35 (see revised item 5b).

Adding check box for probation violations

The committee also proposes inserting a check box and new item 5b to reflect those situations in which the youth is returned to DJF as a result of a probation violation under section 1767.35. Currently, the form does not include this option. Section 1767.35 became operative on January 1, 2013, subsequent to the previous revisions to the form in 2012. Consequently, the form does not reflect the procedures of section 1767.35. The committee proposes revising the form to include language to specify that the court is ordering that the youth be returned to the DJF for a probation violation under section 1767.35, followed by the court-ordered release date. In addition, the committee proposes deleting the current item 5c because the options listed are no longer legally possible. Once a youth is discharged from DJF, DJF jurisdiction is terminated and the youth cannot then be recommitted to DJF under a prior commitment.[5]

Finding exceptional needs

Section 1742 requires that when the court commits a juvenile identified as an individual with "exceptional needs," the court must furnish the juvenile's individualized education program (IEP) to the DJF before the youth is conveyed to the physical custody of the DJF.[6] The committee proposes amending item 11, which addresses findings of exceptional needs, in several respects to help ensure compliance with section 1742. First, the proposal adds instructional language in the heading to specify that box a, b, or c must be checked. This revision will help ensure that the court specifies whether a finding of exceptional needs has been made. Second, the proposal deletes 11a because it leaves open the possibility of the court's finding that the youth has exceptional needs but not requiring the furnishing of the youth's IEP. The new item 11a requires the court to include the IEP as an attachment, or to ensure that it will be furnished to DJF upon delivery of the youth. Finally, the proposal revises item 11a to clarify that the youth's educational program is developed through Education Code section 56340 et seq., which address what an education program entails.

---

[5] Section 1766(b)(7).

[6] The statutory reference to the California Department of Corrections and Rehabilitation, Division of Juvenile Facilities, enacted under Penal Code section 6001, has not been applied to all code sections, including sections 1742 and 1755.4, which still refer to the Department of the Youth Authority.

Other proposed revisions

The committee proposes several additional clarifying revisions to form JV-732, as follows:

- Remove former item 12, "The court requests that the youth be considered for programming related to___." When a minor is committed to DJF, the programs that the youth will be involved in while at DJF are determined based on an assessment at intake rather than any input provided by the court at item 12; therefore, removing this item should not result in programming impacts.
- Revise item 15 (item 14 in revised form) to include language requiring that a completed *Application for Psychotropic Medication* (form JV-220) be attached, if applicable. As recommended by the DJJ, doing so will ensure that the DJF has accurate information about the youth's prescriptions for psychotropic medication, which furthers the mandate of protecting the health and short- and long-term well-being of a youth under the jurisdiction of the DJF as specified in section 1755.4.
- Revise item 17 (item 15 in revised form) to include an order for AIDS testing if there was a sustained sexual offense listed in Penal Code section 1202.1(e). Penal Code section 1202.1 requires that every person convicted of a sexual offense listed in Penal Code section 1202.1(e) "submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) within 180 days of the date of conviction." Both the DJJ and the Office of the Los Angeles County Public Defender suggested adding an item to form JV-732 to address this requirement.
- Add new item 1d identifying who the minor's education/developmental rights holder is. This information will help ensure that the individual who can make decisions about the minor's education and developmental needs is identified. In addition, it is proposed that 1c now require the insertion of the parent's/guardian's address and phone number. Providing this information will facilitate contact with a parent or guardian to provide necessary consents for treatment and medical and educational issues that may arise. Recommendations to include this information on the form were received after the public comment period but were considered unlikely to be controversial by the committee and therefore are being proposed.

Comments, Alternatives Considered, and Policy Implications

External comments

The invitation to comment on this proposal circulated from December 15, 2016, through February 14, 2016, to the standard mailing list for family and juvenile law proposals, as well as to the regular rules and forms mailing list, which included judges, court administrators, attorneys, mediators, family law facilitators and self-help attorneys, and other family and juvenile law professionals and attorney organizations. Eleven comments were received.[7] Three commentators agreed with the proposal as circulated. Four commentators agreed with the proposal if modified. No commentators opposed the proposal. Most of the commentators found

[7] A chart providing the full text of the comments and the committee responses is attached at pages 12–32.

the proposed changes to the form favorable because they provided clarity and limited confusion and delays pertaining to the court's disposition orders committing a youth to DJF.

In response to a request for specific comment, 7 of the 11 commentators agreed that revised item 6 was sufficiently clear regarding eligible offenses to include in the calculation of maximum commitment time. Two commentators noted that under sections 731 and 733, the form should clarify that the most recent offense be an offense described in section 707(b) or Penal Code section 290.008, because these are the only offenses for which a youth may be committed to DJF. This suggestion was incorporated into the proposal.

A judge recommended that the new proposed item 6 be further revised in several respects. The commentator noted that the proposed chart, which included a box for a one-third midterm on each offense line, could lead to confusion and incorrect sentencing. The commentator recommended removing the one-third midterm option because the form made it appear as if a one-third midterm is mandatory, which is not always the case for each individual offense. The commentator also recommended that the subordinate offenses should be listed separately as felonies and misdemeanors, with the misdemeanors on the bottom and an option of including more on an attachment. The judge further suggested that the space to the right of the code section column and felony/misdemeanor box should be left blank so the court can include other sentencing options for each offense, leaving the principal felony row and enhancement column as they are.

Alternatively, the commentator suggested that instead of providing the sentencing abstract as item 6, item 6 could simply indicate the maximum period of imprisonment that could be imposed on an adult convicted of the offense or offenses that brought the youth before the court, and reference an attachment that will provide an abstract. The commentator suggested using the *Felony Abstract of Judgment—Determinate* (form CR-290) as an example of a sentencing abstract.

The committee agrees that the form reflect that the court has a range of sentencing options. The committee proposes that a blank column be inserted to the right of the subordinate offense, where the juvenile court can insert the various sentencing options that may be applicable. The committee also proposes to separate the felonies and misdemeanors.

In addition to the comments above, three commentators recommended that the following advisements be added to the form for the benefit of the parties:

- An explanation for the youth of the way maximum confinement time and parole eligibility are determined. The commentator reasoned that many youth are confused by the way maximum confinement time and parole eligibility are described. Providing additional information is crucial to help youth understand the amount of time they will spend in custody before they are eligible for a board date.

- To item 8, a statement that presentence credit is not applied toward a parole eligibility date, but only toward maximum confinement time. According to the commentator, presentencing credits are a common source of confusion for the youth. Youth erroneously believe that time spent in local custody counts against their parole date. It is important to explain to them at the outset that the time they spend in local facilities before DJF disposition is not credited toward their parole eligibility date.

- A notice to the effect that DJJ does not calculate victim restitution if no amount is specified by the court.

In response to these suggestions, the committee decided not to insert the advisements to the form because doing so would expand its length from two pages to three, and because the form is used as a commitment form and should thus be limited in that respect. However, the committee elected to pursue the creation of an information form in a future cycle. The committee agreed that providing the information suggested above would be very beneficial for the parties. Once approved, the proposed information form could accompany the form and be provided to the youth, the youth's family, attorneys, and the court. The form could contain important clarifying information about how the youth's commitment to DJF will be implemented and important information related to a commitment to DJF.

Three commentators also made recommendations related to how the form displays information about the court's restitution order. One commentator recommended combining items 9 and 10 and adding boxes, with one "to be checked" starting with the most common order: "No restitution is ordered at this time. If restitution is sought at a future time the prosecution will notify all parties and request a hearing to be calendared in the committing court." Items 9 and 10 have different functions. Item 9 refers to the fine that all offenders are ordered to pay into the fund. Item 10 is necessary only if there is a restitution order against this offender, which is not always the case. For this reason, the committee chose not to make the suggested revisions to the form. Information about restitution, however, can be added to the information form.

A commentator recommended inserting "as verified on youth's birth certificate" to the end of item 1(a) where the court provides the youth's name. The commentator did not provide a rationale for this recommendation. The committee chose not to make this revision because many youth do not have birth certificates or would have birth certificates that are difficult to locate, thus placing an extra burden on the court and possibly delaying processing.

In addition, several technical revisions were made to the proposed form in response to comments outlined in the attached comment chart, on pages 12–32.

Alternatives

The committee considered not revising form JV-732 but elected to proceed with the proposal. The committee agreed that the form needed revisions and, in light of the passage of Proposition 57 and the possibility of increased commitments to DJF, decided that to proceed with the

revisions as soon as possible was best. In response to several comments received during the public comment period, the committee also considered proposing the creation of an information form to accompany form JV-732. The form would include information that the committee considers very beneficial for the youth, their family, the court, and the attorneys, including information on parole eligibility, restitution, visitation at a DJF facility, information on the youth's rights while detained at a DJF facility, and the contact information for and purpose of the state ombudsman. Because no information form was included in the proposal that circulated for public comment, the committee proposes pursuing the information form in a future cycle so that it can be considered for public comment.

Implementation Requirements, Costs, and Operational Impacts

The committee does not anticipate that this proposal will result in costs to the courts other than printing costs in courts that continue to distribute printed copies of blank forms. The greater clarity of the form has reduced its length from three pages to two and may result in fewer mistakes and the need to re-do the form, further providing cost savings.

Attachments and Links

1. Form JV-732, at pages 10–11
2. Chart of comments, at pages 12–32

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	DRAFT - Not approved by the Judicial Council
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
YOUTH'S NAME:		
COMMITMENT TO THE CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, DIVISION OF JUVENILE FACILITIES		CASE NUMBER: JUVENILE:

1. a. Youth's name:
   b. Youth's date of birth:
   c. Parent's/guardian's name: Address: Phone No.:
   d. Educational rights/developmental rights holder *(if applicable):*
2. a. Date of hearing: Dept.: Room:
   b. Judicial officer *(name):*
   c. Persons present
   ☐ Youth ☐ Youth's attorney ☐ Mother ☐ Father ☐ Guardian ☐ Deputy district attorney
   ☐ Others as reflected on the attached minute order

THE COURT FINDS AND ORDERS:

3. The youth was under the age of 18 years at the time of the commission of the offense for which the youth is being committed to the Division of Juvenile Facilities.
4. The mental and physical condition and qualifications of this youth render it probable that the youth will benefit from the reformatory discipline or other treatment provided by the Division of Juvenile Facilities.
5. a. ☐ The youth is committed to the Division of Juvenile Facilities for acceptance.
   b. ☐ The youth is returned to the Division of Juvenile Facilities for a modification, as a sanction for a serious violation or a series of repeated violations of the conditions of supervision, under Welfare and Institutions Code section 1767.35. The court-ordered release date is: .
   c. ☐ The youth is committed to the Division of Juvenile Facilities for a 90-day period of observation and diagnosis.
6. The youth has been declared a ward of the court and is committed based on the most recent offense(s) listed in Welfare and Institutions Code section 707(b) or Penal Code section 290.008:

	Code section		Sentencing options		Enhancements *(code section and max. term)*		Total
Principal felony:		with a max term of:		+		=	
Subordinate offense(s):		☐ Felony		+		=	
		☐ Felony		+		=	
		☐ Felony		+		=	
		☐ Misdemeanor		+		=	
		☐ Misdemeanor		+		=	

☐ Continued on attachment 6.

The maximum period of imprisonment that could be imposed on an adult convicted of the offense or offenses that brought the youth before the court is:

7. After having considered the individual facts and circumstances of the case under section 731(c), the court orders that the maximum period of confinement is:

(If lower than the total in number 6, the court has used its discretion to modify the maximum confinement period under section 731(c).)

Form Adopted for Mandatory Use
Judicial Council of California
JV-732 [Rev. September 1, 2017]

Welfare and Institutions Code, §§ 707.2, 731 et seq., 1730 et seq., 1755.3, 1755.4;
Cal. Rules of Court, rules 5.790, 5.795, 5.805
www.courts.ca.gov

YOUTH'S NAME:	CASE NUMBER: JUVENILE:

8. ☐ The youth has credit for time served at the Division of Juvenile Facilities of *(number):* days.
   ☐ The youth has credit for time served at a local holding facility of *(number):* days.
9. The youth is ordered to pay a restitution fine of: $
10. ☐ The youth is ordered to pay victim restitution as stated on attachment 10.
11. Exceptional needs *(a, b, or c must be checked)*
    a. ☐ The youth has been identified as an individual with exceptional needs under Welfare and Institutions Code section 1742 and has an individualized education program under Education Code 56340 et seq. which *(check one)*
       (1) ☐ is included as attachment 11a.
       (2) ☐ will be furnished to the Division of Juvenile Facilities upon delivery of the youth.
    b. ☐ The youth is not an individual with exceptional needs.
    c. ☐ No determination has been made regarding whether the youth has any exceptional needs.
12. ☐ The court requests that a copy of the Clinical Summary Report be sent to the youth's attorney *(name and address of attorney):*
13. The probation officer is directed to forward a copy of the youth's medical records to the Division of Juvenile Facilities before delivery.
14. The youth ☐ has ☐ has not been prescribed psychotropic medication. If form JV-220 has been completed for the youth, it is attached on attachment 14. Such psychotropic medication, if still necessary based on an evaluation by a Division of Juvenile Facilities physician, may be continued for a period not to exceed 60 days from the date of delivery of the youth to the Division of Juvenile Facilities reception center and clinic.
    If no form JV-220 accompanies this form, the types and dosages of medication is/are *(specify):*

    ☐ Continued on attachment 14.
15. The youth is ordered to submit to AIDS testing
    a. ☐ under Welfare and Institutions Code section 1768.9.
    b. ☐ under Penal Code section 1202.1 due to a sustained offense listed in Penal Code section 1202.1(e).
16. ☐ The youth was committed for a sex offense under Penal Code section 290.008 requiring registration as a sex offender:
    a. ☐ The youth was 18 years of age or older at the time of assessment and 15 or younger at the time of offense or is a female; no SARATSO tool was ordered.
    b. ☐ The appropriate SARATSO score, selected under Penal Code section 290.04(d) or (e), was used to assess the youth. The court has read and considered the following risk assessment and received it into evidence:
       (1) ☐ The youth was under 18 at the time of assessment and offense; the JSORRAT-II was considered.
       (2) ☐ The youth was 18 years of age at the time of assessment and 16 or 17 at the time of the offense; the Static-99 was considered.
17. ☐ The court has determined that the youth has been in at least one foster care or other title IV-E eligible placement (Part E of subchapter IV of chapter 7 of title 42 of the United States Code) during the course of a dependency or delinquency case.
18. ☐ Other findings and orders
    a. ☐ See attachment 18a
    b. ☐ *(Specify):*

Date:

▶ _____
JUDICIAL OFFICER

W17-03
Juvenile Law: Commitment to Department of Corrections and Rehabilitation (revise form JV-732)
All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
1.	California Judges Association By Lexi Howard Legislative Director	N/I	Thank you for the opportunity to provide comments on behalf of the Juvenile Court Judges of California, a section of the California Judges Association. *Is item 6 sufficiently clear regarding eligible offenses to include in the calculation of maximum commitment time?* Partially, in that 731 and 733 require that the most recent offense be one described in 707(b) or Penal Code section 290.008. We recommend this be revised as follows: "The youth has been declared a ward of the court and is committed based on the most recent offense(s), which includes an offense described in Welfare and Institutions Code Section 707(b) or Penal Code Section 290.008(c):" *Will the proposed changes in item 7 of the revised form provide greater clarity of the court's order for the maximum custody time?* Yes, this calls direct attention to the requirement that the court make such a determination. *Does the designation of custody time served as "served at Division of Juvenile Facilities" and "served at a local holding facility" in item 8 of the revised form provide a useful distinction of custody time that will assist the court in sentencing?* Yes.	No response required. The committee agrees with the suggestion to include that the committing offense must be described by section 707(b) or Penal Code section 290.008 to item 6. No response required. No response required.

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

W17-03
Juvenile Law: Commitment to Department of Corrections and Rehabilitation (revise form JV-732)
All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			Are there other changes to form JV-732 in addition to those included in this proposal that would improve the form's clarity? (Please specify the particular changes.)	
			Yes; we recommend that Paragraph 7 be highlighted with the box around it rather than the last sentence of paragraph 6 to highlight the maximum period of confinement actually ordered rather than the maximum allowed.	The committee agrees with this suggestion as the emphasis should be on the court's order of confinement in item 7 after having considered the individual facts and circumstances. The committee has therefore highlighted the box where the court inserts the maximum period of confinement in item 7, to put further emphasis on this order of the court.
			Are there other changes to form JV-732 in addition to those included in this proposal that would help ensure that the youth can be committed to the California Department of Corrections and Rehabilitation without unnecessary delays? (Please specify the particular changes.)	
			No.	No response required.
			Would the proposal provide cost savings?	
			We have not identified any cost savings.	No response required.
			What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?	

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

	Commentator	Position	Comment	Committee Response
			Since JV-732 is a form already in use, the training time should be minimal on the use of the form but gathering some of the information such as exceptional needs materials and JV-220 orders may be time intensive. *Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?* Yes. *How well would this proposal work in courts of different sizes?* We anticipate this will work well for all courts. Thank you for the opportunity to submit comments. Please do not hesitate to contact us for further information or with any questions.	No response required. No response required. No response required.
2.	Hon. Becky Lynn Dugan Presiding Judge Superior Court of Riverside County	N/I	The sentencing formula provided in item 6 provides an inaccurate sentencing formula that could lead to further confusion and incorrect sentencing. The sentencing formula for delinquents is the same as adult sentencing. As such, there should be some changes. First, the 1/3 midterm option should be removed because the form makes it appear as if it is mandatory, but a 1/3 midterm will not be used in many situations and doesn't apply to misdemeanors. It is also recommended that the subordinate offenses should be listed separately as felonies and misdemeanors, with the misdemeanors on the bottom. It should list three felonies and two	The committee agrees that the form should reflect that the court has sentencing options. In addition, the committee agrees that the proposed form's sentencing chart in item 6 makes it appear that a 1/3 midterm is mandatory when this will not always be the case. The committee also agrees that the felonies and misdemeanors can be separated into different rows. The committee also agrees with the recommendation that item 6 be amended to provide a space for the court to include a column for "sentencing options". This will provide the court with a space to provide the various sentencing options that may be applicable.

	Commentator	Position	Comment	Committee Response
			misdemeanors with the option of including more on an attachment. The space to the right of the code section column and felony/misdemeanor box should be left blank so the court can include other sentencing options for each offense. The principle felony row can be left as it is. The enhancement column can be left as it is. Alternatively, instead of providing the sentencing abstract as item 6, item 6 could simply indicate what the maximum period of imprisonment that could be imposed upon an adult convicted of the offense or offenses which has brought the youth before the court is and reference an attachment which will provide an abstract. Consider the *Felony Abstract of Judgment-Determinate* form CR-290 as an example of a sentencing abstract that could be used.	
3.	Hon. Donna Quigley Groman Judge Superior Court of Los Angeles County	AM	Thank you for tackling this form. It has been confusing for so long and guesswork has resulted in major delays. **Request for Specific Comments** • Is item 6 sufficiently clear regarding eligible offenses to include in the calculation of maximum commitment time? Yes • Will the proposed changes in item 7 of the	No response required. No response required.

	Commentator	Position	Comment	Committee Response
			revised form provide greater clarity of the court's order for the maximum custody time? Yes • Are there other changes to form JV-732 in addition to those included in this proposal that would improve the form's clarity? (Please specify the particular changes. No. Excellent work. • Are there other changes to form JV-732 in addition to those included in this proposal that would help ensure that the youth can be committed to the California Department of Corrections and Rehabilitation without unnecessary delays? (Please specify the particular changes.) I added language signifying that the court has reviewed the minor's birth certificate and that the name is correctly displayed as in the birth certificate. Also a notice to the effect that DJJ does not calculate victim restitution if no amount is specified by the court.	No response required. No response required. The committee choose not to make this revision because many youth do not have birth certificates or would have birth certificates that are difficult to locate thus potentially delaying processing. The committee elected to provide this information in the information form mentioned below. The committee will pursue development of an information form in a future cycle.
4.	Orange County Bar Association By Michael Baroni President	AM	**Is item 6 sufficiently clear regarding eligible offense to include in the calculation of maximum commitment time?**	

	Commentator	Position	Comment	Committee Response
			Yes. The current form does not indicate that the commitment has to be based on the most recent offense and does not aid the court in calculating subordinate offenses (see *In re Eric J.* (1979) 25 Cal.3d 522, 538) The proposed changes clearly indicate that the court's computation must be for the most recent offense and aid the preparer in calculating a maximum period of confinement. However, the form does not clearly indicate that the committing offense must be listed in Welfare and Institutions Code section 707, subdivision (b) or Penal Code section 290.008, subdivision (c). (Welf. & Inst. Code, § 733, subd. (c); *In re D.B.* (2014) Cal.4th 941, 947.) It may be helpful to consider amending the introductory sentence to the section to include the following italicized language: 6. The youth has been declared a ward of the court and is committed based on the most recent offense(s) *listed in Welfare and Institutions Code section 707(b) or Penal Code section 290.008*: Assuming that a commitment based on an ineligible offense would delay the imposition of a valid dispositional order, the italicized language may help reduce delay. **Will the proposed changes in item 7 of the revised form provide greater clarity of the court's order for the maximum custody time?** Yes. In the current version of JV-732, the maximum period of confinement set by the	The committee agrees with the suggestion to indicate in item 6 that the committing offense must be described by section 707(b) or Penal Code section 290.008. No response required.

	Commentator	Position	Comment	Committee Response
			court is indicated in item 8, where it is not altogether clear whether the form is asking for the maximum period of confinement that could be imposed on an adult or the maximum period of confinement ordered by the court for the minor in its dispositional order. This distinction is critical because, in the exercise of its discretion and after having considered the individual facts and circumstances of the case under Welfare and Institutions Code section 731, subdivision, (c), the court has the authority to set a maximum period of confinement at less than even the mitigated term applicable to adult defendants in cases governed by the determinate sentencing law (*In re A.G.* (2011) 193 Cal.App.4th 791, 804) and for shorter periods for offense governed by the indeterminate sentencing law (*In re R.O.* (2009) 176 Cal.4th 487, 498). **Does the designation of custody time served as "served at Division of Juvenile Facilities" and "served at a local holding facility" in item 8 of the revised form provide a useful distinction of custody time that will assist the court in sentencing?** Yes. Under Welfare and Institutions Code section 1767.35, subdivision (c), the court "upon a finding that the ward violated his or her conditions of supervision" may "order that the person be returned to the custody of the Department of Corrections and Rehabilitation, Division of Juvenile Facilities, for a specified	No response required.

	Commentator	Position	Comment	Committee Response
			amount of time no shorter than 90 days and no longer than one year" and can only be made if the court finds: "(1) that appropriate local options and programs have been exhausted, and (2) that the ward has available confinement time that is greater than or equal to the length of the return." Distinguishing between credit for time served at DJF and a local holding facility will ensure that the youth has reached the limit of total commitment time at DJF if they are returned under section 1765.35. **Are there other changes to form JV-732 in addition to those included in this proposal that would improve the form's clarity?** No, other than the change suggested in first response above. **Are there other changes to form JV-732 in addition to those included in this proposal that would help ensure that the youth can be committed to the California Department of Corrections and Rehabilitations without unnecessary delays?** No, other than the change suggested in first response above.	No response required. No response required.
5.	Pacific Juvenile Defender Center By Pamela Villanueva and Sue Burrell 258A Laguna Honda Blvd. San Francisco, CA 94116		Dear Members of the Judicial Council: These comments are submitted on behalf of the Pacific Juvenile Defender Center, in response to Invitation to Comment W17-03, submitted by	No response required.

	Commentator	Position	Comment	Committee Response
			the Honorable Jerilyn Borack and Honorable Mark Juhas, Co-Chairs of the Family and Juvenile Law Advisory Committee. This proposal is to change Form JV-732 to assure that courts provide complete and accurate information needed for the acceptance of youth by the Division of Juvenile Facilities (DJF), thus avoiding unnecessary delays in the court's disposition orders. We support the need for such changes, and appreciate the Committee's engagement in improving the form. The Pacific Juvenile Defender Center (PJDC) is a regional affiliate of the Washington, D.C.-based National Juvenile Defender Center. It provides support to more than 800 juvenile trial lawyers, appellate counsel, law school clinical programs and non-profit law centers throughout California and around the country. The Center works to improve the quality of representation for children, and to promote the development laws and policies that increase the success of youth in the system and reduce unnecessary confinement. Many of our members represent youth being committed to DJF, so they are sensitive to the need to assure that the commitment process unfolds as efficiently and expeditiously as possible. We are encouraged that the proposed form represents a vast improvement over the old form and is responsive to the concerns expressed by DJF Director Anthony Lucero, and the Los Angeles County Public Defender. In particular,	No response required. No response required.

	Commentator	Position	Comment	Committee Response
			we are heartened by efforts to more clearly describe the paperwork needed for transfer to DJF, thus preventing the previously existing delays that occurred simply because the right paperwork had not been submitted to DJF. We are especially pleased that the language relating to the SARATSO sex offender tool has been revised. These comments briefly touch on the request for specific comments and then offer additional suggestions for improving the form. **<u>Request for Specific Comments</u>** **Is item 6 sufficiently clear regarding eligible offenses to include in the calculation of maximum commitment time?** Yes. The new form clearly states under #6 that the ward is "committed on the most recent offense(s)." This will help to prevent youth from being committed on their entire juvenile record. Lack of clarity on this point previously resulted in many youth serving more time at DJF than contemplated and even sex registration, if an earlier petition, other than the intended "committing offense" was a sex offense. **Will the proposed changes in item 7 of the revised form provide greater clarity of the court's order for the maximum custody time?** Yes.	No response required. No response required.

	Commentator	Position	Comment	Committee Response
			Does the designation of custody time served as "served at Division of Juvenile Facilities" and "served at a local holding facility" in item 8 of the revised form provide a useful distinction of custody time that will assist the court in sentencing?	
			Yes.	No response required.
			Are there other changes to form JV-732 in addition to those included in this proposal that would improve the form's clarity? Are there other changes to form JV-732 in addition to those included in this proposal that would help ensure that the youth can be committed to the California Department of Corrections and Rehabilitation without unnecessary delays? (Please specify the particular changes.)	
			Yes. In addition to the proposed changes, PJDC requests the judicial council consider modifying and/or including the following in the new form:	
			In item 5, consider changing the order of the selections to reflect usage, which would move box (a) to the (c) position.	The committee agrees with this suggestion and has revised the form accordingly.
			In item 7, add additional clarification and advice about confinement time: After having considered the individual facts and circumstances of the case under section 731 (c), the court orders that the maximum period of	The committee agrees with providing information to the youth that will provide the youth with clarification about their confinement time. Ensuring that the youth, his or her family, the attorneys and the court understand this

	Commentator	Position	Comment	Committee Response
			confinement is: (If lower that the total number 6, the court has used its discretion to modify the maximum confinement period under section 731(c). If the number is the same as the number in 6, the court has advised the minor of their likely parole eligibility date based upon their commitment offense in California Code of Regulations, Title 15, Division 4.5, Chapter 2, Article 3, §§ 4951-4957. Additionally, the court has advised the minor that release from DJF will not occur until the Board of Juvenile Hearings determines the minor is sufficiently rehabilitated or 90-120 days before their 23rd birthday, or two years, whichever occurs later (Sections 607, subd. (f), 1766, 1766.2, subdivision (a), 1769, subdivision (c).)) **Comment:** Many youth are confused by the way maximum confinement time and parole eligibility are often described. PJDC believes that providing this additional advice is crucial to help youth to understand the amount of time they will spend in custody before they are eligible for a board date. This will also ensure that court officers and district attorneys understand how long the youth will be at DJF before they are eligible for release. **In item 8**, add: The court has advised the minor that presentence credit is not applied toward their parole eligibility date, only toward their maximum confinement time. **Comment:** Again, this is a common source of	information is helpful for everyone. However, the committee elected not include this information on the form to limit the forms purpose of being a commitment form. In addition, in order to limit the use of excess paper and reduce the burden on courts, the committee would like the form to remain two pages instead of three. The committee has proposed including this important information in an information form that can accompany the form. The information form would contain a chart on the second page that will provide a list of offenses and correspond to their eligibility for a parole hearing. The committee considered including the information form in this proposal, but determined that the information form should go out for public comment first. The committee will pursue development of an information form in a future cycle. The committee agrees that the youth, the parties and the youth's family should be provided with this information. However, for the reasons noted above, the committee elected not to include this advisement in the form. The committee has proposed putting this advisement in an

	Commentator	Position	Comment	Committee Response
			confusion. Youth erroneously believe that time spent in local custody counts against their parole date. It is important to explain to them at the outset that the time they spend in local facilities prior to DJF disposition is not credited toward the youth's eligibility for parole date.	information form, along with other informative information, that can be provided to the youth and the parties. The committee will pursue development of an information form in a future cycle.
			Items 9 and 10: Consider combining, adding boxes with one "to be checked" starting with the most common order "No restitution is ordered at this time. If restitution is sought at a future time the prosecution will notify all parties and request a hearing to be calendared in the committing court"	Item 9 and item 10 are not mutually exclusive warranting a selection of one over the other. Item 9 refers to the fine that all offenders are ordered to pay into the fund. Item 10 is necessary if there is a restitution order, which is not always the case. The committee elected to include the information regarding when restitution is sought at a future time after the commitment order is made in the proposed information form mentioned above. The committee will pursue development of this information form in a future cycle that will include this information.
			Items 14and 15: Consider combining for clarity. / / / /	The committee agrees with this suggestion and has revised the form accordingly.
			We very much appreciate the opportunity to help to improve this form based on our experiences in the field. Please let us know if we can provide further explanations about any of the comments or suggestions in this document.	No response required.

	Commentator	Position	Comment	Committee Response
6.	State Bar of California, Standing Committee on the Delivery of Legal Services By Sharon Ngim Program Developer & Staff Liaison	A	**Specific Comments** • Is item 6 sufficiently clear regarding eligible offenses to include in the calculation of maximum commitment time? Yes. • Will the proposed changes in item 7 of the revised form provide greater clarity of the court's order for the maximum custody time? Yes. • Does the designation of custody time served as "served at Division of Juvenile Facilities" and "served at a local holding facility" in item 8 of the revised form provide a useful distinction of custody time that will assist the court in sentencing? Yes. • Are there other changes to form JV-732 in addition to those included in this proposal that would improve the form's clarity? (Please specify the particular changes.) No. • Are there other changes to form JV-732 in addition to those included in this proposal that would help ensure that the youth can be committed to the California Department of	 No response required. No response required. No response required. No response required.

	Commentator	Position	Comment	Committee Response
			Corrections and Rehabilitation without unnecessary delays? (Please specify the particular changes.) No. **Additional Comments** The proposed changes will help prevent youth from low income families, youth of color and other vulnerable youth from being kept for long periods of time in county facilities where in many cases appropriate education and treatment are not received.	 No response required. No response required.
7.	Superior Court of Los Angeles County	AM	**Propose Modifications:** **Form JV-732** Item 1. a. – add "as verified on youth's birth certificate:" Item 17. a. – add to read "The youth was 18 years of age or older at the time of assessment and 15 or younger at the time of offense; or is a female; no SARATSO tool was ordered." **Request for Specific Comments:** **Is item 6 sufficiently clear regarding eligible offense to include in the calculation of maximum commitment time?**	 The committee choose not to make this revision because many youth do not have birth certificates or would have birth certificates that are difficult to locate thus potentially delaying processing. The committee agrees with this suggestion and has revised the form accordingly.

	Commentator	Position	Comment	Committee Response
			Yes.	No response required.
			Will the proposed changes in item 7 of the revised form provide greater clarity of the court's order for the maximum custody time?	
			Yes.	No response required.
			Are there other changes to form JV-732 in addition to those included in this proposal that would improve the form's clarity?	
			No. Excellent work.	No response required.
			Are there other changes to form JV-732 in addition to those included in this proposal that would help ensure that the youth can be committed to the California Department of Corrections and Rehabilitations without unnecessary delays? (Please specify the particular changes.)	
			Please see proposed changes with added language signifying that the court has reviewed the minor's birth certificate and that the name is correctly displayed as in the birth certificate.	The committee choose not to make this revision because many youth do not have birth certificates or would have birth certificates that are difficult to locate thus delaying processing.
			We also suggest adding a notice to the effect that DJJ does not calculate victim restitution if no amount is specified by the court.	The committee agrees that this information be provided to the parties using an information form as mentioned above. The committee will pursue development of an information form in a future cycle.

W17-03

Juvenile Law: Commitment to Department of Corrections and Rehabilitation (revise form JV-732)

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

	Commentator	Position	Comment	Committee Response
8.	Superior Court of Orange County, Family and Juvenile Orange County Court Managers	N/I	▪ On page 2, section 8, we recommend adding checkboxes before both options. This will help clarify if the youth is receiving credit for time served at a Division of Juvenile Facility, credit for time served at a local holding facility, or both. ▪ On page 2, section 17, we recommend revising the sentence to include a colon at the end. *The Youth has been committed for a sex offense under Penal Code section 290.008 offense:*. This will prompt the court to select either option *a* or *b*, which provides to the reason the youth is being required to register as a sex offender. Due to the recent implementation of Prop. 57, the court anticipates there will be an increase in JV-732 filings.	The committee agrees with this suggestion and has revised the form accordingly. The committee agrees with this suggestion and has revised item 16 of the form accordingly. (Item 17 was changed to item 16 after the comment period). No response required.
9.	Superior Court of Riverside county By Susan Ryan Chief Deputy of Legal Services	N/I	The form does provide the clarity needed to eliminate the delay in transferring juvenile offenders to DJF.	No response required.
10.	Superior Court of San Diego County By Michael M. Roddy Executive Officer	AM	Is item 6 sufficiently clear regarding eligible offenses to include in the calculation of maximum commitment time? *Yes, but is sufficient room provided for both the code section and the max term in the column under the heading "Enhancements"?* • Will the proposed changes in item 7 of the revised form provide greater clarity of the	The committee has ensured that there is sufficient room in the enhancements column.

	Commentator	Position	Comment	Committee Response
			court's order for the maximum custody time? *Yes.* • Does the designation of custody time served as "served at Division of Juvenile Facilities" and "served at a local holding facility" in item 8 of the revised form provide a useful distinction of custody time that will assist the court in sentencing? *Yes.* • Are there other changes to form JV-732 in addition to those included in this proposal that would improve the form's clarity? (Please specify the particular changes.) *None known.* • Are there other changes to form JV-732 in addition to those included in this proposal that would help ensure that the youth can be committed to the CDCR without unnecessary delays? (Please specify the particular changes.) *None known.* • Would the proposal provide cost savings? If so, please quantify. *Unknown.* • What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures	 No response required. No response required. No response required. No response required.

	Commentator	Position	Comment	Committee Response
			(please describe), changing docket codes in case management systems, or modifying case management systems? *Training staff (judicial officers, court clerks, back office clerks, clerical supervisors—hours of training unknown), revising procedures (requires coordination with probation departments and prosecuting agencies), and changing codes in JCMS.* • Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? *Unknown.* • How well would this proposal work in courts of different sizes? *Unknown.* **FORM JV-732** • Page 1, item 5.c.: Insert hyphen. The court-ordered release date is: • Page 1, item 6: Delete "is." Principal felony ~~is~~: 1/3 midterm ~~is~~:	No response required. No response required. No response required. The committee agrees with this suggestion and has revised the form accordingly. The committee agrees with this suggestion but the revision is no longer necessary because the reference to a"1/3 midterm" was deleted after the comment period in response to suggested modifications from one of the commentators.

	Commentator	Position	Comment	Committee Response
			QUERY: Is sufficient room provided for both the code section and the max term in the column under the heading "Enhancements"?	The committee has ensured that there is sufficient room in the enhancements column.
			The maximum period of imprisonment that ~~could~~ can be imposed upon an adult convicted of the offense or offenses which has brought the youth before the court is:	The committee does not agree with this revision because Section 731(c) uses the language "could" instead of "can" in this sentence.
			• Page 2, item 8: Change (state number) to (*specify number*).	The committee does not agree with this revision as the terms are so similar in meaning that a change is not warranted.
			• Page 2, item 11: Italicize (*a, b, or c must be checked*).	The committee agrees with this suggestion and has revised the form accordingly.
			• Page 2, item 11.a.: Italicize (*check one*).	The committee agrees with this suggestion and has revised the form accordingly.
			• Page 2, item 11.c.: ~~It does not appear that a~~ No determination has been made regarding whether the youth has any exceptional needs ~~the youth may have~~.	The committee agrees with this suggestion and has revised the form accordingly.
			• Page 2, item 14: The youth has has not been prescribed psychotropic medication. If a JV-220 has been completed for the youth, it is attached	The committee agrees with this suggestion and has revised the form accordingly.

	Commentator	Position	Comment	Committee Response
			as attachment 14. If there is no form JV-220, ~~specify~~ the type(s) and dosage(s) of medication is/are (*specify*): • Page 2, item 17.b.: The appropriate SARATSO score, selected under Penal Code section 290.04(d) or (e), was used to assess the ~~minor~~ youth. The court has read and considered the following risk assessment and received it into evidence: • Page 2, item 18: The ~~court has determined that the~~ youth has been in at least one foster care placement or other placement eligible for Title 42, U.S. Code, Part IV-E ~~eligible placement~~ funding during the course of a dependency or delinquency case.	The committee agrees with this suggestion and has revised the form accordingly. The committee agrees with this suggestion and has revised the form accordingly. The committee elected not to make these revisions. Keeping the language as it is will help to ensure that the court will make an inquiry into whether or not the youth has been in a foster care placement. The committee also does not feel that it is necessary to specify that a placement is eligible for funding, as the committee believes designating a placement as an eligible placement under Title 42, U.S. Code, Part IV-E is sufficient.
11.	TCPJAC/CEAC Joint Rules Subcommittee	A	The proposal should be implemented because it provides needed clarity for justice system partners.	No response required.

Item number: 04

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 19, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Sealing of Records (Revise forms JV-060, JV-595-INFO, JV-596, JV-596-INFO, and JV-794)

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee
Hon. Jerilyn Borack, Cochair
Hon. Mark A. Juhas, Cochair

Staff contact (name, phone and e-mail): Tracy Kenny, 916-263-2838

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 12/15/16
Project description from annual agenda: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will propose rules and forms as may be appropriate for the council's consideration to implement AB 1945 (Stone D) Juveniles: sealing of records (Ch. 858), which allows a child welfare agency of a county responsible for the supervision and placement of a minor or nonminor dependent to access a record that has been ordered sealed for the limited purpose of determining an appropriate placement or service.

If requesting July 1 or out of cycle, explain:
Needed to implement legislative changes that go into effect January 1, 2017.

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

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: May 18–19, 2017

Title
Juvenile Law: Sealing of Records

Rules, Forms, Standards, or Statutes Affected
Revise forms JV-060, JV-595-INFO, JV-596, JV-596-INFO, and JV-794

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn Borack, Cochair
Hon. Mark A. Juhas, Cochair

Agenda Item Type
Action Required

Effective Date
September 1, 2017

Date of Report
March 29, 2017

Contact
Tracy Kenny, 916-263-2838
tracy.kenny@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends revising forms to conform to recently enacted statutory provisions concerning the sealing of juvenile records. The revisions would update recently adopted forms to implement sealing of records for cases sealed under Welfare and Institutions Code section 786 to include changes to that section that went into effect on January 1, 2017. In addition, two other forms with information on the sealing of juvenile records would be revised to be consistent with the current state of the law.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective September 1, 2017:

1. Revise *Juvenile Court—Information for Parents* (form JV-060) to accurately reflect recent changes in the law concerning sealing of juvenile records, transfer to criminal court jurisdiction, and commitment to the Division of Juvenile Justice (DJJ);

2. Revise *How to Ask the Court to Seal Your Records* (form JV-595-INFO) to add information about recently enacted restrictions on employers inquiring about or considering juvenile criminal history information;

3. Revise *Dismissal and Sealing of Records—Welfare and Institutions Code Section 786* (form JV-596) to reflect recent statutory changes allowing child welfare agencies to access sealed records in specified circumstances;

4. Revise *Sealing of Records for Satisfactory Completion of Probation* (form JV-596-INFO) to alert those whose records are sealed that child welfare agencies may access these records when selecting a placement or services, and to add information about recently enacted restrictions on employers inquiring about or considering juvenile criminal history information; and

5. Revise *Petition to Terminate Wardship and Order* (form JV-794) to delete an outdated notice concerning record sealing, update the findings on the form to reflect the new standard for sealing and dismissal, and add a finding that the ward has been provided mandatory information forms concerning sealing.

The revised forms are attached at pages 7–18.

Previous Council Action

The Judicial Council approved *Juvenile Court—Information for Parents* (form JV-060) effective January 1, 2000. It was revised effective January 1, 2006, to update references to the California Youth Authority. *How to Ask the Court to Seal Your Records* (form JV-595-INFO) was adopted effective July 1, 2016, to implement a legislative requirement that the council develop informational materials on how to petition the court to seal juvenile records. *Dismissal and Sealing of Records—Welfare and Institutions Code Section 786* (form JV-596) was approved, and *Sealing of Records for Satisfactory Completion of Probation* (form JV-596-INFO) was adopted effective July 1, 2016, to implement recently enacted Welfare and Institutions Code section 786.[1] *Petition to Terminate Wardship and Order* (form JV-794) was approved effective January 1, 2006, and was most recently revised effective January 1, 2012, to clarify provisions pertaining to wards in foster care placements and termination at the age of majority.

Rationale for Recommendation

Recently enacted legislation changes juvenile record sealing provisions

In 2013, the Legislature took action to ensure that all juveniles who come before the court or a probation officer receive information about the process required to request sealing of records, and to require the adoption of a Judicial Council form that can be used to petition the court for

[1] Hereinafter, all statutory references are to the Welfare and Institutions Code unless otherwise specified.

sealing under section 781.[2] In 2014, the Legislature went a step further by enacting section 786, requiring courts to seal records without requiring a petition for any child 14 or older who was not a serious or violent 707(b) offender and who satisfactorily completed probation.[3] That legislation, however, spurred many questions and concerns within the juvenile justice system, and as a result, legislation was enacted in 2015 to clarify the scope and impacts of section 786. Assembly Bills 666[4] and 989[5] both sought to clarify section 786 and remedy the ambiguities and concerns raised by stakeholders about the original legislation. In 2016, Assembly Bill 1945[6] further amended section 786 to clarify some of its provisions and to expressly authorize the child welfare agency to access records sealed under section 786 for the purpose of identifying appropriate placements and services for children and nonminor dependents under their supervision.

Existing forms require revision to maintain legal accuracy and implement the law

The committee is recommending revisions to four forms in order to ensure that those forms are up to date and reflect the current state of the law.

Revised form JV-060. *Juvenile Court—Information for Parents* (form JV-060), is an optional informational pamphlet designed to provide parents with information about juvenile delinquency court. The information is presented in a question-and-answer format and includes a question about the sealing of juvenile court records. The answer to that question needs to be revised and updated to reflect the new provisions of law that allow for the sealing of records as a matter of law under section 786 when probation is satisfactorily completed. The proposed revised answer provides information on sealing under section 786 as well as information about petitioning the court to seal records for those cases not sealed under section 786. In addition, it references the two sealing information forms adopted effective July 1, 2016, as sources of further information.

In addition to sealing, other sections of form JV-060 are no longer accurate. The advisory committee proposes that these sections be updated along with the sealing section. Specifically, item 12, which discusses juvenile fitness hearings, was revised to reflect the changes in the law enacted by Proposition 57, the Public Safety and Rehabilitation Act of 2016, which changed the terminology concerning the transfer of jurisdiction from juvenile to criminal court.[7] Items 21 and 22, which discuss the Division of Juvenile Justice (DJJ), were revised to reflect statutory changes that affect the availability of DJJ as a dispositional option. A minor revision was made to item 23

[2] Assem. Bill 1006 (Yamada); Stats. 2013, ch. 269

[3] Sen. Bill 1038 (Leno); Stats. 2014, ch. 249

[4] Stone; Stats. 2015, ch. 368

[5] Cooper; Stats. 2015, ch. 375

[6] Stone; Stats. 2016, ch. 858

[7] Other changes to rules and forms to implement Proposition 57 will be circulated separately in a proposal for that specific purpose, but because form JV-060 was part of this proposal, changes to this information form are included here to allow review of all the proposed changes to the form in one invitation.

to clarify that a restitution order will become a civil judgment. Similarly, the discussion of the child's right to a lawyer in item 5 was revised to reference the recently approved rule related to delinquency attorney standards, California Rules of Court, rule 5.664. Minor grammatical modifications were also made.

Revised form JV-596. To assist courts in implementing the new requirements of section 786, the council adopted an optional sealing order form, *Dismissal and Sealing of Records—Welfare and Institutions Code Section 786* (form JV-596), effective July 1, 2016. Because AB 1945 allows child welfare agencies to access sealed records under specified circumstances, form JV-596 must be revised to reflect that authority in the court's order. Thus, the proposed change to the form would simply add "child welfare agency" to those who can access the sealed records for the specific purposes stated in section 786.

Revised forms JV-595-INFO & JV-596-INFO. The council adopted two information forms on sealing, effective July 1, 2016. One form is to be given at the termination of the case to people whose records are sealed under section 786, and the other is for those wards whose cases are not dismissed under section 786 and who need information about petitioning the court for the sealing of records under section 781. Both forms were revised to include information about Labor Code section 432.7, which prohibits most employers from inquiring about or considering any juvenile court criminal history information in making hiring or other employment-related decisions. In addition, *Sealing of Records for Satisfactory Completion of Probation* (form JV-596-INFO), includes information about who can access records after they are sealed under section 786. That information is proposed to be updated to include the new authority given to child welfare agencies to access sealed records when selecting placements or services.

Revised form JV-794. The proposal would revise the optional *Petition to Terminate Wardship and Order* (form JV-794), to eliminate a notice (currently at the bottom of the form) to the child regarding the sealing of records. That notice is not needed because rules 5.830 and 5.840 of the California Rules of Court require the court or the probation department to provide all wards with mandatory information forms concerning sealing at the time jurisdiction is terminated. As a result, the notice is duplicative of these forms and is proposed to be deleted, but a reference to the forms is proposed to be added to the current finding on providing information about sealing of records. In addition, form JV-794 would be revised to (1) remove a finding concerning successful completion of court-ordered programs, which is potentially confusing given that it is not tied to any statutory requirement; and (2) add a finding that probation has been successfully completed for purposes of section 786.

Comments, Alternatives Considered, and Policy Implications

External comments

This proposal circulated for comment as part of the winter 2017 invitation-to-comment cycle, from December 16, 2016 to February 14, 2017, to the standard mailing list for family and juvenile law proposals. Included on the list were appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court

administrators and clerks, attorneys, social workers, probation officers, and other juvenile law professionals. Nine organizations and individuals, and the Joint Rules Subcommittee of the Trial Court Presiding Judges and Court Executives Advisory Committees provided comments: one agreed with the proposal as drafted, six agreed with the proposal if modified, and three did not indicate a position but provided comments. In addition to the comments discussed below, the committee adopted numerous technical and clarifying changes suggested by various commentators. A chart with the full text of the comments received and the committee's responses is attached at pages 19–46.

Information regarding restrictions on employers inquiring about juvenile records added to information forms. The committee sought specific comment from the public about whether the two existing mandatory information forms concerning sealing of juvenile records should be revised to include information about recent changes in the law enacted by AB 1843.[8] This legislation amended Labor Code section 432.7 to substantially limit the ability of employers to inquire about or consider any juvenile court criminal history information, even when those records are not sealed. The proposal as circulated did not include that additional information, but while a number of commentators opined that the forms should not be expanded to cover this change, others felt it was critical information for those with juvenile court involvement to have. The committee considered those comments and ultimately opted to add the information to both *How to Ask the Court to Seal Your Records* (form JV-595-INFO) and *Sealing of Records for Satisfactory Completion of Probation* (form JV-596 INFO) with caveats and a suggestion to seek legal advice regarding certain types of employers.

Additional sealing notice not required on termination order. The committee revised *Petition to Terminate Wardship and Order* (form JV-794) to delete a notice informing wards of their rights to petition for sealing of records because it was out of date, and because recent legislation and rules of court require that all wards get one of the sealing information forms at the end of their case. To reflect that change, the committee added a finding to the petition/order to reflect that the ward had received the required form, but also sought comment on whether another advisement was needed. Comments on this were split with some preferring the redundancy in case courts fail to comply with the rules of court, while others preferred the modified form circulated for comment that takes into account the new forms. The committee concluded that it was preferable to avoid unnecessary redundancy and to rely on the information forms to provide the information needed, and thus opted not to add a new sealing notice.

Alternatives

As discussed above, the committee considered not adding information about recently amended Labor Code section 432.7 to the two sealing information forms for fear of being unable to capture an accurate and comprehensive description of that section and its exceptions, but opted to add the information with caveats to help publicize this significant change in the law. In addition, the committee considered adding back a notice concerning the process for sealing

[8] Assem. Bill 1843 (Stone); Stats. 2016, ch. 686

records to the juvenile delinquency termination petition and order but concluded that this would be unnecessary because of the recent adoption by the council of the two sealing information forms that are required to be provided at the end of the case.

Implementation Requirements, Costs, and Operational Impacts

Printing costs may be incurred by courts to provide form JV-596-INFO as required by law. Those courts that print form JV-060 will also need to replace their existing stock with new versions. Some courts may incur programming charges if electronic systems are used for the court orders. All of these impacts are a result of legislative changes and are necessary to make the forms legally accurate. In addition, because the informational forms are available in other languages, there will be costs to translate the revised forms.

Attachments and Links

1. Judicial Council forms JV-060, JV-595-INFO, JV-596, JV-596-INFO, and JV-794, at pages 7–18
2. Chart of comments, at pages 19–46
3. Link A: Assembly Bill 1945, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1945*
4. Link B: Assembly Bill 1843, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1843*

26. Can my child's juvenile court record be used against him or her as an adult?

Under the three-strikes law, certain serious or violent felonies committed as a juvenile at ages 16 and 17 can be counted as strikes and used against your child in the future.

27. What should I do as a parent?

All your parental responsibilities continue when your child receives a citation. You may want to contact a lawyer for assistance.

If your child is placed in a group home or committed to a probation camp or the Division of Juvenile Justice, do your best to maintain contact with your child and support the positive activities he or she does there. Encourage your child to follow the court's orders and remain in his or her placement. Understand what is happening in your child's life so that you can prepare for his or her return. Explore ways of creating a protective and supportive environment for your child's return to school or work. Develop strategies to hold your child accountable for his or her behavior.

Contact your child's parole agent or probation officer to ask for referrals to community organizations that can assist you, such as parent groups or counseling. Your school district and local hospital or mental health department may also offer programs.

_____ County

JUVENILE COURT INFORMATION FOR PARENTS

The purposes of the delinquency court are to protect, give guidance to, and rehabilitate children who commit delinquent acts, and to protect the community.

If your child becomes a ward of the court as a juvenile delinquent, the court will make orders for you and your child so that your child and the community will be protected.

As a ward of the delinquency court:

1. Your child may be allowed to live in your home under court supervision; or

2. Your child may be placed outside of your home in an unlocked or locked facility, depending upon your child's age, the seriousness of the offense, and your child's history of delinquency.

The petition and other papers you may have received say your child is accused of having done certain delinquent acts. The petition does not prove anything, but it is important for you to know what your child is accused of having done. You have the right to receive a copy of the petition.

PLEASE READ THE PETITION CAREFULLY.

1. My child came home after being arrested. What will happen now?

Your county's probation department will probably contact you and ask you and your child to come in for a meeting with a probation officer.

Form Approved for Optional Use
Judicial Council of California
JV-060 [Rev. September 1, 2017]

You may receive a Notice to Appear (a specific date and time you and your child must show up at the probation department).

In some cases, your child may receive a Notice to Appear directly in juvenile court.

2. My child was arrested and taken into custody. What can the arresting officer do?

The officer may:

a. Let your child go home to you or bring your child home or back to the place of arrest, and maintain a record of the contact.

b. Bring or refer your child to a community agency providing shelter, care, diversion, or counseling.

c. In some counties, require your child to return to the police station rather than to the probation department (this is sometimes called being "cited back").

d. Give you and your child a Notice to Appear, telling you what you and your child must do and when you must do it.

e. Shortly after the arrest, lock up your child in the juvenile hall (this is called "detention"). A child who is locked up or held by an officer has the right to make at least two phone calls within one hour after arrest. One of the phone calls must be a completed call to a parent, guardian, responsible relative, or employer. The other call must be a completed call to an attorney. If the officer is going to question your child about what happened, the officer must also tell your child that he or she has the right to remain silent, that anything your child says will be used against him or her, that he or she has a right to be represented by a lawyer, and that the court will appoint a lawyer if your child cannot afford one. These are called *Miranda* rights. If the officer is not going to question your child, the officer will not have to explain these rights.

24. Will I be required to pay my child's fees?

Yes. Unless you are the victim of your child's crime, you may receive a bill from the county for all or a portion of your child's attorney's fees. You will be billed for probation department services fees (such as food and laundry while your child was in juvenile hall) and placement costs for keeping your child in a state placement such as the Division of Juvenile Justice, a probation camp, or an out-of-home placement. These costs can be high. You will have a chance to show how much, if any, of these costs you are able to pay. (The Juvenile Court does not make this decision.)

25. Can my child's juvenile records be sealed?

If your child's records are sealed, it is as if the offense that brought your child to court never happened. That means your child can truthfully say he or she does not have a criminal record (unless your child wants to join the military or get federal security clearance).

If your child's case is dismissed by the juvenile court after January 1, 2015, because your child satisfactorily completed probation (formal or informal), in many cases the court will have sealed your child's records. If the court seals your child's records for this reason, he or she should receive a copy of the sealing order and form JV-596-INFO, *Sealing of Records for Satisfactory Completion of Probation.*

If the court finds your child has not satisfactorily completed probation, it will not dismiss the case and will not seal the records at termination. To have the records sealed in this situation, your child will need to ask the court to seal the records at a later date. (See form JV-595-INFO, *How to Ask the Court to Seal Your Records,* for more information about asking the court to seal records.)

The court will not seal your child's records if your child is found to have committed an offense listed in Welfare and Institutions Code section 707(b) (violent offenses such as murder, rape, or kidnapping, and some offenses involving drugs or weapons) when he or she was 14 or older, and the charge was not dismissed or reduced to a lesser offense not listed in 707(b).

You may visit your child during visiting hours, which are on Saturdays or Sundays for 2 to 3 hours at a time, depending on the reception center. The Ventura reception center for girls allows visits for up to 6½ hours at a time. You may not call your child at the reception center, but you may write to your child. Your child may make collect calls to you from a pay phone.

22. When would my child go to the Division of Adult Operations instead of the Division of Juvenile Justice (DJJ)?

Your child can be sentenced to adult prison (California Department of Corrections and Rehabilitation, Division of Adult Operations) if he or she is tried as an adult (see questions 19 and 20). If your child will be tried as an adult, it is extremely important to talk to your child's attorney about the very serious consequences of your child's situation.

Between the ages of 14 and 18, your child must stay at DJJ even if he or she is sentenced to adult prison.

Your child may serve the entire term at DJJ if the term will end before he or she reaches age 21. If your child's term will last past the age of 21, your child could be at DJJ until age 18 and then be transferred to the Division of Adult Operations on his or her 18th birthday.

23. Do I have to pay money for my child's acts?

Yes. You may also have to pay restitution to the victim if your child is ordered to pay. Restitution is money to pay for the victim's losses caused by your child's illegal conduct. Examples of restitution might include the value of stolen or damaged property, medical expenses, and lost wages. Restitution that remains to be paid when your child's case is closed becomes a civil judgment, which can affect your credit score.

If your child is locked up or held somewhere, the officer must take immediate steps to notify you that your child is in custody and where your child is being held. When you are notified, the officer must also tell you about each of the *Miranda* rights that your child has.

3. If we get a Notice to Appear, what will happen at the meeting with the probation officer? What should I do?

If your child doesn't already have a lawyer, you may wish to contact the public defender or a private attorney for advice.

One of three things may happen at the meeting:

a. The probation officer can reprimand your child and then let your child go home without getting the juvenile court involved.

b. The probation officer may offer your child a voluntary program instead of going to court. Each county is different and programs vary, but generally if your son or daughter successfully completes the program (for example, attending special classes or substance abuse counseling, performing community service, cleaning graffiti, or going to a youth or peer court if your county has one), the juvenile court does not need to become involved. If you and your child agree to a voluntary program, the probation department may ask you to sign an informal contract describing what you and your child must do. It can last up to six months.

c. The probation officer can refer your child's case to the district attorney, who will decide whether or not to file a petition.

4. Do I need a lawyer for myself?

No, not usually. If your child has a lawyer, the lawyer represents your child and not you.

5. Does my child need a lawyer?

Yes, and your child has a right to a lawyer who is both effective and prepared. If you cannot afford to hire a lawyer for your child, the court will appoint a lawyer to represent your child. California Rules of Court, rule 5.664, requires any attorney the court appoints to represent your child to have education and training specific to representing children in delinquency cases.

6. **My child's probation officer told me that the district attorney will be filing a petition. What does that mean?**

A petition asks the juvenile court to become involved in your child's life. The petition says what the state believes your child did that violated the law. Later, a judge will decide if what the petition says is true.

There are two types of petitions. They are named after numbered sections of California law:

a. A **601 Petition** is filed by the probation department to say a child has run away, skipped school, violated curfew, or regularly disobeyed his or her parents. If the court finds the petition is true, the child may become a "ward" of the court and is known as a "status offender."

b. A **602 Petition** is filed by the district attorney's office to say a child has committed an act that would be considered a crime if an adult had done it. If the court finds the petition is true, the child becomes a "ward" of the court as a delinquent.

Section 602 of the Welfare and Institutions Code covers any act that is against the law when an adult does it. This includes felonies such as auto theft, burglary, selling a controlled substance (drugs), rape, and murder, and misdemeanors such as simple assault and drunk driving.

The penalty for the offense depends on the type of offense.

7. **What will happen if my child is taken to juvenile hall after the arrest?**

The probation officer can decide whether to keep your child in custody or let your child go home without asking the district attorney to file a petition. The probation officer can also let your child go home and still refer the case to the district attorney, who will decide whether to file a petition. Restrictions may be placed on your child as a condition of being allowed to go home.

18. **May the victim attend and speak at the disposition hearing?**

Yes. A crime victim has a right to come to the hearing. The victim, and his or her parents if the victim is a child, will get notice of the hearing.

19. **When can my child be tried as an adult?**

For some felonies, your child can be tried and sentenced as an adult if your child is at least 14 years old. The case would be moved to adult court. There are major differences between juvenile and adult criminal court in how cases are handled. If the district attorney asks that your child be tried as an adult, it is extremely important to talk to your child's attorney about the very serious consequences of your child's situation.

20. **What felonies are likely to be tried in adult court?**

A child can be tried in adult court for violent and serious offenses, including murder and attempted murder, arson of an inhabited building, robbery with a dangerous or deadly weapon, some forms of rape, some forms of kidnapping and carjacking, some felonies involving firearms, certain controlled substance offenses, and certain violent escapes from a juvenile detention facility.

21. **Where will my child go if he or she is sent to the Division of Juvenile Justice (DJJ)?**

Your child will first go to a reception center for 30 to 90 days. After that, your child will be sent to one of three correctional facilities or the Pine Grove Youth Conservation Camp. The correctional facilities are:

a. N.A. Chaderjian Youth Correctional Facility in Stockton (209-944-6400)

b. O.H. Close Youth Correctional Facility in Stockton (209-944-6391)

c. Ventura Youth Correctional Facility (for girls) (805-485-7951)

c. Your child is placed on probation and ordered to live in a relative's home, a private residential group home, or an institutional program.

d. Your child is placed on probation and sent to a probation camp or ranch.

e. Your child is committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ). (But if your child is tried as an adult, the adult criminal court could sentence your child to the California Department of Corrections and Rehabilitation, Division of Adult Operations (see questions 19, 20, and 22).

f. As a parent, you may be ordered to take part in counseling, parent training, or other activities.

15. May I be present at the hearings?

Yes. In fact, state law requires you to be present. The judge must decide what will be best for your child. Depending on the offense, if you can show that your child will listen to you and follow your rules, and that you will hold your child accountable and be supportive at home, the judge may order your child released to your custody.

16. May I speak at the hearings?

Yes, if the judge asks you questions or if you are called as a witness. You also may ask to speak to the judge. Generally, your child's lawyer will speak for your child. The district attorney will speak for the state. The probation officer may be called as a witness.

17. Do we have the right to an interpreter?

Your child has a constitutional right to an interpreter. You may also have a right to an interpreter and should ask for one if you need one.

If the probation officer keeps your child locked up, a petition must be filed very quickly, usually within 48 hours from the time the police arrested the child. A detention hearing must be held the next day the court is in session. The courts are closed on Saturdays, Sundays, and holidays.

8. How long could my child have to stay in juvenile hall?

At the detention hearing, the judge could decide your child must be kept in juvenile hall until the next hearing. The different hearings are described in question 12. The judge may continue to order your child to remain in juvenile hall until the case is finished.

9. Can I visit my child in juvenile hall?

Usually, but you should contact the probation officer to find out when you can see your child.

10. What is the role of the probation officer?

The probation officer must write a report to the juvenile court judge about your child. The report says what the probation department thinks would be best for your child if the judge finds your child committed the crime listed in the petition. The report may include your child's prior arrest record; a description of the current offense; statements from your child, his or her family, and other people who know your child well; a school report; and a statement by the victim. The probation officer presents this report at the disposition hearing.

If your child is placed on probation, the probation officer will enforce the court's orders. This means monitoring your child to make sure he or she obeys the law and follows the terms of probation. The probation officer will also encourage your child to do well in school and participate in job training, counseling, and community programs. Depending on the situation, the probation officer could meet with your child as often as twice a week or as little as once a month.

If your child is in custody and the judge decides your child should not go home right after the case is finished the probation officer must find an appropriate placement for your child. This could be with a relative, in a foster or group home, or in a private institution.

11. How will my child and I find out about the court hearings?

If your child is locked up, you should get the petition and notice of the hearing, personally or by mail, as soon as possible after the petition is filed and at least 5 days before the hearing. If the hearing will be held less than 5 days after the petition is filed, you will get notice at least 24 hours before the hearing. Your child has the right to get notice if he or she is 8 years or older.

If your child is not in custody, you should get the petition and notice of the hearing, personally or by first-class mail, at least 10 calendar days before the hearing.

12. What hearings will my child go to in juvenile court?

There are several types of hearings:

a. **The Detention Hearing.** If your child is kept in juvenile hall for more than 48 hours, a detention hearing will be held within 72 hours, counting only court days (no Saturdays, Sundays, or holidays). At the detention hearing, the judge will decide whether to let your child go home before the next hearing.

b. **The Pretrial or Settlement Conference.** In many counties, a court appearance is scheduled to try to resolve the matter without a trial.

c. **Hearings on Motions.** There may be court appearances for the court to hear additional matters that come up before the matter is resolved.

d. **The Hearing on Transfer to Criminal Court Jurisdiction.** If your child is 14 years or older, the district attorney may ask that your child's case be tried in adult court for some serious and violent offenses. At this hearing, the judge will decide whether your child's case will be transferred to adult court or heard in juvenile court. If your child is younger than 14, he or she cannot be transferred to adult court.

e. **The Jurisdiction Hearing.** At the jurisdiction hearing, the judge will decide whether your child committed the offense(s) described in the petition.

f. **The Disposition Hearing.** If the judge rules that your child committed the offense, then at the disposition hearing the judge will decide what orders should be made about your child. If the judge rules that your child did not commit the offense, there is no disposition hearing. Sometimes the disposition hearing is held right after the jurisdiction hearing, on the same day.

g. **Review Hearings.** In some cases, the court may set hearings to review your child's progress and performance under probation supervision.

13. What will happen at the jurisdiction hearing?

In many cases, the child will admit all or part of the petition.

Your child's attorney will advise your child as to whether to make an admission.

If there is a contested hearing, or "trial," the district attorney will present the case against your child. Then your child's attorney will present your child's defense. Based on this evidence, the judge will decide whether your child committed the act(s) he or she is accused of. If the judge makes a "true finding," this means there is enough evidence for the judge to find beyond a reasonable doubt that your child did commit those acts.

After a "true finding," the judge schedules a disposition hearing to decide what the consequences will be.

If there is not enough evidence for a "true finding," the case will be dismissed. If your child is in custody, he or she will be released.

14. What will happen at the disposition hearing?

The judge will order one of the following:

a. Your child stays at home on probation supervision for up to 6 months.

b. Your child stays home under the formal supervision of a probation officer which is set up by the judge.

JV-595-INFO How to Ask the Court to Seal Your Records

If you were arrested or subject to a court proceeding or had contact with the juvenile justice system when you were under 18, there may be records kept by courts, police, schools, or other public agencies about what you did. If you make those records **private** (sealed), it could be easier for you to:

- Find a job.
- Get a driver's license.
- Get a loan.
- Rent an apartment.
- Go to college.

If the court sealed your records when probation was terminated, you do not need to ask for them to be sealed.

There are now two ways that records may be sealed in California. As of January 1, 2015, courts are required to seal records in certain cases when the court finds that probation (formal or informal) is satisfactorily completed. If the court sealed all of your records at the end of your case, you should have received a copy of the sealing order, and you do not need to ask the court to seal the records in that sealing order.

For more information about when the court seals your records at termination of probation, see form **JV-596-INFO.**

If you have more than one juvenile case or contact and/or are unsure if your records were sealed by the court, ask your attorney or probation officer.

Who qualifies to ask the court to seal their juvenile records?

If the court has not already sealed your records, you can ask the court to make that order. You qualify if:

- You are at least **18** or it has been at least five years since your case was closed; and
- You have been rehabilitated to the satisfaction of the court.

What if you owe restitution or fines?

The court may seal your records even if you have not paid your full restitution order to the victim.

The court will not consider outstanding fines and court ordered fees when deciding whether to seal your records, but you are still required to pay the restitution, fines, and fees, and your records can be looked at to enforce those orders.

When do you *not* qualify to seal your records?

- If you were convicted as an adult of an offense involving moral turpitude, such as:
  - A sex or serious drug crime;
  - Murder or other violent crime; or
  - Forgery, welfare fraud, or other crime of dishonesty.
- If, when you were 14 or older and the court found that you committed a serious offense listed in Welfare and Institutions Code section 707(b), such as murder, arson, rape, or other violent crime, as well as some offenses involving drugs or weapons, unless the court has dismissed that petition.

If you are unsure if you are eligible, ask your attorney.

Who can see your sealed records?

- DMV can see your vehicle and traffic records and share them with insurance companies.
- The court may see your records if you are a witness or involved in a defamation case.
- If you apply for benefits as a nonminor dependent, the court may see your records.
- You can request the court to unseal your records if you want to have access to them or allow someone else to inspect them.

Can employers see your records if they are not sealed?

Juvenile records are not allowed to be disclosed to most employers, and employers are not allowed to ask about or consider your juvenile history in most cases. There are exceptions to this rule if you are applying to be a peace officer or to work in health settings. Also, federal employers may still have access to your juvenile history. You should seek legal advice if you have questions of what an employer can ask of you.

How do you ask to have your records sealed?

1. You must fill out a court form. Form JV-595, *Request to Seal Juvenile Records,* at *www.courts.ca.gov/forms.htm,* can be used, or your court may have a local form.

2. When you file your petition, the probation department will compile a list of every law enforcement agency, entity, or person the probation department knows has a record of your case, as well as a list of any prior contacts with law enforcement, or probation and attach it to your petition.

3. If you think there are agencies that might have records on you that were never sent to probation, you need to include them, or the court will not know to seal them.

   If you are not sure what contacts you might have had with law enforcement, you can get your criminal history record from the Department of Justice. See http://oag.ca.gov/fingerprints/security for more information.

4. Take your completed form to the probation department where you were on probation. (If you were not on probation, take your form to any county probation office where you have a juvenile record.) Note: A small number of counties require you to take your form to the court. More information on each county's specific requirements is available at *www.courts.ca.gov/28120.htm*.

5. If you are currently 26 years of age or older, you may have to pay a fee. If you cannot afford the fee, ask the probation department or the court about a fee waiver.

6. Probation will review your form and submit it to the court within 90 days, or 180 days if you have records in two or more counties.

7. The court will review your application. The court may decide right away to seal your juvenile records. Or the court may order a hearing. If there is a hearing, you will receive a notice in the mail with the date and time of the hearing. If the notice says your hearing is "unopposed" (meaning there is no disagreement with your request), you may choose not to go.

8. If you qualify to have your juvenile records sealed, the court will make an order to seal the eligible records listed on your application.
   ***Important!* The court can seal only records it knows about. Make sure you list *all* records from *all* counties where you have any records. The court will tell you if it does not seal records from another court that were listed on your petition, and you will need to file a petition in that county to seal those records.**

9. If the court grants your request, it will order each agency, entity, or person on your list to seal your records. The court will also order the records destroyed by a certain date.

10. The court will provide you with a copy of its order. Be sure to keep it in a safe place.

What about sex offender registration? (Penal Code, § 290)

If the court seals a record that required you to register as a sex offender, the order will say you do **not** have to continue to register.

If your records are sealed, do you have to report the offenses in the sealed records on job, school, or other applications?

No. Once your records are sealed, the law treats those offenses as if they did not occur and you do not need to report them. **However**, the military and some federal agencies may not recognize sealing of records and may be aware of your juvenile justice history, even if your records are sealed. If you are seeking to enlist in the military or apply for a job requiring you to provide information about your juvenile records, seek legal advice about this issue.

Questions?

If you are not sure if you qualify to seal your records or if you have other questions, talk to a lawyer. The court is not allowed to give you legal advice. More information about sealing your records can be found at *www.courts.ca.gov/28120.htm*.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
DISMISSAL AND SEALING OF RECORDS— WELFARE AND INSTITUTIONS CODE SECTION 786	CASE NUMBER:

1. Name of subject child: Date of birth:

2. a. Date of hearing: Dept.: Room:

   b. Judicial officer *(name):*

3. The court has read and considered the report of the probation officer and any other evidence presented or information provided.

THE COURT MAKES THE FOLLOWING FINDINGS AND ORDERS:

4. The child has satisfactorily completed a program of informal supervision, probation under section 725, or a term of probation.

5. The petition(s) filed on *(date(s)):* is/are dismissed.

6. The child's juvenile records related to the arrest(s) on *(date(s)):*
   regarding an alleged violation of *(specify offense(s)):*
   in the custody of this court and of the courts, agencies, and officials listed below are ordered sealed:
   - ☐ Probation Dept. *(specify county):*
   - ☐ California Dept. of Justice
   - ☐ Law enforcement agency *(specify all):*
     - ☐ Law enforcement case number(s):

7. ☐ The court finds that sealing the following additional public agency records will promote the successful reentry and rehabilitation of the subject child and orders the records in their custody relating to petitions and arrests listed in items 5 and 6 sealed:
   - ☐ District Attorney *(specify county):*
   - ☐ School:
   - ☐ Department of Motor Vehicles:
   - ☐ Other *(specify):*

   ☐ Attachment. Number of pages attached: _____

Form Approved for Optional Use
Judicial Council of California
JV-596 [Rev. September 1, 2017]

CHILD'S NAME:	CASE NUMBER:

8. All records pertaining to the dismissed petition are to be destroyed on the dates stated in this item, and the arrest is deemed never to have occurred except that the prosecuting attorney, probation officer, child welfare agency, and court may access these records for the specific purposes stated in Welfare and Institutions Code section 786.

   a. Date court records must be destroyed:

   b. Date all other records must be destroyed:

9. The clerk shall send a certified copy of this order to the clerk in each county in which a record is ordered sealed and one copy each to the child, the child's attorney, and the agencies and officials listed in items 6 and 7.

Date:

▶ _____
JUDICIAL OFFICER OF THE SUPERIOR COURT

[SEAL]

CLERK'S CERTIFICATE

I certify that the foregoing is a true and correct copy of the original on file in my office.

Date: Clerk, by _____, Deputy

JV-596-INFO Sealing of Records for Satisfactory Completion of Probation

In many cases, the court will seal your juvenile records if you satisfactorily complete probation (formal or informal supervision).

If your case is terminated by the juvenile court after January 1, 2015, because you satisfactorily completed your probation (formal or informal), in many cases the court will have dismissed the petition(s) and sealed your records. If the court sealed your records for this reason, you should have received a copy of the sealing order with this form.

If the court finds you have not satisfactorily completed your probation, it will not dismiss your case and will not seal your records at termination. If you want to have your records sealed in this situation, you will need to ask the court to seal your records at a later date (**see form JV-595-INFO** for information about asking the court to seal your records).

The court will not seal your records if you were found to have committed an offense listed in Welfare and Institutions Code section 707 (b) (these are violent offenses such as murder, rape, or kidnapping, and also some offenses involving drugs or weapons) when you were 14 or older and it was not dismissed or reduced to a lesser offense not listed in 707 (b).

How will the court decide if probation is satisfactorily completed?

If you have done what you were ordered to do while on probation, and have not been found to have committed any further crimes (felonies or any misdemeanors for crimes involving moral turpitude, such as a sex crime or a crime involving dishonesty), the court will find that your probation was satisfactorily completed even if you still owe restitution, court ordered fees, and fines, **BUT...**

Restitution and court fines and fees must still be paid.

Even if your records are sealed, you must still pay your restitution and court-ordered fees and fines. Your sealed records can be looked at to enforce those orders.

Which records will be sealed?

The court will order your court, probation, Department of Justice, and law enforcement agency records sealed for the case the court is closing and if the court determines you are eligible for earlier cases. If you or your attorney ask the court, it can also seal records of other agencies (such as the District Attorney) if it finds that doing so would help you to be rehabilitated.

If you have more than one juvenile case and are unsure which records were sealed, ask your attorney or probation officer.

Who can see your sealed records?

- If your records were sealed by the court at termination, the prosecutor and others can look at your record to determine if you are eligible to participate in a deferred entry of judgment or informal supervision program.
- If you apply for benefits as a nonminor dependent, the court may see your records.
- If a new petition is filed against you for a felony offense, probation can look at what programs you were in but cannot use that information to keep you in juvenile hall or to punish you.
- If the juvenile court finds you have committed a felony, your sealed records can be viewed to decide what disposition (sentence) the court should order.
- If you are arrested for a new offense and the prosecuting attorney asks the court to transfer you to adult court, your record can be reviewed to decide if transfer is appropriate.
- If you are in foster care, child welfare can look at your records to determine where you should live and what services you need.
- If you want to see your records or allow someone else to see them, you can ask the court to unseal them.

  NOTE: Even if someone looks at your records in one of these situations, your records will stay sealed and you do not need to ask the court to seal them again.

Do you have to report the offenses in the sealed records on job, school, or other applications?

No. Once your records are sealed, the law treats those offenses as if they did not occur and you do not need to report them. **However,** the military and some federal agencies may not recognize sealing of records and may be aware of your juvenile justice history, even if your records are sealed. If you want to enlist in the military or apply for a job that asks you to provide information about your juvenile records, seek legal advice about this issue.

Can employers see your records if they are not sealed?

Juvenile records are not allowed to be disclosed to most employers, and employers are not allowed to ask about or consider your juvenile history in most cases. There are exceptions to this rule if you are applying to be a peace officer or to work in health settings. Also, federal employers may still have access to your juvenile history. You should seek legal advice if you have questions of what an employer can ask of you.

JV-794

CHILD'S NAME:	CASE NUMBER:

PETITION TO TERMINATE WARDSHIP AND ORDER

1. ☐ Wardship was declared on based on a finding that the child violated the following sections:
   a. of the Code.
   b. of the Code.
   c. of the Code.
   d. of the Code.
   e. of the Code.
2. ☐ The child has adhered to the terms and conditions of probation.
3. ☐ The child has satisfactorily met the goals of rehabilitation.
4. ☐ The child has satisfactorily completed probation for purposes of Welfare and Institutions Code section 786.
5. ☐ The child has reached the age of majority. ☐ The child has been in a foster placement. A completed *Termination of Juvenile Court Jurisdiction—Child Attaining Age of Majority* (form JV-365), has been filed with this court.
6. ☐ The whereabouts of the child have been unknown since *(date):* .
7. ☐ Continued wardship is not required for the rehabilitation or protection of the child.
8. ☐ Continued wardship is not required for the protection of the public.
9. ☐ The warrant issued on *(date)* is recalled.
10. ☐ A summary of the child's contacts with the probation department and law enforcement agencies is included as Attachment 10.
11. ☐ A summary of the child's school performance and other activities is included as Attachment 11.
12. ☐ The child is now a dependent of the juvenile court.
13. ☐ The sealing process has been explained to the child, and the child has received either form JV-595-INFO or form JV-596-INFO as appropriate and the name of his or her attorney, who can assist with the sealing process.

Petitioner requests that the court terminate the child's wardship and release him or her from all orders of the juvenile delinquency court.

Date:

TYPE OR PRINT PETITIONER'S NAME

▶ (SIGNATURE OF PETITIONER)

ORDER

☐ Wardship and delinquency court jurisdiction are terminated. All other orders of the juvenile court that are not in conflict remain in full force and effect.

☐ The matter is set for hearing on (date): at (time): ☐ a.m. ☐ p.m.

☐ The petition is denied.

Date:

JUDICIAL OFFICER

Form Approved for Optional Use
Judicial Council of California
JV-794 [Rev. September 1, 2017]

W17-04

Juvenile Law: Sealing of Records (Revise forms JV-060, JV-596, JV-596-INFO, and JV-794)

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

	Commentator	Position	Comment	Committee Response
	David Broady Senior Deputy District Attorney Placer County District Attorney's Office	N/I	I write to comment and ask the advisory committee to consider the very recent appellate decision of In re Joshua R., G052965, filed 1/19/16 (copy attached). This appellate decision concerns a troubling conflict between the sealing statutes and DOJ's ability to retain records related firearms prohibitions and the ability to prove violations of the firearms prohibitions statute (Penal Code Section 29820). I'd ask that the Rules and Forms address this issue.	The committee recognizes that there is some confusion and uncertainty about what records in a sealed file may still be available to prove other violations of the law, but making a change of this nature to the rules and forms would require circulation for comment in a future cycle. Moreover, as the legislature has taken action on sealing repeatedly in recent years, the committee wishes to defer taking action to determine if there will be legislative clarification.
	California Judges Association Lexi Howard Legislative Director	N/I	We offer brief comments that the proposal appropriately addresses the stated purpose. With regard to the question of including provisions regarding AB 1843 (Stone), we recommend that a provision be added to JV-596-INFO that provides that prospective employers, with some exceptions and in accordance with AB 1843 (Chapter 686, Statutes of 2016), are prohibited from asking an applicant for employment to disclose information concerning or related to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law, or seek or utilize any such information as a factor in determining any condition of employment.	The committee has added a question and answer to both the JV-595-INFO and JV-596-INFO concerning the ban on employer use of juvenile criminal history information in making employment decisions, as well as a caveat noting that there are some limited exceptions to this rule.
	Orange County Bar Association	AM	**Does the proposal appropriately address the stated purpose?** Yes, but with some exceptions. The proposed revision to item 5 of JV-060 is confusing. In both the current and proposed	No response required.

	Commentator	Position	Comment	Committee Response
			version the question is the same: "Does my child need a lawyer?" In the current version the answer reads as follows: "Yes, and your child has a right to a lawyer who is both effective and prepared. If you cannot afford to hire a lawyer for your child, the court will appoint a lawyer to represent your child." The proposed revision reads as follows: "Yes, and your child has a right to a lawyer who is both effective and prepared. California Rules of Court, rule 5.664 talks about the training and education that juvenile delinquency attorneys must have." The proposed revision seeks to inform parents that under rule 5.664, which implemented AB 703, attorneys who practice in delinquency court must meet certain training and educational mandates to practice in the delinquency courts. However, the proposed revision does not make clear that the court can only require appointed counsel to provide evidence they have met the competency standards. (Cal. Rules of Court, rule 5.664(d).) As a result, the proposed revision may give the mistaken impression that privately retained counsel must meet these requirements to represent clients in delinquency proceedings. To correct this, we recommend the following revision to the answer to item 5: "Yes, and your child has a right to a lawyer who is both effective and prepared. If you cannot afford to hire a lawyer for your child, the court will appoint a lawyer to represent your child. California Rule of Court, rule 5.664, requires any attorney the court appoints to represent your	The committee has adopted the suggested revision to clarify the form.

	Commentator	Position	Comment	Committee Response
			child to have education and training specific to representing children in delinquency cases." **Is it preferable to delete the notice on form JV-794 in light of the new informational forms, or should it be revised?** Yes, it is preferable to delete the notice. The notice contained in the current version of JV-794 at the very bottom of the form provides general information on sealing under Welfare and Institutions Code section 781. Because rules 5.830 and 5.840 of the California Rules of Court now require the court or probation to provide minors with forms (either JV-595-INFO or JV-595-INFO) explaining the sealing processes as it applies to them, the deleted language is duplicative, and some cases confusing. The proposed revision to item 13, specifically referencing these forms is helpful in emphasizing the content and importance of these forms. **Should information be added to form JV-596-INFO or form JV-595-INFO regarding the changes in what employers may ask people with juvenile records to disclose, enacted by Assembly Bill 1843 (Stone; Stats. 2016, ch. 686), or should those forms remain focused on the impact of sealing of records?** The purpose of forms JV-596-INFO or form JV-595-INFO is to inform the minor or former minor of the legal effect of sealing a juvenile court records. Both documents also address how sealing mitigates the collateral consequences of juvenile court involvement. For example, both forms have a section	The committee agrees and has opted to retain the form as it was circulated for comment with a specific reference to the required information forms. The committee has added a question and answer to both the JV-595-INFO and JV-596-INFO concerning the ban on employer use of juvenile criminal history information in making employment decisions, as well as a caveat noting that there are some limited exceptions to this rule.

	Commentator	Position	Comment	Committee Response
			explaining that once records are sealed, the offenses are treated as if they never occurred and, with some limited exceptions, do need not to be reported to prospective employers or schools. While this is a correct statement of law, some readers may mistakenly infer this relief may only be obtained if they petition to seal their records. AB 1843 (Stone; Stats. 2016, ch. 686), amended Labor Code section 432.7 to prohibit employers from asking an applicant for employment to disclose information concerning or related to an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law. Adding a brief discussion of how the amendments to Labor Code section 432.7 (brought about by AB 1843) prohibit employers from asking about juvenile court involvement generally would help clarify that obtaining a sealing order is not the sole basis protecting former system-involved youth from disclosing their juvenile justice history.	
	State Bar of California, Standing Committee on the Delivery of Legal Services Sharon Ngim, Program and Development & Staff Liaison	A	<u>Does the proposal appropriately address the stated purpose?</u> Yes, overall, the proposed amendments will allow low and moderate-income litigants to have a better understanding of the changes in the law since the passage of Proposition 57 and are necessary to help prevent confusion.	No response required.

	Commentator	Position	Comment	Committee Response
			<u>Is it preferable to delete the notice on form JV-794 in light of the new informational forms, or should it be revised?</u> The Notice listed on the bottom of form JV-794 regarding sealing should remain as is. Some probation and judicial officers are not giving out the mandatory information forms as required under rules 5.830 and 5.840. If the notice is removed from the bottom of JV-794 and officers are not giving out the mandatory information, then clients are NOT receiving the sealing information at all. <u>Should information be added to form JV-596-INFO or form JV-595-INFO regarding the changes in what employers may ask people with juvenile records to disclose, enacted by Assembly Bill 1843 (Stone; Stats. 2016, ch. 686), or should those forms remain focused on the impact of sealing of records?</u> JV-596 INFO and form JV-595-INFO should not add any information regarding what employers may ask people with juvenile records. To include what question an employer can ask could open up numerous issues regarding employment related legal issues. The sealing information should remain the focus of JV-596-INFO and JV-595 INFO.	The committee has opted to retain the form as it was circulated for comment with a specific reference to the required information forms on the petition and order and not to add a duplicative notice. The committee has added a question and answer to both the JV-595-INFO and JV-596-INFO concerning the ban on employer use of juvenile criminal history information in making employment decisions, as well as a caveat noting that there are some limited exceptions to this rule. That guidance also suggests seeking legal advice as a signal that this area of the law is not black and white.

W17-04

Juvenile Law: Sealing of Records (Revise forms JV-060, JV-596, JV-596-INFO, and JV-794)

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

	Commentator	Position	Comment	Committee Response
			Additional Comments Regarding JV-596, add a box to the sealing order that indicates that the client received sealing information from the court or from probation Regarding JV-794, SCDLS suggests that the words "successfully completed" should not be added to the JV-794. The wording should be "satisfactorily completed" as worded on JV-596. Satisfactorily completed is the terminology used in court by judges, district attorneys and some probation officers. Based on experience by SCDLS members, it is easier to come to an agreement whether or not a minor has "satisfactorily completed" probation than "successful completion", which implies a higher standard and is more subjective when it comes to determining if a minor's case should be dismissed and sealed.	At the time the court is preparing and issuing the order it cannot also find that a copy has been provided to the child. But the rule of court is clear that a copy must be provided. The proposal circulated for comment has revised JV-794 to eliminate the use of successfully completed, and substituted a finding of satisfactory completion based on section 786.
	Superior Court of Los Angeles County Los Angeles County Superior Court	AM	Suggested modifications: Form JV-060, Informational Pamphlet Item 26 (page 12) - Add "at ages 16 and 17" to read "…felonies committed as a juvenile at ages 16 and 17 can be counted ..." Form JV-596-INFO First column, paragraph 1 - change "If your case is dismissed…" to "If your case is terminated…" and "the court will have sealed your records." to "the court will have dismissed the petition(s) and sealed your records."	The committee has adopted this suggested revision. The committee has changed dismissed to terminated.

	Commentator	Position	Comment	Committee Response
			First column, paragraph 2 - change "your case" to "the petition(s)" to read "it will not dismiss the petition(s) and will not seal your records at termination." Second column, paragraph 2 - change "dismissal" to "termination" to read "If your records were sealed by the court at dismissal..." to "If your records were sealed by the court at termination…"	To maintain the simplest possible language on this form the committee has retained "case" over the legal term petition. The committee has adopted this suggested revision.
			Request for Specific Comments: Does the proposal appropriately address the stated purpose? Yes.	No response required.
			Should information be added to form JV-596-INFO or form JV-595-INFO regarding the changes in what employers may ask people with juvenile records to disclose, enacted by Assembly Bill 1843 (Stone; Stats. 2016, ch. 686), or should those forms remain focused on the impact of sealing of records? Yes. It is important to include this information since most people with juvenile records are most concerned on the impact of juvenile records on employment.	The committee has added a question and answer to both the JV-595-INFO and JV-596-INFO concerning the ban on employer use of juvenile criminal history information in making employment decisions, as well as a caveat noting that there are some limited exceptions to this rule.
	Superior Court of Orange County, Family and Juvenile Orange County Court Managers	N/I	***Juvenile Court-Information for Parents (JV-060)*** On page 10, the information form mentions that, *between the ages of 14 and 18, your child must stay at DJJ even if he or she is sentenced to*	There are certain cases in which a child may remain at DJJ past age 18 but that is beyond the scope of this response.

	Commentator	Position	Comment	Committee Response
			adult prison. However, the DJJ website reflects they are authorized to house youths until the age of 25, depending on the offense. We recommend revising the sentence mentioned above to read, *your child may stay at DJJ up to the age of 25 depending on the offense.* ***Petition to Terminate Wardship and Order (JV-794)*** Proposed rule 5.830 indicates the court must provide or instruct the probation department to provide all wards with mandatory information forms concerning sealing at the time jurisdiction is terminated. We recommend adding a checkbox to section 13 to specify if it was the court or the probation department that explained the sealing process to the youth and provided them with all the mandatory forms.	The current check box accommodates either situation and the committee does not think it is necessary to specifically identify who provided the information.
	Superior Court of Riverside County Susan Ryan Chief Deputy of Legal Services	AM	*Comment:* Leave the notice on the JV-794. This will notify the court that the minor was notified of the sealing process as required by law. *Comment:* JV-596 and JV-595 should remain focused on sealings' and not include disclosure information.	The committee has opted to retain the form as it was circulated for comment with a specific reference to the required information forms on the petition and order and not to add a duplicative notice. The committee has added a question and answer to both the JV-595-INFO and JV-596-INFO concerning the ban on employer use of juvenile criminal history information in making employment decisions, as well as a caveat noting that there are some limited exceptions to this rule. That guidance also suggests seeking legal advice

	Commentator	Position	Comment	Committee Response
				as a signal that this area of the law is not black and white.
	Superior Court of San Diego County Michael M. Roddy Executive Office	AM	Does the proposal appropriately address the stated purpose? *Yes*. • Is it preferable to delete the notice on form JV-794 in light of the new informational forms, or should it be revised? *It is preferable to delete the notice, as the information will now be delivered via the informational forms.* • Should information be added to form JV-596-INFO or form JV-595-INFO regarding the changes in what employers may ask people with juvenile records to disclose, enacted by Assembly Bill 1843 (Stone; Stats. 2016, ch. 686), or should those forms remain focused on the impact of sealing of records? *Information about the changes resulting from AB 1843 should <u>not</u> be added to either form. It is sufficient that both forms already state, "If you are seeking to enlist in the military or apply for a job requiring you to provide information about our juvenile records, seek legal advice about this issue."* • Would the proposal provide cost savings? If so, please quantify. *Unknown.* • What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures	No response required. The committee agrees and has opted to retain the form as it was circulated for comment with a specific reference to the required information forms. The committee has added a question and answer to both the JV-595-INFO and JV-596-INFO concerning the ban on employer use of juvenile criminal history information in making employment decisions, as well as a caveat noting that there are some limited exceptions to this rule. That guidance also suggests seeking legal advice as a signal that this area of the law is not black and white. No response required. No response required.

	Commentator	Position	Comment	Committee Response
			(please describe), changing docket codes in case management systems, or modifying case management systems? *Implementation requirements would depend on whether courts decide to use the optional forms. The revisions to JV-596-INFO will simply require replacing the old forms with the revised versions.* • Would four months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? *Unknown, but probably.* • How well would this proposal work in courts of different sizes? *Unknown.* **FORM JV-060** • Pages 1-2, item 1: Your county's probation department will probably ~~get in touch with~~ contact you and ask you and your child to come in for a meeting with a probation officer. You may receive a Notice to Appear ~~(~~which states a specific date and time you and your child must show up at the probation department~~)~~ or in juvenile court. ~~In some cases, your child may receive a Notice to Appear directly in juvenile court.~~ • Page 2, item 2: The officer may ~~do one of five things~~:	No response required. No response required. The committee has adopted this revision. The committee has clarified this item but kept the two notice provisions distinct to make it simpler. The committee has adopted all of these stylistic

	Commentator	Position	Comment	Committee Response
			a. Let your child go home to you or ~~accompany him or her~~ bring your child home or back to the place of arrest, and maintain a record of the contact. b. ~~R~~ Bring or refer your child to a community agency providing shelter, care, diversion, or counseling. c. In some counties, require your child to return to the police station rather than to the probation department (this is sometimes ~~referred to as~~ called being "cited back"). d. Give you and your child a Notice to Appear, ~~telling you~~ which states what you and your child must do and when you must do it. e. Shortly after the arrest, lock up your child in the ~~probation~~ juvenile hall (this is called "detention"). ~~If your~~ A child who is locked up or held by ~~the~~ an officer~~, your child~~ has the right to make at least two phone calls ~~no later than~~ within one hour after arrest. One of the phone calls must be a completed call to a parent, guardian, responsible relative, or employer. The other call must be a completed call to an attorney. If the officer is going to question your child about what happened, the officer must also tell your child that he or she has the right to remain silent, that anything your child says will be used against him or her, that he or she has a right to be represented by a lawyer, and that the court will appoint a lawyer if your child cannot	changes to item 2 except for comment d. which appeared to be less plain language that the existing text.

	Commentator	Position	Comment	Committee Response
			afford one. These are called *Miranda* rights. If the officer is not going to question your child, the officer will not ~~necessarily~~ have to explain these rights. • Page 3, item 5: Yes, and your child has a right to a lawyer who is both effective and prepared. Rule 5.664 of the California Rules of Court~~, rule 5.664 talks about~~ describes the training and education that juvenile delinquency attorneys must have. • Page 4, item 6: A petition asks the juvenile court to become involved in your child's life. The petition says what the state believes your child did that violated the law. Later, a judge will decide if what the petition says is true. There are two types of petitions. They are named after numbered sections of California law: a. ~~**601 Petition.**~~ A **601 Petition** is filed by the probation department ~~and says~~ to say ~~that~~ a child has run away, skipped school, violated curfew, or regularly disobeyed his or her parents. If the court finds ~~that~~ the petition is true, the ~~youth~~ child may become a "ward" of the court and is known as a "status offender." b. ~~**602 Petition.**~~ A **602 Petition** is filed by the district attorney's office ~~and says~~ to say ~~that~~ a child has committed an act that would be considered ~~against the law~~ a crime if an adult	The committee clarified this item as suggested by another commentator to distinguish between court appointed and privately retained counsel (see response to commentator 3 above). The committee has adopted all of these stylistic changes to item 6.

	Commentator	Position	Comment	Committee Response
			had done it. If the court finds ~~the facts stated in~~ the petition ~~to be~~ is true, the child becomes a "ward" of the court as a delinquent. Section 602 of the Welfare and Institutions Code covers any act that is against the law when an adult does it. This includes felonies such as auto theft, burglary, selling a controlled substance (drugs), rape, and murder, and misdemeanors such as simple assault and drunk driving. The penalty for the offense depends on the type of offense. • Page 4, item 7: ~~It is up to t~~The probation officer can decide whether ~~or not~~ to keep your child in custody~~.~~ ~~The probation officer may~~ or let your child go home without asking the district attorney to file a petition. The probation officer ~~may~~ can also ~~allow~~ let your child ~~to~~ go home and still refer the case to the district attorney, who will decide whether ~~or not~~ to file a petition. ~~There~~ Restrictions may be ~~restrictions~~ placed on your child as a condition of being allowed to go home. • Page 5, item 7: If the probation officer keeps your child locked up, ~~the law requires that~~ a petition must be filed very quickly, usually within 48 hours from the	The committee has adopted all of these stylistic changes to item 7.

	Commentator	Position	Comment	Committee Response
			time the police arrested the child ~~is taken into custody by the police~~. ~~Then there must be a~~A detention hearing must be held the next day ~~that~~ the court is in session. The courts are closed on Saturdays, Sundays, and holidays. • Page 5, item 10: The probation officer ~~is responsible for writing~~ must write a report to the juvenile court judge about your child. The report ~~tells the judge~~ says what the probation department thinks would be best for your child if the judge finds ~~that~~ your child committed the crime listed in the petition. The report ~~also~~ may include~~s~~ your child's prior arrest record; a description of the current offense; statements from your child, his or her family, and others ~~people~~ who know your child well; a school report; and a statement by the victim. The probation officer presents this report at the disposition hearing. If your child is placed on probation, the probation officer will enforce the court's orders. This means monitoring your child to make sure he or she obeys the law and follows the terms of probation. The probation officer will also encourage your child~~'s positive involvement~~ to do well in school and participat~~ion~~e in job training, counseling, and community programs. Depending on the situation, the probation officer could meet with your child as often as twice a week or as little as once a month.	The committee has adopted all but one of these stylistic changes to item 10.

	Commentator	Position	Comment	Committee Response
			If your child is in custody~~,~~ and the judge decides your child should not go home right after the case is finished, the probation officer~~'s job is to~~ must find an appropriate placement for your child. This could be with a relative, in a ~~county-based~~ foster or group home, or in a private institution. • Page 6, item 11: If your child is locked up, you should get the petition and notice of the hearing, personally or by mail, as soon as possible after the petition is filed and at least 5 days before the hearing. If the hearing ~~is~~ will be held less than 5 days after the petition is filed, you will get notice at least 24 hours before the hearing. Your child has the right to get notice if he or she is ~~at least~~ 8 years or older. If your child is not in custody, you should get ~~notice of~~ the petition and notice of the hearing, personally or by first-class mail, at least 10 calendar days before the hearing. • Page 6, item 12: a. **The Detention Hearing.** If your child is ~~locked up~~ kept in juvenile hall for more than 48 hours, ~~there will be~~ a detention hearing ~~after no more than~~ will be held within 72 hours, counting only court ~~business~~ days (no Saturdays, Sundays, or holidays). At the detention hearing, the judge will decide whether ~~or not~~ to let your child go home before the next	The committee has adopted all of these stylistic changes to item 11. The committee has adopted most of the stylistic changes suggested here to item 12, but left 12f. as it was to maintain present tense.

	Commentator	Position	Comment	Committee Response
			hearing. d. **The Hearing on Transfer to Criminal Court Jurisdiction ~~Hearing~~.** If your child is ~~at least~~ 14 years or older, the district attorney may ask that your child's case be ~~tried~~ heard in adult court. At this hearing ~~on transfer of jurisdiction to criminal court~~, the judge will decide whether your child's case will be ~~tried in~~ transferred to adult court or heard in juvenile court. ~~If the judge decides that your child's case should be transferred, he or she will be tried in adult court.~~ If your child is younger than 14, he or she cannot be transferred to adult court. e. **The Jurisdiction Hearing.** At the jurisdiction~~al~~ hearing, the judge will decide whether ~~or not~~ your child committed the offense(s) described in the petition. *Or*: At ~~the jurisdictional~~ this hearing, …. • Page 7, item 12: f. **The Disposition Hearing.** If the judge rule~~sd~~ that your child committed the offense(s) described in the petition, ~~then~~ at ~~the disposition~~ this hearing the judge will decide what orders should be made about your child. If the judge rule~~sd~~ that your child did not commit the offense(s), there is no disposition hearing. Sometimes the disposition hearing is held right after the jurisdiction hearing, on the same day. g. **Review Hearings.** In some cases, ~~the law or~~ the court may set hearings to review your child's	

	Commentator	Position	Comment	Committee Response
			progress and performance under probation supervision. • Page 7, item 13: Your child's attorney will advise your child as to whether ~~or not~~ to make an admission. If there is a contested hearing, or "trial," the district attorney will present the case against your child. Then your child's attorney will present your child's defense. Based on this evidence, the judge will decide whether ~~or not~~ your child ~~has~~ committed the act(s) he or she is accused of. If the judge makes a "true finding," this means ~~that~~ there is enough evidence for the judge to find beyond a reasonable doubt that your child ~~did~~ committed those act(s). After a "true finding," the judge ~~schedules~~ holds a disposition hearing to decide what the consequences will be. If there is not enough evidence for ~~the judge to find that your child committed the act he or she is accused of~~ a "true finding," the case will be dismissed~~.~~, and i~~f~~f your child is in custody, he or she will be released. • Page 7, item 14: The judge will ~~decide~~ order one of ~~six things~~ the following: Your child ~~may remain~~ stays at home on probation supervision for up to 6 months.	The committee has adopted many of the stylistic changes suggested here to item 13. The committee has adopted many of the stylistic changes suggested here to item 14.

	Commentator	Position	Comment	Committee Response
			Your child ~~may be ordered~~ stays home under the formal supervision of a probation officer~~.~~ ~~Formal supervision~~ which is set up by the judge. • Page 8, item 14: Your child ~~may be~~ is placed on probation and ordered to live in a relative's home, a private residential group home, or an institutional program. Your child ~~may be~~ is placed on probation and sent to a probation camp or ranch. Your child ~~may be~~ is committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ). (But if your child's case is ~~tried as an adult,~~ transferred to the adult criminal court, your child could be sentenced ~~your child~~ to a facility run by the California Department of Corrections and Rehabilitation, Division of Adult Operations (see questions 19, ~~and~~ 20, and 22). As a parent, you may be ordered to ~~comply with conditions such as~~ take part in counseling, ~~or~~ parent training, or other activities. • Page 8, item 15: Yes. In fact, state law requires you to be	The committee has adopted all of these stylistic

	Commentator	Position	Comment	Committee Response
			present. ~~One thing t~~The judge ~~will~~ must decide ~~is~~ what will be best for your child. Depending on the offense, if you can show that your child will listen to you and follow your rules, and that you will hold your child accountable and be supportive at home, the judge may order ~~that~~ your child ~~be~~ released to your custody. • Page 8, item 16: Yes,~~ou may speak~~ if the judge asks you questions ~~directly,~~ or if you are called as a witness. You also may ask to speak to the judge. Generally, your child's lawyer will speak for your child. The district attorney will speak for the state. The probation ~~department~~ officer may be called as a witness. • Page 9, item 18: Yes. A crime victim~~'s bill of rights allows the victim~~ has a right to come to the hearing. The victim, and his or her parents if the victim is a child, will get notice of the hearing. • Page 9, item 19: … There are major differences between juvenile and adult criminal court ~~procedures and philosophies~~ in how cases are handled. If the district attorney ~~requests~~ asks that your child be tried as an adult, it is extremely important to	changes to item 15. The committee has adopted all of these stylistic changes to item 16. The committee has adopted all of these stylistic changes to item 18. The committee has adopted all of these stylistic changes to item 19.

	Commentator	Position	Comment	Committee Response
			talk to your child's attorney about ~~all of~~ the very serious consequences of your child's situation. • Page 9, item 20: A child can be tried in adult court for ~~a wide range of offenses. These are~~ violent and serious offenses, including murder and attempted murder, arson of an inhabited building, robbery with a dangerous or deadly weapon, some forms of rape, some forms of kidnapping and carjacking, some felonies involving firearms~~,~~ or certain controlled substance~~s offenses~~, and certain violent escapes from a juvenile detention facility. • Page 10, item 22: … If your child will be tried as an adult, it is extremely important to talk to your child's attorney about ~~all of~~ the very serious consequences of your child's situation. … Your child may serve the entire term at DJJ if the term will end before he or she reaches age 21. If your child's term will last past the age of 21, ~~then~~ your child could be at DJJ until age 18~~,~~ and then ~~would automatically~~ be transferred to the Division of Adult Operations on his or her 18th birthday. • Page 10, item 23:	The committee has adopted most of these stylistic changes to item 20. The committee has adopted all of these stylistic changes to item 22.

	Commentator	Position	Comment	Committee Response
			23. ~~Am~~ Do I ~~financially liable~~ have to pay money for my child's acts? Yes. You may also have to pay restitution to the victim iIf your child is ordered to pay a fine or restitution to the victim, you will also be responsible for the payment(s). ... Restitution that remains to be paid when your child's case is closed becomes a civil ~~judgement~~ judgment, which can affect your credit score. • Page 11, item 24: Yes. Unless you ~~have been~~ are the victim of your child's crime, you may receive a bill from the county for all or a portion of your child's attorney's fees. You will be billed for probation department services fees (such as food and laundry while your child was in juvenile hall)~~,~~ and placement costs for keeping your child in a state placement such as the Division of Juvenile Justice~~,~~ or a probation camp~~, or an out-of-home placement~~. These costs can be ~~expensive~~ high. You will have a chance to show how much, if any, of these costs you are able to pay. (The Juvenile Court does not make this ~~determination~~ decision.) • Page 11, item 25: ~~This is very important for~~ If your child's ~~because when~~ records are sealed, it is as if the offense that brought your child to court never happened. That means ~~that~~ your child can	The committee has adopted many of these stylistic changes to item 23. The committee has adopted many of these stylistic changes to item 24. The committee has adopted most of these stylistic changes to item 25.

	Commentator	Position	Comment	Committee Response
			truthfully say ~~that~~ he or she does not have a criminal record (~~except possibly to this if~~ unless your child wants to join the military or get federal security clearance). If the juvenile court dismisses your child's case ~~is dismissed by the juvenile court~~ after January 1, 2015, because your child satisfactorily completed probation (formal or informal), ~~in many cases~~ the court ~~will have sealed~~ may seal your child's records. If the court seals your child's records for this reason, he or she should receive a copy of the sealing order and form JV-596-INFO, *Sealing of Records for Satisfactory Completion of Probation.* If the court finds ~~that~~ your child has not satisfactorily completed probation, it will not dismiss the case and will not seal the records at termination. ~~If your child wants t~~To have the records sealed in this situation, ~~he or she~~ your child will need to ask the court to seal the records at a later date (see form JV-595-INFO, *How to Ask the Court to Seal Your Records*, for more information about asking the court to seal records). The court will not seal your child's records if your child is found to have committed an offense listed in Welfare and Institutions Code section 707(b) (~~these are~~ violent offenses such as ~~killing, raping,~~ murder, rape, or kidnapping, and ~~also~~ some offenses involving drugs or weapons) when he or she was 14 or older and ~~it~~	

	Commentator	Position	Comment	Committee Response
			the charge was not dismissed or reduced to a lesser offense not listed in 707(b). **FORM JV-596** • Page 1, item 7: The court finds that sealing the following additional public agency records will promote the successful reentry and rehabilitation of the subject child and orders the records in their custody relating to petitions and arrests listed in ~~5. and 6.~~ Items 5 and 6 sealed: . . . Attachment. Number of pages attached: _____ • Page 2, item 9: The clerk shall send a certified copy of this order to the clerk in each county in which a record is ordered sealed and ~~a~~ one copy each to the child, the child's attorney, and ~~each~~ the agenc~~y~~ies and officials listed ~~above~~ in items 6 and 7. **FORM JV-596-INFO** ~~**In many cases, the court will seal your juvenile records if you satisfactorily complete probation (formal or informal supervision).**~~ **When can juvenile records be sealed?** If the juvenile court dismisses your case ~~is dismissed by the juvenile court~~ after January 1, 2015, because you satisfactorily completed your probation (formal or informal), in many cases the court will ~~have~~ seal~~ed~~ your records. …	The committee has adopted all of the suggested revisions to form JV-596. The committee has adopted many of these suggested style changes to the JV-596-INFO for clarity and simplicity.

	Commentator	Position	Comment	Committee Response
			If the court finds ~~that~~ you have not satisfactorily completed your probation, it will not dismiss your case and will not seal your records at termination. If you want to have your records sealed in this situation, you will need to ask the court to seal your records at a later date (**see Form JV-595-INFO** for ~~more~~ information about asking the court to seal your records). The court will not seal your records if ~~you were~~ it found ~~to have~~ you committed an offense listed in Welfare and Institutions Code section 707(b) (~~these are~~ violent ~~offenses such as killing, raping,~~ crimes like murder, rape, or kidnapping, and ~~also~~ some offenses involving drugs or weapons) when you were 14 or older and ~~it~~ the charge was not dismissed or reduced to a lesser offense not listed in section 707(b). **How will the court ~~determine~~ decide if probation is satisfactorily completed?** If you have done what you were ordered to do while on probation, and have not been found to have committed any further ~~crimes (~~felonies or ~~any~~ misdemeanors ~~for crimes~~ involving moral turpitude, such as a sex crime or a crime involving dishonesty~~)~~, the court will find ~~that~~ your probation was satisfactorily completed even if you still owe restitution, court ordered fees, and fines, BUT...	

	Commentator	Position	Comment	Committee Response
			Restitution and court fines and fees ~~must~~ still must be paid. Even if your records are sealed, you ~~are~~ still ~~required to~~ must pay your restitution and court-ordered fees and fines. Your ~~sealed~~ records can be ~~looked at~~ viewed to enforce those orders. … The court will order ~~your~~ records kept by the court, probation, Department of Justice, and law enforcement ~~agency records~~ sealed for the case the court is closing and ~~prior cases~~, if the court ~~determines~~ finds you ~~are~~ eligible, for earlier cases. If you or your attorney ask the court, it can also seal records of other agencies (such as the District Attorney) if it finds that doing so would help you to be rehabilitated. … If your records were sealed by the court at dismissal, the prosecutor and others can look at your record to ~~determine~~ see if you are eligible ~~to participate in~~ for a deferred entry of judgment or informal supervision program. … If a new petition is filed against you for a felony offense, probation can look at your record to see what programs you ~~have participated~~ were in but cannot use that information to keep you in juvenile hall or to punish you.	

	Commentator	Position	Comment	Committee Response
			If the juvenile court finds you have ~~been found to have~~ committed a felony ~~by the juvenile court~~, it can view your sealed records ~~can be viewed~~ to ~~determine~~ decide what disposition (sentence) ~~the court should~~ to order. If you are arrested for a new offense and the prosecutor~~ing attorney~~ asks the court to transfer you to adult court, your record can be reviewed to ~~determine~~ decide if transfer is appropriate. If you are in foster care, child welfare can look at your records to ~~determine~~ decide where you should live and ~~appropriate placement or~~ what services ~~for~~ you should receive. If you want to ~~have access to~~ see your records or ~~allow~~ let someone else ~~to inspect~~ see them, you can ~~request~~ ask the court to unseal them. NOTE: Even if someone looks at your records in one of these situations, your records will stay sealed ~~in the future~~ and you do not need to ask the court to seal them again. **~~If your records are sealed, d~~Do you have to report the offenses in ~~the~~ sealed records on job, school, or other applications?** **No.** Once your records are sealed, the law treats those offenses as if they did not occur ~~and you do not need to report them~~. **However,** the military and some federal agencies may not recognize sealing of records and may be aware	

	Commentator	Position	Comment	Committee Response
			of your juvenile ~~justice~~ history~~,~~ even if your records are sealed. If you ~~are seeking~~ want to enlist in the military or apply for a job ~~requiring~~ that asks you ~~to provide~~ for information about your juvenile records, seek legal advice about this issue. **FORM JV-794** Item 6: Insert (*date*) and blank line after "since." The whereabouts of the child have been unknown since (*date*): _____. Item 9: Insert (*date*) and blank line after "on." The warrant issued on (*date*) _____ is recalled. Insert verification below "Petitioner requests that the court terminate..." I declare under penalty of perjury under the laws of the State of California that the foregoing and all attachments are true and correct.	The committee has adopted these suggested style changes to the JV-794 for clarity and simplicity. The committee is not certain that this is necessary to add to the form, and it is a substantive change that would require recirculation for comment.
	Superior Court of Ventura County Keri Griffith Court Program Manager	AM	On form JV-060, I suggest the following: Page 6, item 12(d) - add the words "for some serious and violent offenses" at the end of the first sentence. The current sentence could lead someone to believe the DA can request all	The committee has adopted this clarification.

W17-04

Juvenile Law: Sealing of Records (Revise forms JV-060, JV-596, JV-596-INFO, and JV-794)

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

	Commentator	Position	Comment	Committee Response
			children at least 14 years old be tried as an adult. Page 11, item 25 - Second sentence of first paragraph (in parenthesis) is incomplete. (except possibly.??.to this if your child wants to join the military or get federal security clearance.)	The committee has revised this item to make it clearer and complete.
	TCJPJAC/CEAC Joint Rules Subcommittee TCJPJAC/CEAC	AM	The proposed changes to the forms are appropriate in light of current law. Suggested modifications: Regarding Form JV-060 – The JRS recommends adding the following language to the end of the second paragraph in the response to Question 27 “What should I do as a parent?”: “Do not encourage your child to leave placement or violate court orders.” Regarding Form JV-060 – The JRS recommends that the word “judgement” in the response to Question 23 “Am I financially liable for my child's acts?” be amended to “judgment” per common usage in the United States and the Judicial Council Style and Correspondence Guide. Please make this change throughout the document if “judgement” is used elsewhere in the form.	The committee has included the content of this suggestion in this item, but restated it in the positive. The committee has corrected this error.

Item number: 05

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 19, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Family Law: Simplifying Limited Scope Representation Forms and Procedures (amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL-956; revise forms FL-950, FL-955, FL-957, and FL-958)

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Bonnie R. Hough, 415-865-7668, bonnie.hough@jud.ca.gov; Gabrielle D. Selden, 415-865-8085, gabrielle.selden@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Approved December 10, 2015.

Project description from annual agenda: FL-950, 955, 956 and 958 Limited Scope Representation; Rule 5.425 Amend to simplify the procedure for withdrawing when scope of work has been completed. The State Bar reports that many attorneys are unwilling to make court appearance because the procedure that we have adopted for withdrawal is too complicated. Most states have adopted a simpler process. Proposed changes would likely reduce the number of hearings regarding withdrawal of counsel and promote more representation in family law matters.

If requesting July 1 or out of cycle, explain:

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

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 May 18–19, 2017

Title
Family Law: Simplifying Limited Scope Representation Forms and Procedures

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL-956; revise forms FL-950, FL-955, FL-957, and FL-958

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Agenda Item Type
Action Required

Effective Date
September 1, 2017

Date of Report
April 10, 2017

Contact
Bonnie R. Hough, 415-865-7668
bonnie.hough@jud.ca.gov
Gabrielle D. Selden, 415-865-8085
gabrielle.selden@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends amending rule 5.425 of the California Rules of Court, approving two new forms, and revising four existing forms to simplify the procedures for an attorney to withdraw from limited scope representation upon completing the work agreed on with the client in a family law matter. The recommended simplified withdrawal procedures are likely to promote more limited scope representation in family law matters, reduce the number of hearings regarding withdrawal of counsel, and reduce the impact on case management systems in family courts.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective September 1, 2017:

1. Amend rule 5.425 to reflect the new, simplified procedures for an attorney to withdraw from representation, as well as the obligations of the client who opposes the withdrawal;

2. Revise *Notice of Limited Scope Representation* (form FL-950) to include minor formatting changes and to reflect that the limited scope attorney is expected to prepare the form;

3. Revise *Notice of Completion of Limited Scope Representation* (form FL-955) to implement the new withdrawal procedures specified in the amendments to rule 5.425;

4. Approve *Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO) to provide specific information to a client about how to respond to a proposed *Notice of Completion of Limited Scope Representation* (form FL-955) and, if applicable, file and serve an *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956).

5. Revise *Objection to Application to be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-956) to:
   a. Retitle it to "Objection to Proposed Notice of Completion of Limited Scope Representation";
   b. Include hearing date information to be completed by the court clerk on filing;
   c. Serve as the method for the client to identify the services that he or she believes the attorney has not completed; and
   d. Include notices to the client to reduce the likelihood of disclosing information that could potentially compromise the attorney-client privilege;

6. Approve *Response to Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-957) to be used by the limited scope attorney to indicate whether he or she agrees to continue representation or requests an order to be relieved as counsel; and

7. Revise *Order on Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-958) to implement the proposed new process to withdraw from limited scope representation, changing the title of the form to "Order on Completion of Limited Scope Representation" and adding new sections for the court's findings and orders, as well as a section to note the client's last-known address and contact information.

The text of the amended rule is attached at pages 17–20. The new and revised forms are attached at pages 21–33.

Previous Council Action

Effective July 1, 2003, the Judicial Council adopted rules and forms "to enable limited scope representation so that attorneys can assist self-represented litigants, thereby increasing access to

justice and encouraging court efficiency."[1] The council adopted the rules and forms in response to the request and recommendations of the Board of Trustees of the State Bar of California.

On April 23, 2011, the Judicial Council adopted the recommendations of the Elkins Family Law Task Force, which included changes to ensure meaningful access to justice for all litigants and increase the availability of legal representation and providing a continuum of legal services in family court.[2]

Rationale for Recommendation

The current procedures in family law limited scope cases place a burden on the attorney to seek court intervention to withdraw from a case in certain situations, and are reported to discourage attorneys from accepting limited scope clients. For example, the limited scope attorney must file an *Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-955), along with a proposed *Order on Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-958) if the party/client fails to sign a *Substitution of Attorney—Civil* (form MC-050) when the limited scope representation is complete. The next steps depend on whether the party/client files an objection to that application and proposed order:

- If the party/client does not object within 15 days of the service date, the attorney must file an updated form FL-955 to so inform the court and include a proposed *Order on Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-958). Then the clerk must forward the proposed order for judicial signature.

- If the party/client files an *Objection to Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-956), then the court clerk must set a hearing no later than 25 days from the date that the objection was filed. The court must then send the notice of the hearing to the parties and the attorney.

In response to suggestions by the California Commission on Access to Justice—as well as family law attorneys and judges—that the rules and forms be simplified and reflect practice in other states, the Family and Juvenile Law Advisory Committee recommends changing the current procedure by allowing the attorney to file a new *Notice of Completion of Limited Scope*

---

[1] Judicial Council of Cal., Family and Juvenile Law Advisory Com. Rep., *Family Law: Limited Scope Representation* (Mar. 14, 2003), p. 1.

[2] "Equal justice for all is basic to our democracy. The first step toward equal justice is providing everyone, regardless of his or her economic circumstances, meaningful access to the courts. Today, too many people find themselves in family court without the assistance they need to present their cases. For those who are able to represent themselves, we need to provide more services to help them navigate the court system and get their day in court. For those who cannot represent themselves meaningfully, we need to find additional ways to increase representation." Judicial Council of Cal., Task Force Rep., *Elkins Family Law Task Force: Final Report and Recommendations* (April 2010), Recommendation III, p. 58, *www.courts.ca.gov/documents/elkins-finalreport.pdf*.

Representation (form FL-955) to withdraw from the case, instead of filing a motion to withdraw if the client fails to sign a substitution of attorney. The committee's goals are to:

- Respond to the identified concern that attorneys would be more willing to accept limited scope assignments but for the difficulty associated with withdrawing from assignments when the work has been completed;

- Increase court efficiencies by eliminating, in most cases, the need for the clerk to (1) process the application to be relieved as counsel each time a party/client fails to substitute out of the case on completion of the representation, (2) process the proposed order submitted with the application, and/or (3) set a hearing on the matter; and

- Advance the Judicial Council's goals and objectives of ensuring meaningful access to justice for all litigants and increasing the availability of legal representation and providing a continuum of legal services in family court.

To support these goals, the committee recommends the following procedure if a party/client fails to sign a substitution of attorney following completion of the agreed-upon limited scope services:

1. The attorney will be required to serve the client with a *Notice of Completion of Limited Scope Representation* (form FL-955) that is marked as "Proposed," a form entitled *Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO), and a blank *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956). The attorney would also be required to indicate in the notice box of the proposed *Notice of Completion* the date by which the client must file the *Objection*. The date is 10 calendar days after service of the proposed *Notice of Completion* on the client.

2. Following the 10-day period, if the client agrees or does not respond to the attorney, the attorney must file and serve a *Notice of Completion of Limited Scope Representation* (form FL-955) that is marked as "Final" in the caption. In this situation, the attorney will be deemed to be relieved of his or her responsibilities upon filing and service of the final *Notice of Completion* on the client and other parties in the action.

3. If, however, within the 10-calendar-day waiting period, the client files and serves the *Objection* to the proposed *Notice of Completion of Limited Scope Representation* (form FL-956):

    - The court clerk must set a hearing on the objection, and the hearing must be conducted no more than 25 court days after the *Objection* is filed;

    - The attorney may file a *Response to Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-957); and

- Following the hearing, unless the court orders otherwise, the attorney must prepare and obtain the judge's signature on the *Order on Completion of Limited Scope Representation* (form FL-958). The attorney must then file the order and serve it on the client and the parties or the attorneys for all parties in the case.

The proposed approach has a number of advantages:

- It will eliminate the need for the attorney to incur additional expenses to seek a court order to withdraw from the case if the client does not sign a substitution of attorney.

- Based on the current procedure, most clients would likely not disagree that the representation is ended. Thus, most withdrawals would be completed using the final *Notice of Completion of Limited Scope Representation* (form FL-955), thereby significantly reducing the workload of court staff and the impact on case management systems.

- It will provide clarity about the actual date of the attorney's withdrawal. The withdrawal will be completed on service of a final *Notice of Completion* or the court order issued on form FL-958.

Although the rule will still require that the court clerk schedule a hearing so that the matter is heard within 25 days if an *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) is filed, the proposed new process will greatly reduce the number of cases that require a hearing before the attorney can withdraw.

Flowcharts showing the current and proposed withdrawal procedures are included as Attachments A and B

Rule 5.425. Limited scope representation; application of rules

The committee recommends amending the rule to reflect the new procedure to withdraw from limited scope representation. In addition, recommended amendments include that the attorney may not be charged a fee to file the final *Notice of Completion of Limited Scope Representation* (form FL-955), even if the attorney had not previously made an appearance in the case. The committee believes that this change will eliminate another reported barrier for attorneys to take on limited scope clients in family law cases.

***Notice of Limited Scope Representation* (form FL-950)**

The committee recommends a few changes to form FL-950. The caption has been revised to reflect that the attorney is expected to prepare the form. Therefore, the reference on the first line of the caption to "party without attorney" has been deleted.

In addition, the order of the headings has changed to be consistent with other family law forms. For example, item 3a ("Child support") has been moved to item 3b, and item 3d ("Child custody

and visitation") has been moved to 3a. Also, the headings under item 3 have been updated to be consistent with language on current forms. For example, "Child custody and visitation" has been changed to "Child custody and visitation (parenting time)" and "Spousal support" to "Spousal or domestic partner support."

***Notice of Completion of Limited Scope Representation* (form FL-955)**

The committee recommends that this form be revised for mandatory use and include language to help attorneys implement the recommended amendments to rule 5.425. The caption has been changed to reflect that the attorney is expected to complete this form and includes check boxes for the attorney to indicate if it is a proposed or final version of the form. The revised form includes instructions directing the limited scope attorney to insert the date by which the client must file the *Objection*. Requiring the limited scope attorney to calculate the date that corresponds to 10 calendar days after the date that the proposed *Notice of Completion* was served will minimize confusion by the client because that date can vary depending on how the proposed *Notice of Completion* was served.

***Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO)**

The committee developed this form to provide to a client specific information about how to respond to a proposed *Notice of Completion of Limited Scope Representation* (form FL-955) and file and serve the *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956). This information is essential for a client seeking court intervention in a dispute with the limited scope attorney about whether the attorney completed the representation. Among other things, the form covers how to calculate the deadline by which the client must file and serve the *Objection* (form FL-956) and prepare for the hearing. It also provides links to resources if the client has questions.

***Objection to Application to be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-956)**

The committee recommends that this form be revised and renamed "Objection to Proposed Notice of Completion of Limited Scope Representation." The revised form provides space for the client to identify the services that he or she believes the attorney has not completed. However, the content has been tailored to reduce the likelihood of a client's disclosing information that could potentially compromise the attorney-client privilege. In addition, the notice box on the form provides information about protecting the confidentiality of attorney-client communications.

***Response to Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-957)**

This recommended new form will be used by the limited scope attorney to indicate whether he or she agrees to continue representation or requests an order to be relieved as counsel. The form includes a notice for the attorney not to file additional documents with the form to protect

attorney-client confidentiality but, instead, to bring any such evidence to the hearing. Finally, the form includes a proof of service on page 2.

Order on Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation (form FL-958)

The committee recommends revising the form to implement the proposed new process to withdraw from limited scope representation. The title of the form has been changed to "Order on Completion of Limited Scope Representation," and the form includes new sections for the court's findings and orders, as well as a new section to note the client's last-known address and contact information.

In addition, the committee recommends revising the proofs of service on forms FL-950, FL-955, FL-956, and FL-958. The proposed changes reflect the revised form names of forms that are required to be served and/or expand the content to include a section for attorneys who choose to serve the client with a *Notice of Completion* by overnight delivery or another agreed-upon method, such as electronic service.

Comments from prior circulation

The Family and Juvenile Law Advisory Committee circulated an invitation to comment in the previous public comment cycle proposing a different procedure if a party/client fails to sign a substitution of attorney following completion of the agreed-upon limited scope services.[3]

Feedback received from the public about that proposal indicated that improvements were needed. Therefore, the committee developed the current recommendations for simplifying limited scope representation, which take into account the following suggestions:

- Reduce court costs to implement the rule's procedures;
- Impose fewer requirements on the client if there is a disagreement about completion of limited scope services;
- Provide clarity about the actual date of the attorney's withdrawal; and
- Provide more protections and awareness of the confidentiality of the communications between the attorney and the client.

The comments chart for the previous proposal is included in this report as Attachment A.

[3] The invitation to comment is available at *www.courts.ca.gov/documents/SPR16-18.pdf.*

Comments, Alternatives Considered, and Policy Implications

The current proposal circulated for comment as part of the winter 2017 invitation-to-comment cycle, from December 16, 2016 to February 14, 2017, to the standard mailing list for family and juvenile law proposals. Included on the list were appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks, attorneys, family law facilitators and self-help center staff, social workers, probation officers, Court Appointed Special Advocate (CASA) programs, and other juvenile and family law professionals.

The committee received comments from 13 individuals or organizations. Of these commenters, 6 agreed with the proposal, 3 agreed if modified, 3 expressed no position but included comments and suggestions to improve the rule and forms. Also, 1 disagreed with the proposal if it would require the limited scope attorney to remain in the case until an order after hearing or judgment when the party and attorney did not specifically agree to this service. A chart with the full text of the comments received and the committee's responses is attached at pages 34–69.

Rule 5.425. Limited scope representation; application of rules

Five commenters suggested changes to the rule. Most commenters suggested technical changes; some suggested substantive changes; and one generally expressed support for the rule amendments.

Technical changes included correcting a typographical error in the numbering of the rule's subsections, using the word "limited" in front of all references to "attorney" in the rule, and using the word "shall" instead of "should" in a subsection relating to the requirement to pay a filing fee for the *Objection* (form FL-956). In response, the committee incorporated some of the technical changes into the recommendations being made to the Judicial Council. Other changes were incorporated to the extent that they supported the intended meaning of the rule. The committee did not agree to use the term "shall," but recommended using the term "must," as is the policy of Judicial Council regarding rules and forms.

Some commenters suggested substantive changes, such as changing the number of days that the client has to object to the Proposed Notice of Completion from 10 to 15. This suggestion was made because currently clients have 15 days to file the *Objection*. The committee does not agree to recommend that the deadline for the client to file the *Objection* be changed to 15 calendar days. The client will not be prejudiced by the shortening of time in the process, and it will reduce the limbo period in the representation.

The 10-calendar-day deadline for filing the *Objection* applies only in situations in which the client fails to sign a substitution of attorney at the end of the limited scope service. When a client agrees in the *Notice of Limited Scope Representation* (form FL-950) to file a substitution of attorney when the services are completed, but then fails to do so, this leaves the attorney in limbo. The attorney cannot have a client sign a blank substitution but may be unable to get the

client's attention after the services have been completed. Shortening the period to object will help address those situations in which the client has not been responsive to the attorney's attempt to communicate about substituting out of the case.

Finally, as noted in the recommended information sheet (form FL-955-INFO), the actual deadline for filing the *Objection* will vary depending on how the proposed *Notice of Completion* was filed. A deadline of 10 days applies to personal service of the *Notice*; however, it would be extended by 2 court days for overnight delivery and 5 calendar days if service was effected by mail within the state of California.

The same commenter suggested that the rule be changed to state that, if the *Objection* is late, the court may reject the filing. In response, the committee does not agree to recommend amending the rule as suggested by the commenter. If the attorney takes prompt steps to submit the Final *Notice of Completion* at the end of the 10-day waiting period, the risk of late filings should be very limited. Because the attorney has the incentive to be relieved as counsel, the attorney should be given the responsibility of filing the Final *Notice* at the end of the 10-day period. Further, to authorize court clerks to reject an *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) that is untimely filed seems imprudent. If a timeliness issue arises with the filing of the *Objection*, it should be adjudicated by the judicial officer at a hearing on the issue rather than by the clerk.

In response to other suggestions made by commenters, the committee recommends:

- Removing references in the rule to service deadlines for the *Objection*. To avoid confusion, the committee recommends that the deadlines be included in the information sheet.

- Not revising the rule to state that a client can have only one limited scope attorney in the family law case working on separate issues. The State Bar's *California Rules of Professional Conduct* make no such restriction, and such a rule does not support the goal of increasing access to justice.

- Requiring in the rule that the limited scope attorney submit a proof of service for the *Notice of Completion* forms marked as "Proposed" and "Final." This requirement will allow the attorney to let the court know how the "Proposed" *Notice of Completion* was filed, and thus determine if the "Final" *Notice of Completion* was timely filed and served.

- Including in the rule that, before being relieved as counsel, the limited scope attorney must file and serve the order after hearing or judgment following the hearing or trial at which he or she provided representation, unless otherwise directed by the court or unless the party agreed in form FL-950 that completion of the order or judgment was not within the scope of the attorney's representation.

***Notice of Limited Scope Representation* (form FL-950)**

Three commenters suggested changes to the form. One person suggested changes to the proof of service to make it clear what the party should do if service is completed by electronic means. The committee agreed with the commenter and recommends revising page 3 of the form to include a check box for electronic service. The proposed form requires that a separate proof of electronic service be attached because of the space limitations of the form and includes a link to optional *Proof of Electronic Service* (form POS-050). The committee recommends this change to the other forms in this report that include a proof of service.

Two commenters suggested technical changes, such as correcting the form number at the bottom left corner from FL-955 to FL-950 and other minor, technical changes to the proof of service. The committee agreed to incorporate these changes into the recommendations being made to the Judicial Council.

One commenter did not agree to the proposed revision (item 2) that the rule should require a limited scope attorney to remain in the case until he or she submitted an order after hearing of judgment in all cases, especially if the work is not included within the scope of the representation. The commenter, who has a limited scope practice in which he makes court appearances and does not budget to do the order after hearing, indicated that this would add significant costs to his representation. He further asked whether an attorney who was able to settle the entire case at a request for order hearing would be required to prepare the judgment—even if doing so had not been contemplated in the original representation?

In response, the committee noted the requirements of rule 5.125 of the California Rules of Court regarding the preparation, service, and submission of the order after hearing, which provides the following:

> The court may prepare the order after hearing and serve copies on the parties or their attorneys. Alternatively, the court may order one of the parties or attorneys to prepare the proposed order as provided in these rules. The court may also modify the timelines and procedures in this rule when appropriate to the case.

(Cal. Rules of Court, rule 5.125.)

The committee also reviewed the specific comments received from the prior circulation of the rule and forms in the SPR16-18 proposal. In that proposal, 6 of the 12 commenters responded to the specific question "Should the rule or forms require that if an attorney makes an appearance at a hearing, the attorney is responsible for preparing the order after hearing, if so directed by the judge." All 6 agreed that the rule should include the requirement. Below are the commenters are their statements:

- *Harriett Buhai Center for Family Law*: Yes, absolutely. This language should encompass judgments and restraining orders after hearing as well as orders after hearing. Far too often we encounter clients who had limited scope attorneys for a

hearing and neither party completed the order after hearing.

- *Orange County Bar Association:* Yes, for the attorney's own protection as well as protecting the interests of the client.

- *The State Bar of California, The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM):* Yes. If a judge instructs the limited scope attorney to prepare the order, the attorney should do so before he or she withdraws. If the representation is limited to a court appearance, it is only logical that preparation of the order after that hearing is part of the "work agreed upon."

- *State Bar of California, Standing Comm. on the Delivery of Legal Services:* Yes. Appearing at a hearing to get an order and not preparing the order after hearing (i.e., not actually getting an order) is not terribly helpful to a client, as many clients seem to have difficulty with the findings and order after hearing.

- *Superior Court of Los Angeles County:* Yes.

- *Superior Court of San Diego County:* Yes.

In light of the above rule and input from commenters, the committee recommends revising item 2 on form FL-950. Item 2 requires the attorney to indicate the duration of the limited scope representation. The recommendation is to provide three check boxes to specify the duration of the representation, as follows:

The attorney will represent the party as follows:
□ at the hearing on *(date):*_____ □ and for any continuance of that hearing
□ until resolution of the issues checked on this form by trial or settlement
□ Other *(specify duration of representation):*

However, instead of a separate check box that states: "□ until submission of the order after hearing" the committee recommends that the form include a check box for the attorney to indicate whether there is an exception to the rule that the attorney will prepare an order after a hearing or a judgment after the hearing or trial. Specifically, the committee recommends that the check box state, "□ Submitting to the court an order after hearing or judgment is not within the scope of the attorney's representation." By checking this box, the attorney will represent to the court that he or she had a conversation with the client about preparing the order or judgment and that the client agreed that the attorney's representation will not include these tasks.

Notice of Completion of Limited Scope Representation **(form FL-955)**
Seven commenters suggested changes to improve form FL-955. In response, the committee recommends the following changes:

- Adding a section on page 1 to allow the attorney to indicate the date that the proposed *Notice of Completion* was served, along with the method of service.

- Adding a reference and a link to the information sheet, form FL-955-INFO.

- Reformatting the notice boxes to better clarify for the client what is meant if the form is marked "Proposed" or "Final.

- Clarifying in item 2 the document that the attorney must attach to describe the scope of the representation that was agreed upon with the client.

- Adding in item 2 text indicating that the attorney is not to attach a copy of the fee agreement to demonstrate the agreement with the client.

- Changing the second page for use as the proof of service for either the proposed or final *Notice of Completion* (form FL-955)

Information for Client About Notice of Completion of Limited Scope Representation **(form FL-955-INFO)**

Five commenters suggested changes to the proposed new information sheet. Most of the suggestions were minor or technical in nature, such as globally replacing the term "lawyer" with "attorney" to be consistent with the term in rule 5.425, adding and deleting space between words, and emphasizing text by underlining or bolding words or phrases. The committee generally agreed to incorporate these changes into its recommendations.

Two commenters suggested substantive changes. One change was to indicate in section 7 that the court may reject the filing if it is not timely filed and served. The committee does not recommend amending the form as suggested. As previously stated, to authorize court clerks to reject an *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) that is untimely filed seems imprudent. The attorney's incentive to be relieved as counsel should act as a motivator for taking prompt steps to file the *Final Notice of Completion of Limited Scope Representation* (form FL-955), and should, thereby, decrease the risk that the client will file the *Objection* late. Further, if a timeliness issue arises with the filing of the *Objection*, it should be adjudicated by the judicial officer at a hearing on the issue rather than by the clerk.

Also relating to fees, another commenter queried why the party filing the *Objection* has to pay a filing fee when the attorney does not have to pay a fee to file the Final *Notice of Completion*. In response, the committee recommends new language in item 7 to state that the party must pay a fee to file the *Objection* because the court clerk is required to set a hearing on the matter. Because the required fee may be either a motion fee or a first appearance fee, the committee recommends against including more-specific information about fees in the information sheet.

Finally, the committee recommends adding language to the proposed new form to make it consistent with the changes recommended to rule 5.425. Specifically, the committee recommends that item 4 ("What if I don't take any action?") reflect that the limited scope attorney will also file the "Final" *Notice of Completion* with the court, along with the proofs of service of the "Proposed" and "Final" *Notices.*

***Objection to Application to be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-956)**

Three commenters suggested changes to the form. One stated that the form should not have a proof of service attached to it. The reason is that the client must file the form first to get a hearing date before serving the attorney, which means that the proof of service on the second page will not be filled out at the time of filing.

The committee agreed with the suggestion and recommends not including the proof of service on page 2. However, the committee recommends replacing it with information about serving the *Objection* by personal service, mail service, express mail, and electronic service.

Procedurally, the court clerk will return copies to the party/client with the court date completed on page 1. Having the service information on the back of each form will serve as an important resource for the client in arranging for the limited scope attorney and other parties to be served. The service information includes links to each type of proof of service and information sheets about service available on the California Courts website.

Other commenters suggested removing the attorney contact information from the caption on page 1 because the form will be completed by the litigant. In addition, a commenter suggested that the form include that service must be completed by a person who is at least age 18 and not a party to this case. The committee agreed to include the information on page 2 of the form.

***Response to Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-957)**

Three commenters made suggestions about form FL-957. One suggested minor, technical changes to the proof of service attached to the form. The committee agreed and incorporated them into the recommendations about the form. The committee also agreed and incorporated the changes suggested about adding a section specifically for electronic service and a link to a form that may be used for this purpose.

One commenter asked, "shouldn't there be a way for the hearing to come off calendar or at least a prompt that the client or limited scope attorney will take the hearing off calendar?" In response, the committee notes that the suggested change is not one that is normally included in Judicial Council forms. The committee does not recommend revising the form for this purpose. The attorney may follow local court procedures for taking the matter off calendar if he or she reaches an agreement with the client.

***Order on Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-958)**

The committee agreed with the minor, technical changes suggested by the three commenters to this form. The changes include switching the order of "Client/Party" to "to Party/Client" throughout the form for consistency with form FL-955, and using the term "may use" instead of "can use" in the notice box relating to a change of address form. Another minor technical change is to use boldface for the phrase "you now represent yourself in the case" so that the notification to the party/client is more prominent.

Responses to request for specific comments

Cost savings. The committee sought comments about whether the new procedure for limited scope representation will provide cost savings. Three courts responded. Although one court stated that it would not provide cost savings, two courts responded that it would. Specifically, the two courts responded that the number of hearings related to the withdrawal of the limited scope attorney would decrease. A court also noted that the proposal will offer a clearer time frame for when the withdrawal from limited scope representation occurs.

Implementation requirements. Four courts responded to the inquiry about implementation requirements for the courts. None of the courts responded that the changes would be burdensome to implement. All noted that staff will need to be trained, including staff at the filing window, data entry clerks, and courtroom clerks. One court provided the example that the filing window clerk will need to know the time frame for setting a court hearing when an *Objection* is filed. Another court noted that court clerks, courtroom assistants, judicial officers, and judicial assistants will also need to be trained about the new withdrawal procedures.

Each court responded that some changes will be needed to their case management systems. The new procedures will need to be integrated into the current system. Also, new case management codes will need to be created for the new forms, FL-955-INFO and FL-956. Another court noted that the configuration of its case management system will be minor. Finally, courts responded that the proposal will require them to update their training materials.

Impact on low- and moderate-income litigants. Three courts responded to this inquiry. One court responded that the proposal will have no impact. Another court responded that the impact is unknown. The third court responded that "[t]he increased ease in which an attorney may withdraw from a case may be a detriment to a self-represented litigant who disputes the withdrawal since they would have to file an objection and attend a hearing."

In response, the committee recognizes that the new process does shift the burden on the party in terms of requiring the party to dispute the proposed *Notice of Completion*. However, the committee anticipates that the cost to the party will actually decrease because the attorney will no longer be charging the party/client for his or her professional time to draft an application and proposed order to be relieved as counsel. Nor will the client be charged by the attorney for filing

fees and the attorney's cost for serving the documents. Instead, the party's costs may be limited to the fees for filing the *Objection* and the cost of serving the documents.

Finally, a private family law judge responded that "[t]his proposal will benefit low and moderate income litigants by encouraging lawyers to get involved for limited purposes or issues without fear of being drawn into an uncompensated quagmire of *pro per* litigation."

Timing of effective date. Only three courts responded to the question of timing, and they each agreed that two months from the Judicial Council approval of the committee's recommendations until their effective date will provide sufficient time for implementation.

Alternatives considered

The Family and Juvenile Law Advisory Committee considered changing the rule and forms based on comments received from the public and recommending that the Judicial Council adopt the recommendations effective January 1, 2017.

The committee decided to develop a new proposal to try to address the concerns and suggestions of commenters and circulate it for comment in the winter 2017 public comment cycle. Because there is no legislative mandate to revise the forms with a specified deadline for implementation, there was no detriment inherent in allowing more time to develop recommendations to the Judicial Council about simplifying the limited scope representation procedures in family court.

Implementation Requirements, Costs, and Operational Impacts

The committee anticipates that the recommendations will result in some costs incurred by the courts to revise forms, train court staff about the changes to the rules and forms included in this proposal, and possibly revise local court rules and forms so they are consistent with the changes adopted by the Judicial Council. However, the committee expects that the changes will save resources for the courts in the long term by clarifying and simplifying procedures.

Relevant Strategic Plan Goals and Operational Plan Objectives

The rule and forms in the report support the policies underlying Goal I, Access, Fairness, and Diversity, by increasing the availability of legal representation and providing a continuum of legal services in family court. They respond to the identified concern that attorneys would be more willing to accept limited scope assignments but for the difficulty associated with withdrawing from that assignment when the work has been completed.

In addition, the rule and forms in the report increase court efficiencies by eliminating, in most cases, the need for the clerk to (1) process the application to be relieved as counsel each time a party/client fails to substitute out of the case on completion of the representation, (2) process the proposed order submitted with the application, and/or (3) set a hearing on the matter.

Attachments

1. Cal. Rules of Court, rule 5.425, at pages 17−20
2. Forms FL-950, FL-955, FL-955-INFO, FL-956, FL-957, and FL-958, at pages 21−33[4]
3. W17-05 chart of comments, at pages 34−69
4. Attachment A: Limited Scope Representation, Current Withdrawal Procedure
5. Attachment B: Limited Scope Representation, Recommended Withdrawal Procedure
6. Attachment C: SPR16-18 chart of comments

[4] Please note that the recommended revisions to forms FL-955, FL-956, and FL-957 are so extensive that these revisions are not identified on the attached forms by using shading, as is the typical practice. The changes are, however, described in the body of this invitation to comment.

Rule 5.425 of the California Rules of Court is amended, effective September 1, 2017, to read:

Rule 5.425. Limited scope representation; application of rules

(a)–(c) * * *

(d) Noticed limited scope representation

(1) A party and an attorney must provide the required notice of their agreement for limited scope representation by serving other parties and filing with the court a *Notice of Limited Scope Representation* (form FL-950).

(2) After the notice in (1) is received and until either a ~~substitution of attorney~~ *Substitution of Attorney—Civil* (form MC-050), a *Notice of Completion of Limited Scope Representation* (form FL-955) with the "Final" box checked, or an order to be relieved as attorney is filed and served:

(A) The attorney must be served only with documents that relate ~~only~~ to the issues identified in the *Notice of Limited Scope Representation* (form FL-950); and

(B) ~~The party must be served directly with~~ Documents that relate to all other issues outside the scope of the attorney's representation must be served directly on the party or the attorney representing the party on those issues.

(3) Electronic service of notices and documents described in this rule is permitted if the client previously agreed in writing to accept service of documents electronically from the attorney.

(4) Before being relieved as counsel, the limited scope attorney must file and serve the order after hearing or judgment following the hearing or trial at which he or she provided representation, unless:

(A) Otherwise directed by the court; or

(B) The party agreed in the *Notice of Limited Scope Representation* (form FL-950) that completion of the order after hearing is not within the scope of the attorney's representation.

(e) Procedures to be relieved as counsel on completion of limited scope representation if client has not signed a substitution of attorney

An attorney who has completed the tasks specified in the *Notice of Limited Scope Representation* (form FL-950) may use the following procedures to request that he

or she be relieved as attorney ~~in cases in which the attorney has appeared before the court as an attorney of record and~~ if the client has not signed a *Substitution of Attorney—Civil* (form MC-050):

(1) ~~*Application*~~ *Notice of completion of limited scope representation*

~~An application to be relieved as attorney on completion of limited scope representation under Code of Civil Procedure section 284(2) must be directed to the client and made on the *Application to Be Relieved as Counsel Upon Completion of Limited Scope Representation* (form FL-955).~~ The limited scope attorney must serve the client with the following documents:

(A) A *Notice of Completion of Limited Scope Representation* (form FL-955) with the "Proposed" box marked and the deadline for the client to file the *Objection* completed by the attorney;

(B) *Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO); and

(C) A blank *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956).

~~(2) *Filing and service of application*~~

~~The application to be relieved as attorney must be filed with the court and served on the client and on all other parties or attorneys for parties in the case. The client must also be served with a blank *Objection to Application to Be Relieved as Counsel on Completion of Limited Scope Representation* (form FL-956).~~

~~(3)~~(2) *No objection*

~~If no objection is served and filed with the court within 15 days from the date that the *Application to Be Relieved as Counsel on Completion of Limited Scope Representation* (form FL-955) is served on the client, the attorney making the application must file an updated form FL-955 indicating the lack of objection, along with a proposed *Order on Application to Be Relieved as Counsel on Completion of Limited Scope Representation* (form FL-958). The clerk must then forward the order for judicial signature.~~ If the client does not file and serve an *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) within 10 calendar days from the date that the *Notice of Completion of Limited Scope Representation* (form FL-955) was served, the limited scope attorney:

(A) Must serve the client and the other parties or, if represented, their attorneys with a *Notice of Completion of Limited Scope Representation* (form FL-955) with the "Final" box marked;

(B) Must file the Final *Notice of Completion of Limited Scope Representation* (form FL-955) with the court, and attach the proofs of service of both the "Proposed" and "Final" *Notices of Completion*;

(C) May not be charged a fee to file the final *Notice of Completion*, even if the attorney has not previously made an appearance in the case; and

(D) Is deemed to be relieved as attorney on the date that the final *Notice of Completion* is served on the client.

~~(4)~~(3) *Objection*

~~If an objection to the application is served and filed within 15 days, the clerk must set a hearing date on the *Objection to Application to Be Relieved as Counsel on Completion of Limited Scope Representation* (form FL-956). The hearing must be scheduled no later than 25 days from the date the objection is filed. The clerk must send the notice of the hearing to the parties and the attorney.~~ If the client files the *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) within 10 calendar days from the date that the proposed *Notice of Completion* was served, the following procedures apply:

(A) The clerk must set a hearing date on the *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) to be conducted no later than 25 court days from the date the *Objection* is filed.

(B) The court may charge a motion fee to file the *Objection* and schedule the hearing.

(C) The *Objection*—including the date, time, and location of the hearing—must be served on the limited scope attorney and all other parties in the case (or on their attorneys, if they are represented). Unless the court orders a different time for service, the *Objection* must be served by the deadline specified in *Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO).

(D) If the attorney wishes, he or she may file and serve a *Response to Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-957). Unless otherwise directed by the court,

any response should be filed with the court and served on the client and other parties, or their attorneys, at least nine court days before the hearing.

(E) Unless otherwise directed by the court, the attorney must prepare the *Order on Completion of Limited Scope Representation* (form FL-958) and obtain the judge's signature.

(F) The attorney is responsible for filing and serving the *Order* on the client and other parties after the hearing, unless the court directs otherwise.

(G) If the court finds that the attorney has completed the agreed-upon work, the representation is concluded upon service of the signed *Order on Completion of Limited Scope Representation* (form FL-958).

~~(5) *Service of the order*~~

~~If no objection is served and filed and the proposed order is signed, the attorney who filed the *Application to Be Relieved as Counsel on Completion of Limited Scope Representation* (form FL-955) must serve a copy of the signed order on the client and on all parties or the attorneys for all parties who have appeared in the case. The court may delay the effective date of the order relieving the attorney until proof of service of a copy of the signed order on the client has been filed with the court.~~

(f) * * *

ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	***FOR COURT USE ONLY*** ***DRAFT*** ***NOT APPROVED BY THE JUDICIAL COUNCIL***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	
NOTICE OF LIMITED SCOPE REPRESENTATION ☐ **AMENDED**	CASE NUMBER:

1. Attorney *(name):*
   and party (*name):*
   have an agreement that attorney will provide limited scope representation to the party.

2. The attorney will represent the party as follows:
   - ☐ At the hearing on *(date):* ☐ and for any continuance of that hearing
   - ☐ Until resolution of the issues checked on this form by trial or settlement
   - ☐ Other (*specify duration of representation):*

   ☐ Submitting to the court an order after hearing or judgment is not within the scope of the attorney's representation.

3. Attorney will serve as "attorney of record" for the party **only** for the following issues in the case:
   a. ☐ Child custody and visitation (parenting time): (1) ☐ Establish (2) ☐ Enforce (3) ☐ Modify *(specify):*

   b. ☐ Child support: (1) ☐ Establish (2) ☐ Enforce (3) ☐ Modify *(describe in detail):*

   c. ☐ Spousal or domestic partner support: (1) ☐ Establish (2) ☐ Enforce (3) ☐ Modify *(describe in detail):*

   d. ☐ Restraining order: (1) ☐ Establish (2) ☐ Enforce (3) ☐ Modify *(describe in detail):*

   e. ☐ Division of property *(describe in detail):*

Form Adopted for Mandatory Use
Judicial Council of California
FL-950 [Rev. September 1, 2017]

Cal. Rules of Court, rule 5.425
www.courts.ca.gov

PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	CASE NUMBER:

3. f. ☐ Pension issues *(describe in detail):*

g. ☐ Contempt *(describe in detail):*

h. ☐ Other *(describe in detail):*

i. ☐ See attachment 3i.

4. **By signing this form, the party agrees to sign *Substitution of Attorney—Civil* (form MC-050) when the representation is completed.**

5. The attorney named above is "attorney of record" and available for service of documents only for those issues specifically checked on pages 1 and 2. For all other matters, the party must be served directly. The party's name, address, and phone number are listed below for that purpose.

Name:
Address *(for the purpose of service):*

Phone: Fax Number:

This notice accurately sets forth all current matters on which the attorney has agreed to serve as "attorney of record" for the party in this case. The information provided in this document is not intended to set forth all of the terms and conditions of the agreement between the party and the attorney for limited scope representation.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PARTY)

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF ATTORNEY)

PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	CASE NUMBER:

PROOF OF SERVICE: ☐ **PERSONAL SERVICE** ☐ **MAIL** ☐ **OVERNIGHT DELIVERY** ☐ **ELECTRONIC SERVICE**

1. At the time of service, I was at least 18 years of age and **not a party to this legal action** (not applicable to electronic service).
2. I served a copy of *Notice of Limited Scope Representation* (form FL-950) as follows:
   a. ☐ **Personal service.** The document listed above was given to
      (1) Name of person served:
      Address where served:
      Date served:
      Time served:
      (2) Name of person served:
      Address where served:
      Date served:
      Time served:
   b. ☐ **Mail.** I placed a copy of the form listed above in the U.S. mail in a sealed envelope with postage fully prepaid. The envelope was addressed and mailed as indicated below. I live or work in the county where the form was mailed.
      (1) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
      (2) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
   c. ☐ **Overnight delivery.** I placed a copy of the form listed above in a sealed envelope, with Express Mail postage fully prepaid, and deposited it in a post office mailbox, subpost office, substation, mail chute, or other like facility maintained by the U.S. Postal Service for receipt of Express Mail. The envelope was addressed and mailed as indicated below. I live or work in the county where the form was deposited for overnight delivery.
      (1) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
      (2) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
   d. ☐ **Electronic service.** I electronically served the document listed above as described in the attached proof of electronic service (*Proof of Electronic Service* (form POS-050) may be used for this purpose).
3. Server's information
   a. Name:
   b. Home or work address:
   c. Telephone number:

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON SERVING NOTICE)

ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	***FOR COURT USE ONLY*** ***DRAFT*** ***NOT APPROVED BY THE JUDICIAL COUNCIL***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	
NOTICE OF COMPLETION OF LIMITED SCOPE REPRESENTATION ☐ Proposed ☐ Final	CASE NUMBER:

1. In accordance with the terms of an agreement between *(name):* ☐ petitioner ☐ respondent ☐ other party/claimant and myself, I agreed to provide limited scope representation.
2. I was retained as attorney of record for the services described in the attached ☐ *Notice of Limited Scope Representation* (form FL-950) ☐ Other *(specify):* *(Do not include your fee agreement.)*
3. I completed all services within the scope of my representation on *(date):*
4. The last known information for the ☐ petitioner ☐ respondent ☐ other party/claimant *(for the purpose of service)* is
   Mailing address:
   Telephone number:
   E-mail address:

NOTICE TO PARTY/CLIENT:
Your attorney has served this *Notice of Completion of Limited Scope Representation* stating that he or she has completed the tasks that you agreed the attorney would perform. For more information, read *Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO).

IF THIS FORM IS MARKED "☒ PROPOSED"

You have the right to object if you believe that the attorney has not finished everything that he or she agreed to do. To object, you must do the following:

(1) Complete the enclosed *Objection to Notice of Completion of Limited Scope Representation* (form FL-956).

(2) Have the *Objection* served on your limited scope attorney and the other parties in the case by a person who is at least 18 years of age and not a party in the case.

(3) File the *Objection* and proof of service with the court.

(4) Have the *Objection* filed and served by the following date: _____

IF THIS FORM IS MARKED "☒ FINAL"

You did not object to the proposed *Notice of Completion,* which was served on *(date):* _____
by *(specify type of service):* _____

(1) The attorney no longer represents you in your limited scope action.

(2) YOU NOW REPRESENT YOURSELF IN ALL ASPECTS OF THIS CASE.

(3) All legal documents will be directed to you at your last known address, shown above in item 4.

If that address is incorrect, you need to let the court and the other parties in the case know your correct mailing address as soon as possible. You may use *Notice of Change of Address or Other Contact Information* (form MC-040) for this purpose.

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF ATTORNEY)

PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	CASE NUMBER:

PROOF OF SERVICE: ☐ **PROPOSED** ☐ **FINAL** **NOTICE OF COMPLETION OF LIMITED SCOPE REPRESENTATION**

1. At the time of service, I was at least 18 years of age and **not a party to this legal action.**
2. I served a copy of *(specify):*
   ☐ Proposed *Notice of Completion of Limited Scope Representation* (form FL-955), a blank *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956), and *Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO).
   ☐ Final *Notice of Completion of Limited Scope Representation* (form FL-955).
3. I served the above forms as follows*:*
   a. ☐ **Personal service.** The documents listed above were given to
      (1) Name of person served:
      Address where served:
      Date served:
      Time served:
      (2) Name of person served:
      Address where served:
      Date served:
      Time served:
   b. ☐ **Mail.** I placed a copy of the forms listed above in the U.S. mail in a sealed envelope with postage fully prepaid. The envelope was addressed and mailed as indicated below. I live or work in the county where the forms were mailed.
      (1) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
      (2) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
   c. ☐ **Overnight delivery.** I placed a copy of the forms listed above in a sealed envelope, with Express Mail postage fully prepaid, and deposited it in a post office mailbox, subpost office, substation, mail chute, or other like facility maintained by the U.S. Postal Service for receipt of Express Mail. The envelope was addressed and mailed as indicated below. I live or work in the county where the forms were deposited for overnight delivery.
      (1) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
      (2) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
   d. ☐ **Electronic service.** I electronically served the document listed above as described in the attached proof of electronic service (*Proof of Electronic Service* (form POS-050) may be used for this purpose).
4. Server's information
   a. Name:
   b. Home or work address:
   c. Telephone number:

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON SERVING NOTICE)

FL-955-INFO Information for Client About Notice of Completion of Limited Scope Representation

1 Why did I get this Proposed *Notice of Completion of Limited Scope Representation* (form FL-955)?

When you and the limited scope attorney (attorney) signed the *Notice of Limited Scope Representation* (form FL-950), you agreed to sign the *Substitution of Attorney—Civil* (form MC-050) form when the attorney completed the tasks listed on that form.

You have not yet signed that *Substitution of Attorney* form. By serving you a Proposed *Notice of Completion* (form FL-955), your attorney is telling you that he or she has completed the tasks agreed to and is taking action to be removed from your case.

2 Why is it marked "Proposed"?

The attorney wants to give you a chance to respond if you agree or disagree that he or she completed the work for you.

3 What do I do if I agree?

You can contact the attorney and say that you agree. But you don't have to to take any action.

4 What if I don't take any action?

After the 10th day, the attorney will serve you and the other party a *Notice of Completion* form marked "Final." It will then be filed with the court along with the proofs of service of the "Proposed" and "Final" *Notices of Completion*. When the "Final" *Notice* is served on you, the attorney no longer represents you. Unless you have a new attorney, you now represent yourself.

5 What if I don't agree and think that the attorney is not finished with the work we agreed to?

Contact the attorney right away and see if you can work it out. But, if you can't, YOU MUST ACT RIGHT AWAY to file papers and ask for a court hearing.

6 How fast do I have to act?

You have only **10 days** from the date that form FL-955 was personally served on you to file papers with the court. If the form was served another way, the time to act is increased by a short time.

Look at the *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956). The attorney is required to fill in the date by which you have to file the form. To understand how that date was calculated, read 7.

7 What do I have to do by the 10th day if I disagree?

☑ Fill out form FL-956, *Objection to Proposed Notice of Completion of Limited Scope Representation*.

You should have been served with a blank form FL-956 along with the *Notice of Completion of Limited Scope Representation* that was marked "Proposed." Form FL-956 is also available online at *courts.ca.gov/documents/fl956.pdf*.

☑ Next, make 2 copies of the completed *Objection* (form FL-956).

☑ File the original *Objection* with the court clerk by the following deadlines:

10 calendar days	from the date that form FL-955 was personally served on you.
10 calendar days, *PLUS* *2 court days*	from the date that form FL-955 was served on you by e-mail, facsimile, express mail, or other overnight delivery.
10 calendar days, *PLUS* *5 calendar days*	from the date that form FL-955 was served to you by mail within the state of California.

Note: The court clerk may reject your *Objection* if it is not served and filed by the correct deadline.

☑ The court clerk will set the hearing no later than 25 court days from the date you file the *Objection* and give you filed copies of the *Objection* so that they can be served as described in item 11.

8 Is there a filing fee for the *Objection*?

Yes, a fee is due when you file the *Objection* (form FL-956) because the court will have to set a hearing on the *Objection*. If you cannot afford to pay and don't have a fee waiver order for your case yet, you can ask the court to waive the fee by completing and filing form FW-001, *Request to Waive Court Fees* and form FW-003, *Order on Court Fee Waiver*.

FL-955-INFO Information for Client About Notice of Completion of Limited Scope Representation

9 What else needs to be done?

Copies of the filed *Objection* have to be "served" on your attorney and the other party in the case, or the other party's attorney. Someone else who is at least 18 years old must do it (for example, a friend, relative, sheriff, or professional process server). The server must complete a proof of service, which must be filed with the court.

10 How can the *Objection* be served?

A copy of the filed *Objection* can be served by:

- *Personal service*. The server hand delivers the papers. The server may leave the papers near the person if he or she will not take them.
- *Mail service*. The server places a copy of all documents in a sealed envelope and mails them to the address of each person being served. The server must be at least 18 years old and live or work in the county where the mailing took place.
- *Electronic* service. If you and your attorney have agreed in writing that you can send each other documents by e-mail or other electronic transmission, you can serve each other that way.
- *Service by express mail or overnight delivery*. An authorized courier or driver authorized by the express service delivers the papers to a person's business or residence.

11 When does the *Objection* need to be served?

Everyone in the case needs to be served with the *Objection*, as described below, unless otherwise ordered by the court:

16 court days before the hearing	if personal service is used.
16 court days *PLUS* *2 court days* before the hearing	if service is by fax, electronic service, or overnight delivery.
16 court days *PLUS* *5 calendar days* before the hearing	if service is by mail within California. *For service outside of California, see item* 15.

12 What does my limited scope attorney do if I file the *Objection*?

The attorney may file form FL-957, *Response to Objection to Notice of Completion of Limited Scope Representation,* with the court at least nine court days before the hearing, and serve a copy on you and all the parties (or their attorneys) in the case. The hearing will go forward even if the attorney does not file and serve a *Response*.

13 Get ready for your hearing

☑ Take at least two copies of your documents and filed forms to the hearing.

☑ Write down the tasks that the attorney agreed to do but has not completed and bring that list to court.

☑ Bring any paperwork that helps prove that the work is incomplete.

Important! Your agreement with your attorney is private and should not go into the court file. Letters between you and your lawyer are also private. If you want to bring these documents to court to show why you don't think the tasks are completed, make two copies. Keep the original and give one copy to the judge and the other to the attorney at the hearing. These documents will help the judge make the decision, but they should not be filed with form FL-956, *Objection*.

14 What happens at the hearing?

The judge will decide if your attorney has finished the work agreed to or not. You will get an *Order on Completion of Limited Scope Representation* (form FL-958) signed by the judge. The attorney will usually prepare the order, unless the court decides otherwise.

15 Do you have questions or need help?

Talk to a lawyer or contact the Family Law Facilitator or Self-Help Center for information and assistance about any subject included in this form. Go to www.courts.ca.gov/selfhelp-courtresources.htm.

PARTY: NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS:	*FOR COURT USE ONLY*
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	***DRAFT*** ***NOT APPROVED BY THE JUDICIAL COUNCIL***
PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	
OBJECTION TO PROPOSED NOTICE OF COMPLETION OF LIMITED SCOPE REPRESENTATION HEARING DATE: TIME: DEPARTMENT OR ROOM:	CASE NUMBER:

1. I am the ☐ petitioner ☐ respondent ☐ other parent/claimant in this case.
2. I object to the proposed *Notice of Completion of Limited Scope Representation* (form FL-955) that I received from my attorney. *(Attach a copy if available.)*
3. I believe that my attorney has not finished everything he or she agreed to do in the *Notice of Limited Scope Representation* (form FL-950). I understand that this is the only reason that I can object to my attorney's proposed notice of completion.
4. My attorney has not completed these specific services:

5. ☐ Before I filed this *Objection,* I attempted to contact the attorney and resolve our difference of opinion about whether the representation was complete. That effort was unsuccessful.
6. I request that the court not allow the attorney to withdraw from representation until those services have been completed.

NOTICE

If you want to object to the proposed *Notice of Completion of Limited Scope Representation* (form FL-955), you must complete this *Objection* and file it with the court clerk by **10 calendar days** after the date that the attorney served the proposed *Notice of Completion*.

Protect the confidentiality of the communications between you and your attorney! This form serves as your declaration to the court in support of your *Objection.* Do not file any other declarations with this form. Do not file any other papers that you received or sent to your attorney about your case! Instead, you may bring the papers or other evidence with you to the court hearing.

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.
Date:

(TYPE OR PRINT NAME)

(SIGNATURE)

Form Adopted for Mandatory Use
Judicial Council of California
FL-956 [Rev. September 1, 2017]

Cal. Rules of Court, rule 5.425
www.courts.ca.gov

INFORMATION FOR SERVING FORM FL-956
(This page does not need to be filed with the *Objection.*)

A copy of the filed *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) must be served on the limited scope attorney and the other parties in the case (or on their attorneys). The document must be served by a person who is at least 18 years of age and not a party in the case, unless electronic service is used. For more information, read *Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO).

1. The *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) can be served on the limited scope attorney and on the other parties in the case (or their attorneys, if they have one) by:

a.	**Personal service.**	The server hand delivers the *Objection*. The server then fills out a proof of service and gives it to you. *Proof of Personal Service* (form FL-330) may be used for this purpose. If the server needs instructions, give him or her *Information Sheet for Proof of Personal Service* (form FL-330-INFO).
b.	**Mail**	The server places a copy of the *Objection* in the U.S. mail, in a sealed envelope with postage fully prepaid and addressed. The server must live or work in the county where the form was mailed. The server then fills out a proof of service and gives it to you. *Proof of Service by Mail* (form FL-335) may be used for this purpose. If the server needs instructions, give him or her an *Information Sheet for Proof of Service by Mail* (form FL-335-INFO).
c.	**Overnight Delivery/Express Mail**	The server places a copy of the *Objection* in a sealed envelope, with Express Mail postage fully prepaid, and deposits it in a post office mailbox, subpost office, substation, mail chute, or other like facility maintained by the U.S. Postal Service for receipt of Express Mail. *Proof of Service—Civil* (form POS-040) may be used for this purpose.
d.	**Electronic Service**	If you and your limited scope attorney have agreed in writing that you can send each other documents by e-mail or other electronic transmission, you—the client/party in the case—can serve the *Objection* that way. You would then fill out a proof of service. *Proof of Electronic Service* (form POS-050) may be used for this purpose.

2. The deadline for service depends on how the *Objection* was served. See item **11** in *Information for Client About Notice of Completion of Limited Scope Representation* (form FL-955-INFO) for a list of filing deadlines.

3. Make at least two copies of the completed proof of service. Take the original and two copies to the clerk's office (or e-file it, if available in your court) at least five court days before your hearing.

ATTORNEY: STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	***FOR COURT USE ONLY***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	***DRAFT*** ***NOT APPROVED BY THE JUDICIAL COUNCIL***
PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	
RESPONSE TO OBJECTION TO PROPOSED NOTICE OF COMPLETION OF LIMITED SCOPE REPRESENTATION HEARING DATE: TIME: DEPARTMENT OR ROOM:	CASE NUMBER:

1. I am the limited scope attorney for ☐ petitioner ☐ respondent ☐ other parent/claimant in this case.
2. In response to the *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) *(select one)*
   a. ☐ I agree to continue representation.
   b. ☐ I request an order to be relieved as the limited scope attorney in this matter.

Notice: Protect the confidentiality of the communications between you and your client!

Do not attach declarations to the *Response to Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-957).

If you choose to do so, attach only a copy of the proposed *Notice of Completion of Limited Scope Representation* (form FL-955) that was served on the client. Do not attach or file any other papers that you received or sent to your client about the case. Instead, you may bring the papers or other evidence with you to the court hearing.

Following the hearing on the *Objection,* you must file and serve an *Order on Completion of Limited Scope Representation* (form FL-958) as soon as possible, unless otherwise directed by the court.

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

▶ _____
(SIGNATURE OF PERSON SERVING NOTICE)

PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	CASE NUMBER:

PROOF OF SERVICE: ☐ **PERSONAL SERVICE** ☐ **MAIL** ☐ **OVERNIGHT DELIVERY** ☐ **ELECTRONIC SERVICE**

1. At the time of service, I was at least 18 years of age and **not a party to this legal action** (not applicable to electronic service).
2. I served a copy of *Response to Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-957) as follows:
   a. ☐ **Personal service.** The document listed above was given to
      (1) Name of person served:
      Address where served:
      Date served:
      Time served:
      (2) Name of person served:
      Address where served:
      Date served:
      Time served:
   b. ☐ **Mail.** I placed a copy of the form listed above in the U.S. mail, in a sealed envelope with postage fully prepaid. The envelope was addressed and mailed as indicated below. I live or work in the county where the form was mailed.
      (1) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
      (2) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
   c. ☐ **Overnight delivery.** I placed a copy of the form listed above in a sealed envelope, with Express Mail postage fully prepaid, and deposited it in a post office mailbox, subpost office, substation, mail chute, or other like facility maintained by the U.S. Postal Service for receipt of Express Mail. The envelope was addressed and mailed as indicated below. I live or work in the county where the form was deposited for overnight delivery.
      (1) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
      (2) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
   d. ☐ **Electronic service.** I electronically served the document listed above as described in the attached proof of electronic service (*Proof of Electronic Service* (form POS-050) may be used for this purpose).
3. Server's information
   a. Name:
   b. Home or work address:
   c. Telephone number:

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON SERVING NOTICE)

ATTORNEY: STATE BAR NO.:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	***DRAFT*** ***NOT APPROVED BY THE JUDICIAL COUNCIL***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	
ORDER ON COMPLETION OF LIMITED SCOPE REPRESENTATION	CASE NUMBER:

1. The proceeding on the party's *(name):* objection to the attorney's *(name):* proposed *Notice of Completion of Limited Scope Representation* (form FL-955) was heard
   a. on *(date):* at *(time):* in Dept.: Room:
      by Judge *(name):* ☐ Temporary Judge
   b. The following persons were present at the hearing:
      ☐ Petitioner ☐ Attorney *(name):*
      ☐ Respondent ☐ Attorney *(name):*
      ☐ Other Parent/Claimant ☐ Attorney *(name):*

2. **THE COURT FINDS**
   a. ☐ The attorney demonstrated that he or she has completed the services that the party and attorney agreed that the attorney would perform in the *Notice of Limited Scope Representation* (form FL-950).
   b. ☐ The party demonstrated that the attorney has not completed the services that the party and the attorney agreed would be performed in the *Notice of Limited Scope Representation* (form FL-950).
   c. ☐ Other *(specify):*

3. **THE COURT ORDERS**
   a. ☐ The attorney is relieved as attorney of record for the party/client.
   b. ☐ The request of the attorney to be relieved of limited scope representation is denied.
      (1) ☐ effective immediately.
      (2) ☐ effective upon the filing of the proof of service of this signed order on the client.
      (3) ☐ effective on *(specify date):*
   c. ☐ The court further orders *(specify):*
   d. ☐ All legal documents and notices must be served directly on the party using the following address or contact information:
      Mailing address:
      Telephone number: E-mail address:
   e. The attorney must serve copies of this order on the parties and their attorneys of record and file the proof of service with the court.

Date:

JUDGE OF THE SUPERIOR COURT

NOTICE TO PARTY/CLIENT: If the court relieved the limited scope attorney as your attorney of record, **you now represent yourself in the case**. You may wish to seek other legal counsel to represent you. You must keep the court and the other parties in your case informed of your current mailing address and contact information. You may use *Notice of Change of Address or Other Contact Information* (form MC-040) for this purpose.

Form Adopted for Mandatory Use
Judicial Council of California
FL-958 [Rev. September 1, 2017]

Cal. Rules of Court, rule 5.425
www.courts.ca.gov

PETITIONER: RESPONDENT: OTHER PARENT/CLAIMANT:	CASE NUMBER:

PROOF OF SERVICE: ☐ **PERSONAL SERVICE** ☐ **MAIL** ☐ **OVERNIGHT DELIVERY** ☐ **ELECTRONIC SERVICE**

1. At the time of service, I was at least 18 years of age and **not a party to this legal action** (not applicable to electronic service).

2. I served a copy of *Order on Completion of Limited Scope Representation* (form FL-958) as follows:

   a. ☐ **Personal service.** The document listed above was given to
      (1) Name of person served:
      Address where served:
      Date served:
      Time served:
      (2) Name of person served:
      Address where served:
      Date served:
      Time served:

   b. ☐ **Mail.** I placed a copy of the form listed above in the U.S. mail, in a sealed envelope with postage fully prepaid. The envelope was addressed and mailed as indicated below. I live or work in the county where the form was mailed.
      (1) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
      (2) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*

   c. ☐ **Overnight delivery.** I placed a copy of the form listed above in a sealed envelope, with Express Mail postage fully prepaid, and deposited it in a post office mailbox, subpost office, substation, mail chute, or other like facility maintained by the U.S. Postal Service for receipt of Express Mail. The envelope was addressed and mailed as indicated below. I live or work in the county where the form was deposited for overnight delivery.
      (1) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*
      (2) Name of person served:
      Address where served:
      Date of mailing:
      Place of mailing *(city and state):*

   d. ☐ **Electronic service.** I electronically served the document listed above as described in the attached proof of electronic service (*Proof of Electronic Service* (form POS-050) may be used for this purpose).

3. Server's information
   a. Name:
   b. Home or work address:
   c. Telephone number:

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.
Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PERSON SERVING NOTICE)

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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.	Richard D. Brover Attorney at Law	A	The proposed changes make good sense. In my Family Law practice, in Limited Scope cases, there is currently an unfair burden imposed open my office in 'getting out' of a case. I will ask the client, many times, and often send repeated letters, with a Substitution form and a postage paid envelope. I do this to avoid the expense and delay of a Court appearance. The new procedure will make it easier for attorneys (and therefore, less expensive for clients) to take on Limited Scope Representation, with the knowledge that an attorney can do the work for which he or she was hired, and then not (generally) be obliged to go to Court to get out of the case.	No response required. No response required. No response required.
2.	Dubrovsky Law Gary Vadim Dubrovsky Partner	AM	All comments are included under specific headings below.	See responses to specific provisions below.
3.	Virginia Johnson Staff Attorney Superior Court of San Diego County	N/I	All comments are included under specific headings below.	See responses to specific provisions below.
4.	Levitt & Quinn Family Law Center Ana M. Storey Attorney	N/I	The simplified procedure incorporating the new Notice of Completion of Limited Scope Representation (form FL-955) is an	No response required.

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

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**
			improvement to the current procedure. It allows attorneys to end the representation when we have properly completed the services we contracted with the client to provide without forcing an unnecessary court hearing that further taxes our and the court's resources. And importantly, it protects a client's right to seek relief if their attorney inappropriately attempts to withdraw prior to the completion of agreed upon services. Additional comments are included under specific headings below.	See responses to specific provisions below.
5.	Limited Scope Law Group Christopher Stefan Attorney North Hollywood	N	All comments are included under specific headings below.	See responses to specific provisions below.
6.	State Bar of California The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) Saul Bercovitch Legislative Counsel	A	The proposed changes would simplify the current procedure for withdrawal while maintaining protections for the litigant and provide an opportunity to request a hearing to examine the attorney's assertions of fulfilling all limited scope tasks. With a simplified process to be relieved as counsel, more attorneys are expected to adopt this legal service delivery model. As a result, attorneys will be offering this method of representation	No response required.

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**
			and market these affordable legal services to historically underrepresented and vulnerable populations, thus improving access to justice for low and moderate-income litigants. All comments are included under specific headings below. Additional comments are included under specific headings below.	See responses to specific provisions below.
7.	State Bar of California Standing Commission on the Delivery of Legal Services Sharon Ngim Program Development & Staff Liaison	A	Forms FL-306 and FL-307: The proposed changes are beneficial for low and moderate income litigants. Splitting the form into two streamlines the process for requesting a continuance and providing notice of the request, which will avoid duplicate filing fees and increase efficiency for the court.	No response required.
8.	Superior Court of Los Angeles County Los Angeles County Superior Court	AM	All comments are included under specific headings below.	See responses to specific provisions below.
9.	Superior Court of Orange County Family and Juvenile Orange County Court Managers	N/I	All comments are included under specific headings below.	See responses to specific provisions below.
10.	Superior Court of Riverside County Susan Ryan Chief Deputy of Legal Services	A	All comments are included under specific headings below.	See responses to specific provisions below.
11.	Superior Court of San Diego County	AM	All comments are included under specific	See responses to specific provisions below.

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**
	Michael M. Roddy Executive Officer		headings below.	
12.	M. Sue Talia Private Family Law Judge	A	I am pleased that the Judicial Council has undertaken the simplification of Rule 5.425. As an expert in limited scope for over 20 years, I am often the first contact when a lawyer has a question about the implementation, and most particularly, the ending of a limited scope engagement. California lawyers have been complaining to me since the very first iteration of the prior Rule 5.71. They feel that the current rule places them at the mercy of unsophisticated clients who don't understand the importance of the Substitution of Attorney. I like the fact that the proposed rule includes two methodologies for withdrawal which are instigated by the lawyer. The complete comment is attached. All comments relating to the rule and forms and request for specific comments are included under specific headings below.	No response required.
13.	TCPJAC/CEAC Joint Rules Subcommittee TCPJAC/CEAC	A	Agree with proposed changes.	No response required.

COMMENTS APPLICABLE TO RULE 5.425

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

Commentator	Comment	Committee Response
Virginia Johnson Staff Attorney Superior Court of San Diego County	* Can a party have both an attorney of record for all purposes and a LSA? It is my legal opinion that a party cannot have a general attorney of record and a noticed LSA. The plain language and history of *CRC, rule 5.425* provide that a *noticed representation* limited scope attorney can only represent an SRL.	The Family and Juvenile Law Advisory Committee follows the lead of the State Bar of California commissions (noted below) on the subject of limited scope representation in adopting rules that promote the expansion of limited scope services. The committee does not recommend amending rules or revising forms to preclude a party from having a limited scope attorney and a general attorney of record. *Rule 5.425* The committee does not agree with the commentator's interpretation of rule 5.425. Rule 5.425(c) defines the two types of limited scope representation—undisclosed representation and noticed representation. In undisclosed representation, the attorney does not make an appearance in the case, but instead drafts or assists in drafting legal documents. In noticed representation, the attorney actually appears in the case to represent the client, and must be substituted out or relieved of his or her duty to the client by the court following that appearance. So, the rule specifies that, of the two types of representation, only an attorney providing noticed limited scope can represent the client in court. Rule 5.425 does not address the work of the limited scope attorney in relation to a general attorney hired by the same client. Further, the rule does not state nor infer that a party is precluded from having a general attorney of record and a noticed limited scope attorney.

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

COMMENTS APPLICABLE TO RULE 5.425		
Commentator	**Comment**	**Committee Response**
	The purpose of a noticed LSA is to provide legal assistance to SRLs who cannot afford to retain a lawyer to handle their entire case. See *Report on Limited Scope Legal Assistance with Initial Recommendations dated October 2001 with Initial Recommendations Approved by the Board of Governors of the State Bar of California on July 28, 2001*.	The commentator's statement suggests that the only purpose of limited scope representation is to help litigants who are without the financial means to hire a full-service attorney. The *Report* cited by the commentator written by the Limited Representation Committee of the California Commission on Access to Justice in October 2001, however, does not make such a statement. On the contrary, the *Report on Limited Scope Legal Assistance with Initial Recommendations*[1] notes on page 2 that *in addition*, the practice is also used to provide the consumers of legal services with greater control over their legal matters and has been an accepted practice for many years, particularly in certain areas of law such as bankruptcy and corporate law. So, too, individuals can retain the same authority and flexibility by using limited scope legal assistance. Further, the Report notes that corporate clients may use limited representation to try reduce the overall legal costs by having in-house counsel oversee a project and perform many of the tasks, while retaining outside specialists, such as tax, real estate, or corporate finance

[1] The full report is found at: http://www.lians.ca/sites/default/files/documents/report_on_limited_scope_legal_assistance-california.pdf

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

COMMENTS APPLICABLE TO RULE 5.425		
Commentator	**Comment**	**Committee Response**
		lawyers, to provide specific advice on specific questions.[2] In family law cases, the full-representation attorney may do the same, for example, by contracting with, or having the client contract with a specialist to prepare a Qualified Domestic Relations Order for the division of a party's pension, or a forensic accountant to assist in the division of a community property business.
	Presently, both rule 5.425 and form FL-950 provide that after the *Notice of Limited Scope Representation* is served on the other parties and filed with the court, the limited scope attorney must be served with documents that relate only to the issues identified in the Notice. Documents that relate to all other issues must be served directly on the party. *CRC, rule 5.425(d)(2); FL-950 at p.2, #5.* Logic dictates that the party would not be served directly with all other documents if that party is represented by another attorney.	No response required.
	Having an LSA and a general attorney of record for all other matters also creates conflicts under the Rules of Professional Conduct, Rule 2-100, as to who can communicate what with an opposing counsel. "The attorney of record has the exclusive right to appear in court for his client and neither the party	The commentator cites to a 1958 case. Since then, the committee in the *Report on Limited Scope Legal Assistance with Initial Recommendations* (2001) stated that "[it] believes that no modifications to the Rules of Professional Conduct are necessary at this time to

[2] See *Handbook on Limited Scope Legal Assistance, A Report on the Modest Means Task Force of the American Bar Association* (2003), at pages 5-6. http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_handbook_on_limited_scope_legal_assistance.authcheckdam.pdf

COMMENTS APPLICABLE TO RULE 5.425		
Commentator	**Comment**	**Committee Response**
	himself nor another attorney should be recognized by the court in the conduct or disposition of the case." *Epley v. Califro (1958) 49 Cal.2d 849, 854.*	implement the recommendations of this report." With respect to Rule 2-100 of the Rules of Professional Conduct, the Limited Representation Committee noted on page 10 of the *Report*: Of more practical importance is an attorney's concern about knowing who has authority to negotiate on a given issue, or having to negotiate different issues with different individuals. The limited scope representation form recommended by this Committee may at least help clarify when opposing party is or is nor represented by counsel, and thus when direct communication is appropriate.
	As written, rule 5.425 does not preclude an SRL from having more than one LSA working on separate issues. As a practical matter, I have never seen this and it would not seem to be cost inefficient.	As previously noted, historically, parties in other areas of the law have used more than one limited scope attorney to retain greater control and flexibility over their legal matters. As noted in the 2001 report of the Limited Representation Committee, using more than one limited scope attorney may still result in the overall reduction of legal costs to a client. Further, this type of use has expanded substantially in the area of family law.
	I recommend that the rule be clarified to limit an SRL to one LSA at any given time. The change to the rule would be as follows: ~~The party must be served directly with~~ Documents that relate to all other issues outside the scope of the limited scope	The committee does not recommend revising the rule to preclude a party from having more than one limited scope attorney. Changing the rule as suggested by the commentator would not support the statement of principle adopted by the Limited Representation Committee (established by the California Commission

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

COMMENTS APPLICABLE TO RULE 5.425		
Commentator	**Comment**	**Committee Response**
	attorney's representation must be served directly on the party ~~or the attorney representing the party on those issues.~~ Having more than one LSA acting in the same case would likely create confusion for the parties, their attorneys, the court clerks, and the judicial officers on who gets served with what papers. Also, how does the court efficiently set hearings for RFOs on separate but related issues being handled by separate attorneys for the one party. Include language in rule 5.425(b) specifically providing that an attorney acting as a noticed LSA cannot be simultaneously acting as a private child support collector (PCSC) for that same party.	on Access to Justice) that the State Bar should support the expansion of limited scope legal assistance as part of its ongoing effort to increase access to legal services. As noted in page 2 of the Report cited by the commentator, …from a court's perspective, limited assistance will clarify the presentation of issues and help reduce errors and continuances, demand on court personnel, and court congestion. New procedures can provide clarity about when a party is or is not represented, helping the court and opposing party address such issues as knowing who needs to be served, and with whom they can negotiate. Courts will have to properly note the use of multiple limited scope attorney in a case and adjust their case management systems accordingly to respond to the decision of the party to contract with multiple limited scope attorneys in their case. The committee does not agree with the commentator that the rule should be revised to provide that an attorney acting as a noticed limited scope attorney cannot be simultaneously acting as a PCSC for that same party on any other family law issue. If the issue is one of conflicts of interest, as stated by the commentator, and the attorney is aware of a conflict,

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

COMMENTS APPLICABLE TO RULE 5.425		
Commentator	**Comment**	**Committee Response**
	PCSC, including attorneys, are governed by Family Code §§5610 et seq. Practically speaking, an attorney whose primary business is collecting child support arrearages can represent an SRL in court for the limited purpose of collecting those arrearages. Except, there are conflicts between the statutes governing each category. PCSCs are governed by Fam. Code §§5610-5616. LSA are governed by CRC, rule 5.425. Several of the mandatory contract provisions in Fam. Code §5611 for a PCSC conflict with the mandates in rule 5.425 for a LSA. Most notably are: (1) how the attorney's fees will be paid; and (2) how the contractual relationship may be terminated. Rationally and legally, an attorney cannot have two conflicting fee agreements with one client on the same case. This leads me to the conclusion that, by its very nature and in accordance with the law, a PCSC attorney represents a client for the limited purpose of collecting child support. There is no need for, nor should the PCSC attorney, file a notice of limited scope representation which creates legal conflicts between the PCSC attorney and their client.	the attorney has the obligation to refuse to provide services. The committee does not agree with the commentator that the rule should be revised to provide that an attorney acting as a noticed limited scope attorney cannot be simultaneously acting as a PCSC for that same party on any other family law issue. If the issue is one of conflicts of interest, as stated by the commentator, and the attorney is aware of a conflict, the attorney has the obligation to refuse to provide services.
Superior Court of Los Angeles County Los Angeles County Superior Court	Rule 5.425 (e) (2) (B) (page 10) - change "May not be charged a fee," to "Shall not be charged a fee." Rule 5.425 (e) (4) (page 11) - renumber to 5.425 (e) (3).	The committee agrees with the commentator's suggestions. However, because Judicial Council rules an forms use the term "must" instead of "shall," the committee recommends amended the rule by using the term "must."
Superior Court of Orange County	For proposed rule 5.425(d)(2), we recommend adding specific	The committee agrees with the commentator's

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

COMMENTS APPLICABLE TO RULE 5.425		
Commentator	**Comment**	**Committee Response**
Family and Juvenile Orange County Court Managers	language that clarifies it is the limited scope attorney who is responsible for the serving the Notice of Limited Scope Representation (FL-950) to the other parties. Proposed rule 5.425(e)(2), indicates that clients would have 10 calendar days from the date they were served the Notice of Completion of Limited Scope Representation to file an objection. Currently, clients have 15 days to file an objection. In order to allow clients sufficient time to file their objections, we recommend keeping the timeframe at 15 days.	suggestions and incorporate them into the amendments it is recommending to the Judicial Council. The committee does not agree to recommend that the deadline for the client to file the objection be changed to 10 calendar days. The client will not be prejudiced by the shortening of time in this process because the new procedures/deadlines apply only if the client fails to sign a substitution at the end of the limited scope service. When a client agrees in the *Notice of Limited Scope Representation* (form FL-950) to file a substitution of attorney when the services are completed, but then fails to do so, this leaves the attorney in limbo. The attorney cannot have a client sign a blank substitution, but may not be able to get the client's attention after the services have been completed. Shortening the period to object will help address those situations in which the client has not been responsive to the attorney's attempt to communicate about substituting out of the case. As noted in the recommended information sheet (form FL-955-INFO), the actual deadline for filing the *Objection* will vary depending on how the proposed Notice of Completion was filed. A deadline of 10 days applies to personal service. That deadline could be extended by two court days for overnight delivery, or 5 calendar days, if service was effected by mail within the

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

COMMENTS APPLICABLE TO RULE 5.425		
Commentator	**Comment**	**Committee Response**
		state of California.
	We recommend specifying that if the Objection is filed late, the court may reject the filing.	The committee does not agree to recommend amending the rule as suggested by the commentator. If the attorney takes prompt steps to submit the Final *Notice of Completion* at the end of the 10 day waiting period, there should be very limited risk of late filings. Since the attorney has the incentive to be relieved as counsel, it seems as the attorney should be given the responsibility of filing the Final *Notice* at the end of the 10 day period. Further, it does not seem prudent to authorize court clerks to reject an *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) that is untimely filed. If a timeliness issue arises with the filing of the *Objection*, it should be adjudicated by the judicial officer at a hearing on the issue, not by the clerk.
	For proposed rule 5.425(e)(4)(b) *(now(e)(3)(C))*, we recommend updating this sentence to read: The limited scope attorney and all other parties must be served with the Objection, including the hearing details. Service of the Objection must be completed 16 court days before the hearing, unless the court orders a different time for service. Updating this sentence will clarify details of who should be served and when.	The committee recommends that the *Objection* remain the focus of item (e)(3)(C). As suggested, a person reading the rule could misread the rule and believe that the limited scope attorney must serve the *Objection*. The committee further recommends removing the service deadline from the rule and placing it in the information sheet. The information sheet can then include more detailed information, including how the type of service will affect how to count the 16 day deadline. This additional information would make the rule unnecessarily complex.

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

COMMENTS APPLICABLE TO RULE 5.425		
Commentator	**Comment**	**Committee Response**
Superior Court of San Diego County Michael M. Roddy Executive Officer	Proposed revised Rule 5.425(d)(2)(B): For clarification consider inserting the words "limited scope" as set forth below. The proposed language is not clear on what type of attorney may be representing the litigant: "(B) Documents that relate to all other issues outside the scope of the limited scope attorney's representation must be served on the party or the limited scope attorney representing the party on those issues."	The committee agrees with the commentator's suggestions and incorporate them into the amendments it is recommending to the Judicial Council. In response, the committee prefers not to recommend amending the rule as suggested by the commentator. It is possible for a party to have a limited scope attorney as well as an attorney who is not retained specifically as a limited scope attorney. Using the term "attorney" will best cover this situation.
	Proposed revised Rule 5.425(e): Directly above, in proposed Rule 5.425(d)(2), an order relieving an attorney is listed as a third option to the termination of the attorney-client representation, however; within this subsection, subsection (e), only the event of the signing of a substitution of attorney is provided. Consider adding the event of an order relieving an attorney.	The committee does not recommend the proposed change. The committee believes that the proposed language is not needed to clarify the meaning of this section of the rule.
	Proposed revised Rule 5.425(e): How will the Court know the limited scope attorney served the proposed Notice of Completion of Limited Scope Representation? Only a proof of service of the final Completion of Limited Scope Representation is required by the Rule. Alternatively, consider revising the proof of service on form, FL-955, to where the limited scope attorney can attest on one proof of service form	The committee recommends revising the rule and form FL-955 for the attorney to indicate when and how the party/client was served with the Proposed *Notice of Completion of Limited Scope Representation*, as well as the version marked "Final." Limited space on the form precludes having one form as suggested by the commentator. Instead, the attorney may complete page 2 twice and attach it to the Final Notice

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

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

COMMENTS APPLICABLE TO RULE 5.425		
Commentator	**Comment**	**Committee Response**
	that both the service of the proposed and final Notice of Completion forms were served. Proposed revised Rule 5.425(e)(4)(C) but should be 5.425(e)(3)(C): The limited scope attorney may file a response; however, the rule does not state whether the client may file a reply and the procedures for a reply, if any. Same with the Information for Client About Notice of Completion of Limited Scope Representation (form FL-955 INFO).	of Completion. There are checkboxes on the proof of service for the attorney to specify which version of the form was served. The committee prefers to limit the filings of the party and the attorney on the issue of the completion of the services to avoid the filing of confidential documents or statements. Instead of adding procedures about a reply, the committee prefers that the judicial officer handle the matter in the courtroom.
M. Sue Talia Private Family Law Judge	*There are two ranges of issues which argue for the proposed simplification of 5.425: 1. Encourage attorneys to agree to make limited scope court appearances by reducing the risk of unanticipated time/costs to withdraw/be relieved at conclusion. 2. The other important impact of the Notice of Completion is to create a bright line for the termination of the attorney's responsibility. These cases can go on a long time. Lawyers want to be able to point to a piece of paper which demonstrates that they were out as of a certain date. A lawyer's involvement may be for only a small part of an ongoing case. There often isn't a bright line at the end. Lawyers (and insurance carriers) want to know when the representation terminates and have a record to protect them	No response required. No response required. No response required.

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

COMMENTS APPLICABLE TO RULE 5.425		
Commentator	**Comment**	**Committee Response**
	from being dragged into later events/hearings/appearances which may not have been contemplated at the initial retention. Insurance carriers also want to have a bright line when the statute of limitations is triggered. I like the fact that the proposed rule includes two methodologies for withdrawal which are instigated by the lawyer. I support the substitution of a Notice of Completion and believe that the provision of a Proposed notice followed by a Final one 10 days later puts the burden on the attorney rather than the court (unless an objection is filed) and reduces the likelihood that an attorney who has completed the services is forced to remain in a case and invest additional unpaid time. It also means that the default is not to require court staff to schedule and monitor a hearing which may in fact be ignored by the client it is intended to protect. The provision for an objection is, in my opinion, more than sufficient to protect the client whose lawyer has not completed the services which have been contracted for. I have some confusion regarding the reference to filing fees in the second paragraph from the bottom of Page 5. This states that they may not be charged a fee for filing FL-955 "even if the attorney had not previously made an appearance in the	No response required. No response required. The language regarding fees was recommended after the committee received input from an attorney that a court had charged him a fee for filing the application to be

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

COMMENTS APPLICABLE TO RULE 5.425		
Commentator	**Comment**	**Committee Response**
	case." I don't understand what this means. Most of the attorneys who will use FL-955 have previously filed an FL-950, so they will have already made an appearance. I don't believe they should be charged a fee for either form. It helps the court to have attorneys present on a limited scope basis. The proposed rule change takes significant burdens off of court staff.	relieved as limited scope attorney when he had not appeared in the case.

COMMENTS APPLICABLE TO FORM FL-950		
Commentator	**Comment**	**Committee Response**
Dubrovsky Law Gary Vadim Dubrovsky Partner	My comment relates to references to service methods of the Notice of Limited Scope and the new Notice of Completion forms. First, I think it's quite handy that they reference electronic service as an alternative to the more traditional types of service. But it seems to invite confusion by referring to a separate form rather than providing space within the form itself to show that you complied with the requirements of effecting valid electronic service. Since there really isn't enough room for a whole new section relating to e-service, I would suggest we treat it just like the	The committee agrees with the commentator and recommends revising page three of the form to include a checkbox for electronic service, which requires a separate proof of electronic service be attached. The new check box will also refer to optional Proof of Electronic Service (form POS-050). Same as above response.

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

COMMENTS APPLICABLE TO FORM FL-950		
Commentator	**Comment**	**Committee Response**
	Proof of Service of Summons deals with service via Notice and Acknowledgment of Receipt; you check a box and attach the completed form. So there would be a box to check, asserting that service was via electronic means, as further described in the attached POS-050. Or something like that. But I do think the form needs to be clearer about what folks are supposed to do if service was not via personal, mail, or overnight methods.	
Virginia Johnson Staff Attorney Superior Court of San Diego County	*Include two additional statements on form FL-950 between #2 & #3: Attorney is not aware of any other attorney presently representing the party in this case. Attorney is not acting as a private child support collector under a contract with the party pursuant to Family Code §5610 et seq. There appears to be a typo on the form number on the bottom left of FL-950.	The committee does not recommend the substantive changes to the form as suggested by the commentator. The questions which the commentator suggests be added to the *Notice of Completion* do not relate to whether or not the attorney has completed the limited scope services that he or she agreed to complete, and are, therefore, not relevant to the form's purpose. The committee recommends correcting the form number as suggested by the commentator.
Limited Scope Law Group Christopher Stefan Attorney	The checkbox regarding whether or not the limited scope attorney was retained to do the order after hearing appears to be going away.	The language referred to by the commentator is highlighted, not because is it proposed for deletion, but because the committee proposed a slight change. The current language is" …until submission of the order after hearing." The proposed change was to extend the phrase after the check box to state, "until submission of the order after hearing or judgment that is within the

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

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

COMMENTS APPLICABLE TO FORM FL-950		
Commentator	**Comment**	**Committee Response**
	1) Does that mean that it is becoming a permanent requirement for all appearances that need an OAH or judgment? If we settle a case during an RFO or MSC, will we be required to do the judgment as well? 2) Will LSR attorneys be permitted to use the other box to specify if we are retained to only do the appearance and any OAH needs to be done by hand on the day of the hearing prior to the parties departure? And any judgment will be submitted by the client rather than the LSR attorney? 3) If not, does this mean that the appearing attorney can not complete a MC-050 voluntarily signed by the client prior to submission of the OAH? (Those of us who offer flat rate appearance only representation being unable to execute a sub-out the day of the hearing would have a huge effect on our practice) 4) What measures, if any, are available to parties who may be caught in the middle if an LSR attorney must stay in the case prior to the OAH but need to file other documents outside the scope of the LSR?	scope of representation. The committee recommends that form FL-950 include an item for the attorney to indicate if the party and the attorney agreed that submission of an order after hearing or judgment is not within the scope of representation. An "other (specify):" box may also be used to reflect the other terms agreed to about the preparation of the order or judgment. The "other" box may be used to specify other terms of the agreement with the party that are not confidential. The appearing attorney should not complete the substitution of attorney before submitting the order after hearing or judgment, unless the client agreed that the attorney will not complete the order judgment following the hearing or trial or the judge so directs. Parties may always file their own documents outside of the scope of the limited scope representation. No other measure is needed. The party will need to file

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

COMMENTS APPLICABLE TO FORM FL-950		
Commentator	**Comment**	**Committee Response**
	5) What measures, if any, are available to parties who may need to file docs pending the FL-955 process? (Other than executing a voluntary MC-050). 6) What measures, if any, do parties and LSR attorneys have in the event the opposing party (or counsel) send documents OUTSIDE the scope of the terms of the FL-950? How will this operate with the ambiguity the rule change creates?	a substitution of attorney as he or she agreed to do by signing form FL-950. Rule 5.425 (d)(2)(B) requires that the party be served with documents that relate to all other issues outside the scope of the attorney's representation. The requirement is repeated on form FL-958.
Superior Court of Los Angeles County Los Angeles County Superior Court	Bottom left corner (page 1 of 3), change form number from FL-955 to FL-950. Item 2, Box 3 (page 1 of 3) - change "until resolution of the issues checked **on this form** by trial or settlement" to "until resolution of the issues checked **in item 3 below** by trial or settlement Item 2a (page 3 of 3) - change "…documents listed above were…" to "…document listed above was…" Item 2b (page 3 of 3) - change the word "forms" to "form". Item 2c (page 3 of 3) - change the word "forms" to "form". Instead of requiring POS-050 to be used for electronic	The committee recommends correcting the form number as suggested by the commentator. The committee agrees with the commentator and recommends revising the form as suggested. The committee agrees with the commentator and recommends revising the form as suggested. The committee agrees with the commentator and recommends revising the form as suggested. The committee agrees with the commentator and recommends revising the form as suggested. Due to a limited space on the form, it is not possible to

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

COMMENTS APPLICABLE TO FORM FL-950		
Commentator	**Comment**	**Committee Response**
	service, modify this form to include the option of electronic service.	include a complete subitem for electronic service information without expanding the form to four pages. The committee recommends revising the form to include a separate subitem to indicate that electronic service was used. The new subitem will link to form POS-050 in case the server wants to use the form, but not require it to be used.
Superior Court of Orange County Family and Juvenile Orange County Court Managers	On page 1, in the footer section, the form number should be updated to reflect FL-950. On page 2, section 4, we recommend making the advisement bold to help parties understand that they are to file *Substitution of Attorney* (MC-050) once representation is complete.	The committee recommends correcting the form number as suggested by the commentator. The committee recommends revising the form as suggested by the commentator to try to increase awareness to the party about the agreement to sign a substitution of attorney when the representation is completed.

COMMENTS APPLICABLE TO FORM FL-955		
Commentator	**Comment**	**Committee Response**
Dubrovsky Law Gary Vadim Dubrovsky Partner	My comment relates to references to service methods of the Notice of Limited Scope and the new Notice of Completion forms. First, I think it's quite handy that they reference electronic service as an alternative to the more traditional types of service. But it seems to invite confusion by referring to a separate form rather than providing space within the form itself	The committee agrees with the commentator and recommends revising page 2 of the form to include a checkbox for electronic service, which requires a separate proof of electronic service be attached. The new check box will also refer to optional *Proof of Electronic Service* (form POS-050) but not require it to be used for this purpose.

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

COMMENTS APPLICABLE TO FORM FL-955		
Commentator	**Comment**	**Committee Response**
	to show that you complied with the requirements of effecting valid electronic service. Since there really isn't enough room for a whole new section relating to e-service, I would suggest we treat it just like the Proof of Service of Summons deals with service via Notice and Acknowledgment of Receipt; you check a box and attach the completed form. So there would be a box to check, asserting that service was via electronic means, as further described in the attached POS-050. Or something like that. But I do think the form needs to be clearer about what folks are supposed to do if service was not via personal, mail, or overnight methods.	Same as above response.
Levitt & Quinn Family Law Center Ana M. Storey Attorney	Our only suggestion is to consider requiring in Section 2 of the Final FL-955 Proof of Service either an attached copy of the Proposed FL-955's Proof of Service or a statement of when and how the Proposed was served so it is clear that the client received the proper "10 day" notice period in circumstances where the client does not file an objection.	The committee agrees with these suggestions and has incorporated them, with minor alterations, into the amendments that it is recommending for adoption.
State Bar of California The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) Saul Bercovitch Legislative Counsel	Page 16 [FL-955, paragraph 2] – The form refers to "Attachment 2" but does not specify the form – i.e. what "Attachment 2" is. We would like to see clarification as to what is to be attached as "Attachment 2." Page 16 [FL-955, paragraph 3] – FLEXCOM recommends putting a "line" to clarify that it needs to be filled in with the date service is completed.	The committee recommends inserting a hyperlink in item 2 to allow the attorney the option of using form MC-025, *Attachment to Judicial Council Form*, or using another document to describe the limited scope services that the attorney was retained to complete. The committee agrees with the commentator and recommends revising item 3 to state, "I completed all services within the scope of my representation on *(date):*"

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

COMMENTS APPLICABLE TO FORM FL-955		
Commentator	**Comment**	**Committee Response**
State Bar of California Standing Commission on the Delivery of Legal Services Sharon Ngim Program Development & Staff Liaison	In the text box labeled "NOTICE TO PARTY/CLIENT," SCDLS recommends the following: 1) In the second paragraph, add clarifying language about service of process (e.g. "…and have it served on your limited scope attorney and the other parties in the case (or their attorneys) by a person who is at least age 18 and not a party to this case, and who completes Proof of Service on page 2 of this form."). 2) In the fourth paragraph, bold the sentence, "You now represent yourself in all aspects of the case." so that the notification to the party/client is more prominent. 3) Add a fifth paragraph that references FL-955-INFO to guide Party/Client how to file and serve Objection to Proposed Notice of Completion of Limited Scope Representation where appropriate.	The committee agrees with these suggestions and has incorporated them, with minor alterations, into the amendments that it is recommending for adoption. The committee agrees with these suggestions and has incorporated them, with minor alterations, into the amendments that it is recommending for adoption. The committee agrees with these suggestions and has incorporated them, with minor alterations, into the amendments that it is recommending for adoption.
Superior Court of Los Angeles County Los Angeles County Superior Court	In the box "Notice to Party/Client," 2nd paragraph - instead of "file it, and serve it" change wording to "file the form at the court by _____ and serve it on the other party and your attorney" In the box "Notice to Party/Client," 4th paragraph - last line change "you **can** use Notice of Change of Address…" to "you **may** use Notice of Change of Address…"	The committee agrees with these suggestions and has incorporated them, with minor alterations, into the amendments that it is recommending for adoption. The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.

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

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

COMMENTS APPLICABLE TO FORM FL-955		
Commentator	**Comment**	**Committee Response**
Superior Court of Orange County Family and Juvenile Orange County Court Managers	On page 1, in the If this form is marked "Proposed" section, we recommend updating the last sentence to indicate the number of days a party has to file and serve an objection. On page 1, in the Notice to Party/Client section, we recommend adding, "in the title section above", after "If this form is marked "Proposed/Final" to make it easier for the party to identify where they should look for this information on the form.	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption. The committee agrees that the notices boxes on the form should be improved to relate them back to the check boxes in the title caption. Instead of amending the form as proposed by the commentator, the committee recommends reformatting the notice boxes and incorporating images of a box that is checked for "Proposed" and "Final," as they would appear when completed by the attorney.
Superior Court of San Diego County Michael M. Roddy Executive Officer	Signature line needs a closing ")" after "Attorney" (notice box) and new form FL-955-INFO: Consider replacing the word "removed" with "relieved" to be consistent with Rule 5.425 that the limited scope attorney is being relieved as opposed to being removed from a case. Item 2: What is "Attachment 2" as referenced on this form? Consider the following sentence instead: "2. I was retained as attorney of record for the limited scope services described in the Notice of Limited Scope Representation (form FL-950) filed on date: (Attach a copy if available.)"	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption. The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption. The committee agrees with these suggestions, and recommends adding a checkbox for the attorney to indicate if form FL-950 is attached or if another document is attached (with a fillable space to specify the name of the document) that describes the scope of the services. The committee recommends deleting "Attachment 2."

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

COMMENTS APPLICABLE TO FORM FL-955		
Commentator	**Comment**	**Committee Response**
M. Sue Talia Private Family Law Judge	I have some concerns regarding section 2 of FL-955. It is not uncommon for me to hear from a lawyer who thinks they should attach their limited scope fee agreement to the FL-950 as evidence of the terms of the agreed scope. I always advise them that the fee agreement is a *confidential document* which should *never* be entered into the public record. To avoid confusion, I would recommend adding an admonition that the attachment should be the original FL-950 or other explanation of the scope, *not the fee agreement.*	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.

COMMENTS APPLICABLE TO FORM FL-955-INFO		
Commentator	**Comment**	**Committee Response**
State Bar of California The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) Saul Bercovitch Legislative Counsel	Page 19 [FL-955-INFO, paragraph 11 box] – "court days" is only underlined in the last deadline. FLEXCOM believes it would be more clear (especially for self-represented litigants) to underline "court days" in all deadlines in the box under Paragraph 11.	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
State Bar of California Standing Commission on the Delivery of Legal Services Sharon Ngim Program Development & Staff Liaison	In number 14 (What happens at the hearing?), add "completed by the limited scope attorney and" after "(form FL-958)".	The committee agrees with this suggestion that the form specify that the limited scope attorney will complete the order after hearing, if directed by the court, and has incorporated it into the amendments that it is recommending for adoption.

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

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

COMMENTS APPLICABLE TO FORM FL-955-INFO		
Commentator	**Comment**	**Committee Response**
Superior Court of Los Angeles County Los Angeles County Superior Court	Remove all references to "lawyer" and replace with "attorney." Both words are used throughout the form.	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	Item 1 - title and 2nd paragraph - the word "proposed" should be capitalized and in quotes as "Proposed."	The committee agrees to capitalize the word propose as suggested by the commentator, and has incorporated the change into the amendments that it is recommending for adoption.
	Item 4 - change, "In **about** 10 days" to "After the 10th day."	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	Item 7, check box 1, second to last line - Add a space between the words "Proposed." and "Form."	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	Item 9 - change "friend, relative" to "friend or relative." and remove extra space between "sheriff, or" and "professional."	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	Item 10 - "Handdelivers" should be two words.	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	Item 13 last sentence of note - change "They will help the judge…" to "These documents will help the judge…"	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

COMMENTS APPLICABLE TO FORM FL-955-INFO		
Commentator	**Comment**	**Committee Response**
Superior Court of Orange County Family and Juvenile Orange County Court Managers	On page 1, section 7, we recommend adding a sub-section that indicates the court may reject the filing if is not filed and served timely.	The committee does not agree to recommend revising the form as suggested by the commentator. If the attorney takes prompt steps to submit the Final *Notice of Completion* at the end of the 10 day waiting period, there should be very limited risk of late filings. Since the attorney has the incentive to be relieved as counsel, it seems as the attorney should be given the responsibility of filing the Final *Notice* at the end of the 10 day period. Further, it does not seem prudent to authorize court clerks to reject an *Objection to Proposed Notice of Completion of Limited Scope Representation* (form FL-956) that is untimely filed. If a timeliness issue arises with the filing of the *Objection*, it should be adjudicated by the judicial officer at a hearing on the issue, not by the clerk.
Superior Court of San Diego County Michael M. Roddy Executive Officer	Although they are interchangeable, consider replacing the word "lawyer" with "attorney" to be consistent with Rule 5.425 and the forms. Item 8: Is this correct? The attorney pays no fee to file, but if the litigant objects that his/her counsel has not completed the agreed upon registration he/she has to pay a fee? If this is correct, what is the appropriate fee? First paper or motion?	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption. A fee is required to file the *Objection* because the court will have to set a hearing within 25 days of the filing. The fee may be a motion fee or a first appearance fee depending on the facts of the case.

COMMENTS APPLICABLE TO FORM FL-956		
Commentator	**Comment**	**Committee Response**

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

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

COMMENTS APPLICABLE TO FORM FL-956		
Commentator	**Comment**	**Committee Response**
State Bar of California Standing Commission on the Delivery of Legal Services Sharon Ngim Program Development & Staff Liaison	In the "NOTICE" text box, second paragraph, add the following language: "by a person who is at least age 18 and not a party to this case, and who completes the Proof of Service on page 2 of this form." between the words "served" and "on".	The committee agrees with these suggestions and has incorporated them, with minor alterations, into the amendments that it is recommending for adoption.
Superior Court of Los Angeles County Los Angeles County Superior Court	In the "Notice" section, last line - change "your court hearing" to "the court hearing"	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	The Objection should require a separate Proof of Service. Please Note: The litigant must file the form first, to get a hearing date before serving the attorney. Which means that POS on the second page will not be filled out at the time of filing. Since it is page 2 of a document, it can't be filed separately from page 1.	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption. The committee recommends deleting the proof of service on page 2 and replacing it with information about serving the *Objection* by personal service, mail service, express mail, and electronic service. The information would include links to each type of proof of service and information sheets about service.
	Item 2a (page 2 of 2) - change "documents listed above were" to "document listed above was."	The committee recommends deleting the proof of service language from page 2 of the form and replacing it with information about service and links to applicable proofs of service. The suggested changes do not apply to the recommended new text.
	Item 2b (page 2 of 2) - change the word "forms" to "form."	Same as above response.
	Item 2c (page 2 of 2) - change the word "forms" to "form."	The committee recommends deleting the proof of

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

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

COMMENTS APPLICABLE TO FORM FL-956		
Commentator	**Comment**	**Committee Response**
		service language from page 2 of the form and replacing it with information about service and links to applicable proofs of service. The suggested changes do not apply to the recommended new text.
	Include the option for electronic service instead of requiring form POS-050 to be used for electronic service.	Same as above response.
Superior Court of San Diego County Michael M. Roddy Executive Officer	Caption should be changed to remove Attorney, State Bar No, etc., as the form would be completed by the litigant.	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.

COMMENTS APPLICABLE TO FORM FL-957		
Commentator	**Comment**	**Committee Response**
Dubrovsky Law Gary Vadim Dubrovsky Partner	My comment relates to references to service methods of the Notice of Limited Scope and the new Notice of Completion forms. First, I think it's quite handy that they reference electronic service as an alternative to the more traditional types of service. But it seems to invite confusion by referring to a separate form rather than providing space within the form itself to show that you complied with the requirements of effecting valid electronic service. Since there really isn't enough room for a whole new section relating to e-service, I would suggest we treat it just like the Proof of Service of Summons deals with service via Notice and	The committee agrees with the commentator and recommends revising page 2 of the form to include a checkbox for electronic service, which requires a separate proof of electronic service be attached. The new check box will also refer to optional *Proof of Electronic Service* (form POS-050) but not require it to be used for this purpose. Same as above response.

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

COMMENTS APPLICABLE TO FORM FL-957		
Commentator	**Comment**	**Committee Response**
	Acknowledgment of Receipt; you check a box and attach the completed form. So there would be a box to check, asserting that service was via electronic means, as further described in the attached POS-050. Or something like that. But I do think the form needs to be clearer about what folks are supposed to do if service was not via personal, mail, or overnight methods.	
Superior Court of Los Angeles County Los Angeles County Superior Court	In the "Notice" section, last line- change "your court hearing" to "the court hearing."	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	Item 2a (page 2 of 2) - change "documents listed above were" to "document listed above was."	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	Item 2b (page 2 of 2) - change the word "forms" to "form."	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	Item 2c (page 2 of 2) - change the word "forms" to "form."	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	Include the electronic service option on this form instead of requiring form POS-050 to for electronic service.	Due to a limited space on the form, it is not possible to include a complete subitem for electronic service informaion without expaning the form to four pages. The committee recommends revising the form to include a separate subitem to indicate that electronic service was used. The new subitem will link to form POS-050 in

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

COMMENTS APPLICABLE TO FORM FL-957		
Commentator	**Comment**	**Committee Response**
		case the server wants to use the form, but not require it to be used.
Superior Court of San Diego County Michael M. Roddy Executive Officer	Item 2.a.: If the limited scope attorney agrees to continue representation shouldn't there be a way for the hearing to come off calendar or at least a prompt that the client or limited scope attorney will take the hearing off calendar?	The suggested change is not one that is normally included in Judicial Council forms. The committee does not recommend revising the form for this purpose. The attorney may follow local procedure for taking the matter off calendar if he or she reaches an agreement with the client.

COMMENTS APPLICABLE TO FORM FL-958		
Commentator	**Comment**	**Committee Response**
Dubrovsky Law Gary Vadim Dubrovsky Partner	My comment relates to references to service methods of the Notice of Limited Scope and the new Notice of Completion forms. First, I think it's quite handy that they reference electronic service as an alternative to the more traditional types of service. But it seems to invite confusion by referring to a separate form rather than providing space within the form itself to show that you complied with the requirements of effecting valid electronic service. Since there really isn't enough room for a whole new section relating to e-service, I would suggest we treat it just like the Proof of Service of Summons deals with service via Notice and Acknowledgment of Receipt; you check a box and attach the	The committee agrees with the commentator and recommends revising page 2 of the form to include a checkbox for electronic service, which refers to an appropriate proof of service form for electronic service and requires that it be filed with the court. Same as above response.

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

COMMENTS APPLICABLE TO FORM FL-958		
Commentator	**Comment**	**Committee Response**
	completed form. So there would be a box to check, asserting that service was via electronic means, as further described in the attached POS-050. Or something like that. But I do think the form needs to be clearer about what folks are supposed to do if service was not via personal, mail, or overnight methods.	
State Bar of California Standing Commission on the Delivery of Legal Services Sharon Ngim Program Development & Staff Liaison	In the text box labeled "NOTICE TO CLIENT/PARTY," bold the words "you now represent yourself in the case." so that the notification to the party/client is more prominent.	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
Superior Court of Los Angeles County Los Angeles County Superior Court	In the box "Notice to Client/Party"- change "Client/Party to "Party/Client" for consistency with form FL-955.	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	In the box "Notice to Client/Party"- change last line change "You **can** use Notice of Change of Address" to "You may use Notice of Change of Address."	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	Item 2a (page 2 of 2) - change "documents listed above were" to "document listed above was."	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	Item 2b (page 2 of 2) - change the word "forms" to "form."	The committee agrees with this suggestion and has incorporated it into the amendments that it is recommending for adoption.
	Item 2c (page 2 of 2) - change the word "forms" to "form."	The committee agrees with this suggestion and has

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

COMMENTS APPLICABLE TO FORM FL-958		
Commentator	**Comment**	**Committee Response**
		incorporated it into the amendments that it is recommending for adoption.

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

Request for Specific Comments		
Commentator	**Comment**	**Committee Response**
Superior Court of Los Angeles County Los Angeles County Superior Court	**Q. Would the proposal provide cost savings? If so please quantify.** A. The proposal could provide a cost savings as to the number of court hearings set on the court's calendar to relieve counsel of record. **Q. What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?** A. Training would be necessary for the filing window and data entry clerks as well as the courtroom clerks. For example, the filing window clerk needs to know the time frame for setting a court hearing when an Objection is filed. New CMS codes would need to be created for form FL-955 INFO and FL-956. **Q. Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?** A. Two months is sufficient time for implementation. **Q. How well would this proposal work in courts of different sizes?** A. The proposal will work in any size court location.	No response required. No response required. No response required.

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

W17-05

Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

Request for Specific Comments		
Commentator	**Comment**	**Committee Response**
	Q. What is the impact of this proposal on low- and moderate- income litigants? A. No impact on low and moderate income litigants.	No response required. No response required.
Superior Court of Orange County Family and Juvenile Orange County Court Managers	Q. What would the implementation requirements be for courts? Staff training, procedures, changing docket codes or modifying case management systems? A. Minor configuration changes to our case management system, procedure updates and training would be needed to implement this change.	No response required.
Superior Court of Riverside County Susan Ryan Chief Deputy of Legal Services	Q. Would the proposal provide cost savings? If so, please quantify. A. Yes, there would be a reduction in the number of hearings related to this issue. This will also offer a clearer timeframe for when the withdrawal from limited scope representation occurs. Q. What are the implementation requirements for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? A. Court clerks, courtroom assistants, judicial officers, and judicial assistants would need to be trained, and the process would need to be integrated into the case management system. Q. Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for	No response required. No response required.

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

Request for Specific Comments		
Commentator	**Comment**	**Committee Response**
	implementation? A. For Self Help purposes and staff training, two months is sufficient for implementation. Q. How well would this proposal work in courts of different sizes? A. The proposed change appears to suit courts of all sizes. Q. What would the impact of this change be on low- and moderate-income litigants? A. The increased ease in which an attorney may withdraw from a case may be a detriment to a self-represented litigant who disputes the withdrawal since they would have to file an objection and attend a hearing. A translated document would be tremendously helpful. A limited or non-English speaker would need assistance understanding the document.	No response required. No response required. The process does shift the burden on the party in terms of requiring the party to dispute the proposed withdrawal. However, the committee anticipates that the cost to the party will actually decrease because the attorney will no longer be charging the party/client for his or her professional time spent drafting an application to be relieved as counsel. Nor will the client be charged by the attorney for filing fees and the attorney's cost for serving the documents. Instead, the party's costs may be limited to the fees for filing the Objection and the cost of serving the documents. The documents will be translated and posted on the California Courts Web Site.

W17-05

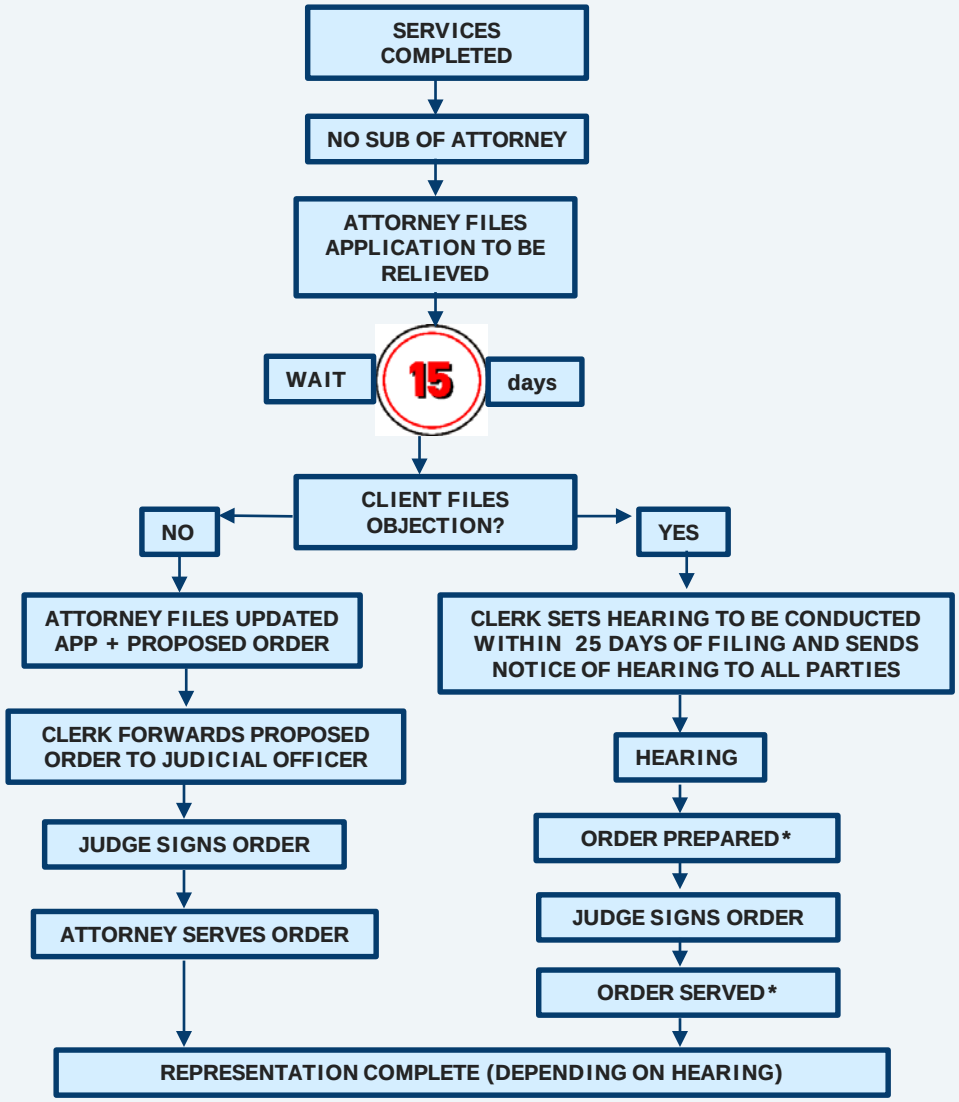
Family Law: Simplifying Limited Scope Representation Forms and Procedures (Amend Cal. Rules of Court, rule 5.425; approve forms FL-955-INFO and FL956; revise forms FL-950, FL-955, FL-957, and FL-958)

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

Request for Specific Comments		
Commentator	**Comment**	**Committee Response**
Superior Court of San Diego County Michael M. Roddy Executive Officer	Q: Would the proposal provide cost savings? A No. Q: What would the implementations requirements be for courts? A. Update training materials and update case management system. Q: Would two months from JC approval of this proposal until its effective date provide sufficient time for implementation? A. Yes. Q: What is the impact of this proposal on low- and moderate-income litigants? A. Unknown.	No response required. No response required. No response required. No response required.
M. Sue Talia Private Family Law Judge	Impact on Low and Moderate Income Litigants: This proposal will benefit low and moderate income litigants by encouraging lawyers to get involved for limited purposes or issues without fear of being drawn into an uncompensated quagmire of *pro per* litigation. They want to help, generally look on this as an opportunity to expand their client base. It is important to keep in mind that all lawyers aren't rich or well compensated, and that it particularly true of those who serve low and moderate income clients. These people still have offices to run, insurance to pay, and need these clients, even if they charge modest fees. The legal problems of these clients are usually more complex	No response required.

Limited Scope Representation
Current Withdrawal Procedure

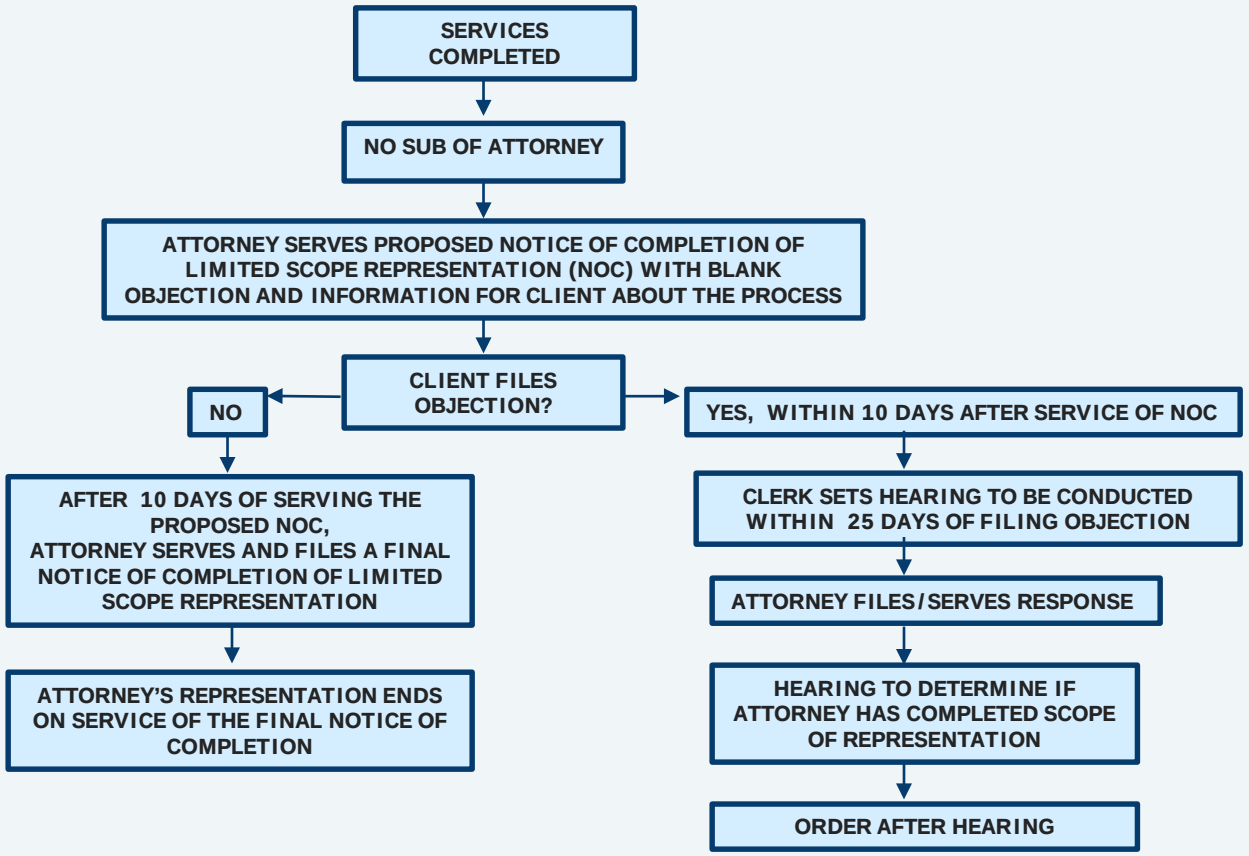
Attachment A



* Current rule does not assign responsibility for completing this action.

Limited Scope Representation
Recommended Withdrawal Procedure

Attachment B



SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
1.	Aderant Legal Software Elaine Kwak Rules Attorney Los Angeles	AM	According to the SPR 16-18 Invitation to Comment, CRC 5.425(e)(1)(B) as proposed would state: "The client has 15 calendar days after the date on the proof of service on the Notice of Completion to file the objection and a proposed order with the court and serve it on his or her attorney and on all other parties or attorneys for parties in the case." (Emphasis added.) The rule as proposed is ambiguous and could lead to confusion regarding whether additional time should be added to this deadline to account for method of service of the notice. For example, CCP 1013(a) states in relevant part, "any period of notice and any right or duty to do any act or make any response within any period or on a date certain after service of the document, which time period or date is prescribed by statute or rule of court, shall be extended five calendar days, upon service by mail." (Emphasis added.) CCP 1013(c) and (e), and CRC 2.251(h)(2) have similar provisions for an additional 2 court days to respond following service by fax, overnight delivery, and electronic means, respectively. By using the phrase, "15 calendar days after the date on the proof of service on the Notice of Completion," instead of "15 days after the date of service," the rule is unclear as to whether the	No response required. Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes language in the rule and forms on which the comment is based. The committee believes that the new recommended procedures will provide more clarity about the actual date of the attorney's withdrawal, impose fewer requirements on the client who objects to the attorney's *Notice of Completion of Limited Scope Representation*, and further reduce court staff's workload to implement the rule's procedures. Same as above response.

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

	Commentator	Position	Comment	Committee Response
			provisions of CCP 1013 and CRC 2.251(h)(2) apply to extend the time to file the objection and proposed order with the court, following service by means other than hand. If it is the court's intention to allow extra time for method of service, and in order to make the rules consistent and remove any ambiguity, we propose that CRC 5.425(e)(1)(B) be modified as follows: "The client has 15 calendar days after the date ~~on the proof~~ of service ~~on~~ <u>of</u> the Notice of Completion to file the objection and a proposed order with the court and serve it on his or her attorney and on all other parties or attorneys for parties in the case." By modifying the language as shown above, it becomes clear that the extra time for service (i.e., the 5 day extension for service by mail) should be added to the 15 day deadline. Additionally, the language of proposed the proposed forms is inconsistent with the language of the revised rule, as well as within each form. Specifically, Form FL-955 as proposed states, "If you do not agree that these tasks have been completed and you want the attorney to continue to represent you until the tasks are completed, you must file an *Objection to Notice of Completion of Limited Scope Representation* (form FL-956) and a proposed	Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes language in the rule and forms on which the comment is based. The committee believes that the new recommended procedures will provide more clarity about the actual date of the attorney's withdrawal, impose fewer requirements on the client who objects to the attorney's *Notice of Completion of Limited Scope Representation*, and further reduce court staff's workload to implement the rule's procedures. Same as above response.

SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
			Order on Objection to Notice of Limited Scope Representation (form FL-958) with the court within 15 calendar days of the date that this notice was served on you." Form FL-955 then states, "Please refer to the *Proof of Service* on page 2 of this form to determine the date that the notice was served on you (if this form was served by mail, the date of service is 5 days after the date of mailing)." Form FL-956 as proposed then states, "You must file the *Objection* and proposed *Order* within 20 calendar days of the date that the *Notice of Completion* was put in the mail to you. If you were personally served, the *Objection* and proposed *Order* must be filed 15 calendar days from the date the notice was given to you." In order to make the forms consistent and remove any ambiguity, we propose that Forms	Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes language in the rule and forms on which the comment is based. The committee believes that the new recommended procedures will provide more clarity about the actual date of the attorney's withdrawal, impose fewer requirements on the client who objects to the attorney's *Notice of Completion of Limited Scope Representation*, and further reduce court staff's workload to implement the rule's procedures. Same as above response.

SPR16-18
Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)
All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			FL-955 and FL-956 include consistent language throughout, for example: "If you were personally served, this form must be filed 15 calendar days from the date the notice was given to you. If the notice was served by mail, this form must be filed 20 calendar days from the date the notice was mailed to you.	Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes language in the rule and forms on which the comment is based.
2.	Harriett Buhai Center for Family Law Rebecca L. Fischer, Staff Attorney Los Angeles	AM	**General Comment:** The Harriett Buhai Center for Family Law wholeheartedly supports modifying the rules and forms related to Limited Scope Representation to make the process simpler and more efficient. Should the rule or forms require that if an attorney makes an appearance at a hearing, the attorney is responsible for preparing the order after hearing, if so directed by the judge? Yes, absolutely. This language should encompass judgments and restraining orders after hearing as well as orders after hearing. Far too often we encounter clients who had limited scope attorneys for a hearing and neither party completed the order after hearing.	No response required. In response to the comment, the committee recommends changing the rule and forms to clarify that the attorney must file and serve the order after hearing or judgment if the attorney has appeared at a hearing or trial within the scope of the representation, if so directed by the court.

SPR16-18
Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)
All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			Does the proposal appropriately address the stated process? Yes. Will this proposal improve access for low-and moderate-income litigants? Yes. Many of our clients are assisted by pro bono attorneys during the course of their cases and simplifying the forms will encourage more pro bono attorneys to accept limited scope representation. Re: Form FL-950: In Item 2, the language "until submission of the order after hearing" should be modified to make it clear "order after hearing" also encompasses completing a judgment or a restraining order after hearing.	No response required. No response required. The committee recommends revising the form to state “until submission of an order after hearing or judgment within the scope of representation. The committee believes that the “order after hearing” sufficiently conveys that it includes restraining orders after hearing.
3.	Orange County Bar Association By: Todd G. Friedland, President Newport Beach	N/I	Should the rule or forms require that if an attorney makes an appearance at a hearing, the attorney is responsible for preparing the order after hearing, if so directed by the judge? Yes, for the attorney’s own protection as well as protecting the interests of the client. Does the proposal appropriately address the stated purpose? Yes. Will the proposal improve access for low- and moderate-income litigants? Yes; one of the issues with “unbundled services” or taking a	The committee recommends that the rule and forms be revised as suggested by the commentator. No response required. No response required.

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

SPR16-18
Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)
All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			case on limited scope was the additional cost of seeking to have that representation declared complete. The forms expedite the ability of the attorney to be done with the representation.	
4.	The State Bar of California The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) by Saul Bercovitch Legislative Counsel San Francisco		The Executive Committee of the Family Law Section of the State Bar (FLEXCOM) supports simplifying the procedures for an attorney to withdraw from limited scope representation when the attorney has completed the work agreed upon with the client in a family law case. With respect to the specific request for comments, FLEXCOM responds as follows: 1. Should the rule or forms require that if an attorney makes an appearance at a hearing, the attorney is responsible for preparing the order after hearing, if so directed by the judge? Yes. If a judge instructs the limited scope attorney to prepare the order, the attorney should do so before he or she withdraws. If the representation is limited to a court appearance, it is only logical that preparation of the order after that hearing is part of the "work agreed upon." 2. Does the proposal appropriately address the stated purpose? Yes. The proposed forms provide a streamlined process for an attorney to request withdrawal and obtain it if there is no objection. If there is	No response required. The committee recommends that the rule and forms be revised as suggested by the commentator. No response required.

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

SPR16-18
Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)
All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			an objection, proposed new rule 5.425(e)(1) provides an opportunity for the client to object. With regards to requiring the client to provide a proposed order to the court along with his or her Objection to Notice of Completion of Limited Scope Representation, FLEXCOM recommends the following: a) Amend 5.425(e)(1)(A) to require the limited scope attorney to serve a blank proposed order to client with the Notice of Completion of Limited Scope Representation form; b) Or, in the alternative, modify 5.425(e)(1)(B) to not require the client to submit a proposed order with his or her objection. 3. Will this proposal improve access for low- and moderate-income litigants? Yes. The limited scope representation process was developed so that low and moderate income self represented litigants could afford to have representation for what they deemed to be key issues or stages of their cases. This proposal	Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes language in the rule and forms on which the comment is based. Same as above response. Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes language in the rule and forms on which the comment is based. Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer

SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
			simplifies what is now a complicated withdrawal procedure and, hopefully, more attorneys will be willing to offer such services.	includes language in the rule and forms on which the comment is based. The committee believes that the new recommended procedures will provide more clarity about the actual date of the attorney's withdrawal, impose fewer requirements on the client who objects to the attorney's *Notice of Completion of Limited Scope Representation*, and further reduce court staff's workload to implement the rule's procedures.
5.	State Bar of California, Standing Comm. on the Delivery of Legal Services	AM	Should the rule or forms require that if an attorney makes an appearance at a hearing, the attorney is responsible for preparing the order after hearing, if so directed by the judge? Yes. Appearing at a hearing to get an order and not preparing the order after hearing (i.e., not actually getting an order) is not terribly helpful to a client, as many clients seem to have difficulty with the findings and order after hearing. Does the proposal appropriately address the stated purpose? Yes. Will this proposal improve access for low and moderate-income litigants? Intuitively it seems likely, but without empirical data it would not be possible to know.	 The committee recommends amending the rule and forms as suggested by the commentator. No response required. No response required.

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

SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
			Additional Comments FL-955 (Notice of Completion of Limited Scope Representation) "Notice to party/client" text box on page 1 First paragraph last sentence: bold "If this is correct, you now represent yourself in all aspects of your case." Remove requirement that client also prepare, serve, and file proposed order.	Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes language in the rule and forms on which the comment is based.
			New paragraph beginning with "You must also have copies of [this] form served on your attorney. . ."	Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes language in the rule and forms on which the comment is based.
			Move sentence "If you do not file the Objection . . ." to after first sentencing ending in " . . .that this notice was served on you."	Same as above response.
			Edit sentence beginning with "Please refer to the Proof of Service" to state "The deadline to file your objection is based on the date this form was served on you. To determine the date this form was served on you, please refer to page 2 for date of personal service or date of mailing. If this form was served by mail, you must file your objection with the court within 20 calendar	Same as above response.

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

	Commentator	Position	Comment	Committee Response
			days." Form FL-956 (Objection to Notice of Completion of Limited Scope Representation) "Notice" text box on page 1 Require the attorney to serve a blank FL-956 (Objection to Notice) and blank FL-958 (Order on Objection). Include directions to client about what part of the FL-958 (Order on Objection) must be completed. Edit last sentence as new paragraph and to state "You must serve this form on the attorney and the other party's attorney. This means that a person who is not a party in this case must complete page 2 of this form and serve a copy of this form in person or by mail to the attorney and the other party's attorney."	Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes language in the rule and forms on which the comment is based. Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes language in the rule and forms on which the comment is based.
6.	Superior Court of Los Angeles County	AM	Page 7, (d)(2)(A): A Substitution of Attorney (form MC-050); or (add the word "or" at the end of this section so it is clearer) Page 7, (d)(3)(C): An order to be relieved as attorney of record (correct the word "or" to "of")	The committee agrees with the commentator and recommends amending the rule as suggested. The committee agrees with the commentator and recommends amending the rule as suggested.

SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
			Page 8, (1)(B): The client has 15 calendar days… to file an objection --Move this entire paragraph to (3) under Objection	Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes language in the rule and forms on which the comment is based.
			Page 8, (2): If the client does not object within the time permitted—specify 15 (court or calendar?) days after the date on the proof of service	Same as above response.
			Page 10, bottom left hand corner of page (footer): Correct the form number from FL-955 to FL-950	The committee agrees with the commentator and recommends amending the rule as suggested.
			Page 13, bottom of page: Place end parenthesis after Signature of Attorney.	The committee agrees with the commentator and recommends amending the rule as suggested.
			Page 15, item 3: See Attachment 3—For clarification purposes, add verbiage: if you need more space, attach Form MC-025 and title it Attachment 3	The committee does not recommend revising the form as suggested. The proposed language is used in plain language forms, instead of standard family law forms like the "FL-" series of forms.
			Page 15, item 4: See Attachment 4—For clarification purposes, add verbiage: if you need more space, attach Form MC-025 and title it Attachment 4	Same as above response.
			Page 17, item 2: See Attachment 2—For	The committee does not recommend revising the

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

SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
			clarification purposes, add verbiage: if you need more space, attach Form MC-025 and title it Attachment 2	form as suggested. The proposed language is used in plain language forms, instead of standard family law forms like the "FL-" series of forms.
			Page 17, item 3: See Attachment 3—For clarification purposes, add verbiage: if you need more space, attach Form MC-025 and title it Attachment 3	The committee does not recommend revising the form as suggested. The proposed language is used in plain language forms, instead of standard family law forms like the "FL-" series of forms.
			Page 17, declaration at bottom of page: Should require signature of attorney (not person serving notice)	The committee agrees with the commentator and recommends amending the rule as suggested.
			We recommend eliminating the proposal that gives the clerk 25 days to set the hearing and instead allowing the hearing date to be set at the time the form FL-956 Objection to Notice of Completion of Limited Scope Representation is filed. This would provide the ability to collect fees at the time the hearing date is set. This process would also allow for the form to be filed and served with a hearing date. Resources will be saved by eliminating the need for notice to be given by the clerk at a later date.	The committee agrees with the commentator and recommends amending the rule as suggested.
			The proposal as written creates additional work and complicates the fee collection process.	The committee believes that the recommended changes to the rule and forms will eliminate additional work for the courts and not impact the collection of fees.
			We also recommend eliminating page 2, Proof of Service, and allowing this document to be a one page document.	The committee agrees and recommends eliminating the proof of service on page 2 of form FL-956.

	Commentator	Position	Comment	Committee Response
			In the alternative, we recommend modifying form FL-956 Objection to Notice of Completion of Limited Scope Representation by inserting a box for "Dept. No/Room No" and removing the box that provides space for the hearing date, time and department or room. Once the form is filed, staff will not be able to modify the form to insert a hearing date and therefore, the hearing information box is not necessary.	The committee recommends inserting a space on the form to include hearing information.
			Proposed rule 5.425(e)(3)(B) states that the attorney must file a response to the objection at least 9 court days before the hearing, however, there is no language indicating how many days before the hearing the attorney must be served notice of the hearing date.	The committee recommends that the rule and forms be revised as suggested by the commentator.
			Request for Specific Comments: Should the rule or forms require that if an attorney makes an appearance at a hearing, the attorney is responsible for preparing the order after hearing, if so directed by the judge? Yes.	No response required.
			Does the proposal appropriately address the stated purpose? Yes. It would simplify the process for limited scope representation.	No response required.
			Will this proposal improve access for low- and moderate-income litigants?	

SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
			Yes, simplifying the procedures for limited scope representation will improve access for low and moderate income litigants by increasing resources available. The advisory committee also seeks comments from courts on the following cost and implementation matters: Would the proposal provide cost savings? If so please quantify.	No response required.
			Yes, it will provide cost savings by reducing the number of hearings required. We are unable to quantify the savings at this time.	No response required.
			What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.	
			A form will need to be created for setting hearing dates.	No response required.
			The current case management and financial system will need to be updated to include the fee assessment for this type of hearing. The court would be required to identify and train	

SPR16-18
Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)
All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			appropriate staff, implement corresponding CMS codes. • Would 2 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes. Implementation would require limited training. • How well would this proposal work in courts of different sizes? Size of court would not affect implementation. However, unless the clerk provides a hearing date when form FL-956 Objection to Notice of Completion of Limited Scope Representation is filed, the process will add workload to clerks.	No response required. No response required. No response required.
7.	Superior Court of Orange County, Family and Juvenile Court Managers Michelle Wang Program Coordinator Specialist	N/I	Form FL-956 The attachments on each form lists corresponding numbers which may be misleading. For example, number 3, if there is more space that is needed, the form lists "see attachment 3." We recommend using the general MC-025 attachment form and incorporate this as an option for wherever additional space is needed rather than matching the number to the attachment. This may be misleading because numbers 1 and 2 may not have an attachment, and since numbers 3 and 4 have attachments, this may appear on the form that each number should have a corresponding attachment.	Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes the specific language in form FL-956 on which the comment is based.

SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
8.	Superior Court of Riverside County Marita Ford Sr. Management Analyst	N/I	The proposed changes address attorney's concerns regarding withdrawing from cases. Their clients, especially those who are non-English speakers or have literacy issues, would be exposed to some vulnerability given that the proposed procedure places the obligation on them to object within a relative short time frame. For this reason, plain language and clear instructions should be on the orders. Specifically, the Notice of Change of Address or Other Contact Information (form MC-040) should be a required form rather than optional when an address update is needed.	Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The committee believes that the new recommended procedures will impose fewer requirements on the client who objects to the attorney's *Notice of Completion of Limited Scope Representation*. Form MC-040 was approved as an optional form. Therefore, the committee does not recommend requiring the party to use one particular form to provide a change of address. This will allow the court clerk to accept a party's notice of change of address submitted on pleading or any other paper —and not reject it because the party did not use any one particular form.
9.	Superior Court of San Diego County Michael M. Roddy Executive Officer	AM	Q: Should the rule or forms require that if an attorney makes an appearance at a hearing, the attorney is responsible for preparing the order after hearing, if so directed by the judge? Yes. Q: Does the proposal appropriately address the stated purpose? Yes. Q: Will this proposal improve access for low and moderate income persons? Unable to determine.	The committee recommends that the rule and forms be revised as suggested by the commentator. No response required. No response required.

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

SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
			Q: Would the proposal provide cost savings? No.	The committee anticipates that this proposal will result in some costs incurred by the courts to revise forms, train court staff about the changes to the rules and forms included in this proposal, and possibly revise local court rules and forms so they are consistent with the changes adopted by the Judicial Council. However, the committee expects that the changes will save resources for the courts by clarifying and simplifying procedures.
			Q: What are implementations requirements for courts? Training effected staff and updating case management system.	Same as above response.
			Q: Would two months from JC approval of this proposal until its effective date provide sufficient time for implementation? Yes.	No response required.
			FL-955: Signature line on page one needs a closing ")"	The committee agrees with the commentator and recommends correcting the form as suggested.
			FL-956: It is recommend to include some sort of notice or advisement on this form to the client/party against providing detailed information that could potentially waive any privilege they may have including attorney-client privileged communications.	The committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services, which could not potentially waive any of the party's privilege, including attorney-client privileged communications.
			FL-957: "Of person serving notice" should be removed from signature line on page one and replaced with "of Attorney."	The committee agrees with the commentator and recommends revising the form as suggested.

SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
			CRC Rule 5.425(d)(2) should read: (2) After the notice in (1) is received, the attorney will continue to represent the party until ***one of*** the following is filed and served: …..	The committee agrees with the commentator and recommends revising the form as suggested.
			Rule 5.425(d)(2)(C): Correct typo to delete "or" and replace with "of" as follows: "An order to be relieved as attorney <u>of</u> ~~or~~ record."	The committee recommends another construction for this section as noted in the report.
			Rule 5.425(d)(2)(C): What is the order referenced in (d)(2)(C)? Is it the form, *Order Granting Attorney's Motion to Be Relieved as Counsel-Civil* (MC-030) or some other order? What happens if a *Notice of Withdrawal of Attorney of Record* (FL-960) is filed?	The word 'order' refers to any order made by the court relieving the attorney as attorney of record.
			Rule 5.425(e)(1)(A) and **(e)(1)(B)**: Attorneys sometimes do not complete the proof of service on the back of FL-955 as they use another type of proof of service. It is suggested that it be clarified that whatever proof of service is used that it be clear that the proof of service must be filed with the court within a specified period of time after service, such as two court days, in order for the court to determine whether a client/party has been served with an FL-955.	The committee does not agree to recommend amending the rule as suggested by the commentator. The additional language is not needed. The recommended amendments provide the incentive for the attorney to file proof that the party was served with a final Notice of Completion, since he or she will remain in the case until it is filed.
			Rule 5.425(e)(3)(C) should read: (C): Following the hearing the attorney must serve a copy of the court's signed Order on Objection to Notice of Completion of Limited Scope Representation (form FL-958) on all parties or	

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

SPR16-18
Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)
All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			the attorneys for all parties who have appeared in the case. The order will be deemed effective once proof of service of the order on all parties has been filed with the court, unless otherwise ordered by the court at the time of the hearing. General Comment: The rule should be clear as to when the order is effective. The language that the court "may" delay the effective date of the order until proof of service of a copy of the signed order has been filed with the court will create a vacuum of ambiguity surrounding its effective date. Better to state plainly when it is effective and to put the burden on the attorney to complete the required process in order to be relieved as counsel.	Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The committee believes that the new recommended procedures will provide greater clarity about the actual date of the attorney's withdrawal.
10.	M. Sue Talia Private Family Law Judge		I am a national expert on limited scope representation, having published my first book on the subject in 1997. I was an early advocate for California's pioneering work on the subject. Since that time, I have traveled throughout the United States and Canada, teaching thousands of lawyers how to offer limited scope services competently and ethically.	No response required.

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

SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
			I support the proposed revision of Rule 5.425 and accompanying proposed forms.	No response required.
			By way of background, in May 2014, I suggested a relaxation of rule 5.425, fulfilling a promise I had made to numerous California lawyers over the years to do what was in my power to facilitate withdrawal after a limited scope court appearance.	No response required.
			Over the years I have been consulted, both formally and informally, by the Supreme Courts and Access to Justice Commissions in numerous states which were interested in modifying their rules to facilitate and encourage limited scope representation. In each case, my recommendation was that there be a Notice of Completion of Limited Scope Representation served and filed at the completion of the attorney's involvement, without the requirement of client consent or court permission for withdrawal.	No response required.
			We would all prefer to see a Substitution of Attorney at the end of a limited scope court appearance, but that is not always practical. The chilling effect of the current cumbersome process of filing an Application to be Relieved is real, traceable partly to economics and partly to demographics.	No response required.
			The economic factors relate to the fact that the lawyers who offer limited scope in family law	No response required.

	Commentator	Position	Comment	Committee Response
			tend to be solo and small firm practitioners who already serve a middle class and modest means clientele. They usually have high accounts receivable from full service clients which they will never collect. Many of them are hand to mouth themselves. They want and need their limited scope clients. Several have told me that, but for limited scope, they would not have been able to keep their doors open during the worst of the Recession in 2009 and 2010.	
			They are happy to get the additional business limited scope offers, but can't afford to take the risk that their engagement will be expanded, or that they will have to attend an additional (and uncompensated) hearing just to get out after they have performed the agreed services. Many simply elect not to make limited court appearances because of those barriers.	No response required.
			The demographic barriers relate to the client base most of these lawyers serve (and where the greatest demand for limited scope services is found). They are generally unsophisticated, distrustful of attorneys, and profoundly suspicious of the billable hour. To them, legal services are a commodity, not unlike the service provided by a plumber. They expect the lawyer to draft the documents, advise them on the law, or make a court appearance, and then be gone. In their minds, they have paid for a service which the lawyer has performed. They don't understand why they then have to sign a paper	No response required.

	Commentator	Position	Comment	Committee Response
			attesting that the work was done. They suspect this is just something else the lawyer will charge them for.	
			Lawyers have told me that sometimes their limited scope clients won't even open an envelope with their return address after a court appearance, out of fear that it is either a bill, or something they will be billed for. They fear that the lawyer is drafting more paper to force them to pay more money.	No response required.
			This has a palpable chilling effect on the willingness of some lawyers to accept a limited scope assignment which requires a court appearance: They can't get a substitution signed in advance to be filed at their discretion. While I always tell the lawyers I train to take a substitution to the hearing to potentially be signed at the conclusion, this isn't always practical, or even appropriate.	No response required.
			If the judge has ordered the lawyer to prepare the Order After Hearing, the work isn't completed, and a substitution signed before it is done would itself be an ethical violation. If the hearing is law and motion, the client probably isn't present to sign it, and there is still the issue of drafting the Order.	No response required.
			The current system is simply too cumbersome to make many attorneys uncomfortable signing on for a court appearance. The fees for such limited	The committee agrees with this position and recommends changes to the rule and forms to simplify the process.

	Commentator	Position	Comment	Committee Response
			scope appearances are necessarily modest, and the risk of having to make subsequent appearances for free undercuts the incentive to take a reduced fee in the hand rather than a greater one in the future. **Orders After Hearing** When I train lawyers, I tell them that if they agree to go to court, they should assume they will be drafting the Order After Hearing, and factor that into the fee they quote. While I know many lawyers would love to walk away at the end of the hearing, I believe that an order announced from the bench is illusory if it isn't reduced to an enforceable writing. The lawyer who obtained the order is in the best position to draft an enforceable order: not the *pro per* client or the staff or facilitators at the Self Help Center.	No response required.
			While I would not make it a mandatory practice, because there are reasons why judges may not order the limited scope lawyer to draft the order (there may be a full service lawyer on the other side who would be better suited to draft the order) if requested by the judge, I think lawyers should consider drafting the order as an integral part of the service they are offering in attending the hearing. Not only is it essential to the client to have an enforceable order, a rule which does not provide for an enforceable order at conclusion of a hearing imposes an unreasonable burden on the courts and court	The committee recommends that the rule and forms reflect that an attorney who makes an appearance at a hearing under the agreement for limited scope representation must prepare the order after hearing or judgment if so directed by the judge.

	Commentator	Position	Comment	Committee Response
			staff when they are unable to determine, with clarity, what the resulting order was. **Abandonment of Clients** I understand the concern, which led up to the current version of the rule, is that some unscrupulous lawyers will abandon their clients before all agreed work is done. Full service lawyers also do it occasionally. To me, that is a disciplinary and not a rules issue. Those aren't the lawyers I talk to. At the conclusion of every training I do, I post my contact information and encourage lawyers to contact me at any time about questions that arise in the future. I get emails all the time from lawyers I have trained, sometimes years after the fact. These are conscientious people who want to be sure they are doing it right, don't want to get into disciplinary or ethical trouble, want to offer a service to the public and, frankly, need the business. They would love to have more paying clients if they could figure out how to manage the economics while adhering to their ethical responsibilities. **Competence Issues** I further understand the fact that, in drafting rules, it is important to give lawyers clear guidelines as to their responsibilities. That means that sometimes rules are drafted with the lowest common denominator in mind. There are sloppy lawyers out there, both limited scope and full service, though I try to reduce their numbers	No response required. The committee agrees with this comment and believes that the recommended changes to the rule and forms will achieve the balance about which the commentator writes.

	Commentator	Position	Comment	Committee Response
			with the free trainings and risk management materials I offer. However, the fact that some may do the thing badly is not evidence that the thing itself is bad. There needs to be a balance between drafting a rule strictly enough so that there is a clear roadmap to what a competent attorney will understand as their responsibilities, but not so strictly that, in protecting the public from predators, it discourages good lawyers from providing essential legal services to members of the public who are in desperate need of them. **Insurance Carrier Issues** While not part of the request to comment, I am aware that some have raised issues regarding insurance carrier issues in connection with the termination of a limited scope representation. Having talked to numerous carriers over the years, both in California and elsewhere, I can shed some light on the concerns they have expressed to me. One of the most frequently cited issues is not a limited scope issue at all. Carriers express frustration that lawyers get lazy at the end of a full service representation, and don't promptly serve and file the Notice of Withdrawal. They hate it when a lawyer ends a case and doesn't get around to filing the Notice until the end of the year or until they need the file shelf space for other cases. This means there is no bright	No response required. No response required.

	Commentator	Position	Comment	Committee Response
			line memorializing when the representation ends and the statute of limitations begins to run. They hate having a grey area at the end of the representation. The current system, consisting of Application, time to Object, potential hearing, is the antithesis of a bright line termination. It is my belief that carriers would overwhelmingly favor a rule which allows a Notice of Completion to be served and filed which, if not objected to, starts the statute running. I should also point out that, unlike those full service lawyers who feel no urgency to serve and file the Notice of Withdrawal, limited scope lawyers who have made an appearance have a strong incentive to serve and file the Notice of Completion promptly, before the service of another RFO. **Conclusion** I ask that the Council focus, not on the examples of sloppy work that we have all seen, but on the vast need for limited scope court appearances. When between 70% and 80% of family law litigants don't have lawyers, when the lawyers who want to serve them are often struggling themselves to make ends meet, it is incumbent on us as a society to make it easier rather than harder for lawyers to serve the needs of such a vast percentage of the population. I submit that when 70% of family law litigants don't have lawyers, we, as a profession and the court, as an institution, are morally and	No response required. No response required.

SPR16-18
Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)
All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			professionally obligated to identify the barriers to representation and remove them where we can. The proposed revision to Rule 5.425 is just such an opportunity.	
11.	Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee	AM	Regarding the impact on existing automated systems: A small impact to case management systems is anticipated as a result of configuring elements and importing forms into the system. Regarding development of local rules and/or forms: This proposal will require development of local rules/forms. It will also create one time staff costs to prepare the packet. Regarding additional training: Minimum time training staff is anticipated. Regarding increases to court staff's workload: The proposal will result in increased court staff workload to reschedule hearings to accommodate the 25 day requirement. Suggested Modification: Regarding rule 5.425(e)(3)(A), the JRS recommends adding the following language (see	The committee believes that the small impact on case management systems will be outweighed by the benefit of reduced filings by attorneys to be relieved as the limited scope attorney in the case. The committee agrees that courts may have to amend local rules to conform to the simplified procedures in this report. The committee agrees that the changes to the rules and forms will require some training for court staff. Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedures no longer includes a requirement that the court clerk set a hearing on an application to be relieved as counsel within 25 days, but that the hearing be set if the client files an *Objection to the Proposed Notice of Completion.* The committee agrees with this comment and recommends incorporating some of the language

SPR16-18
Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)
All comments are verbatim unless indicated by an asterisk (*).

	Commentator	Position	Comment	Committee Response
			italicized text) to make it explicit to court clerks that the hearings can be scheduled for an earlier time. This will help to alleviate crowded family law calendars. "The court clerk must set a hearing on the objection no later than 25 days from the date the objection is filed or as soon as the matter can be scheduled."	into the rule.
12.	Hon. Rebecca Wightman Commissioner Superior Court of San Francisco County	AM	I am very glad to see this process getting simplified! One form correction: (1) Your current draft version of new FL-957 states at the bottom left that it is a mandatory form, when the report indicated that it was decided to provide this form for optional use (I agree it should be optional). A few minor suggested edits for clarification: (1) FL-955, Item 3 -- this item should be expanded to indicate that there has been completion of the work that the party and the attorney agreed would be performed in the Notice of Limited Scope Representation (form FL-950), as well as any work ordered by the court. There are many situations where the work to be performed was not ordered by the court and/or the court made no orders as to the attorney (i.e. perhaps it was just to make an appearance and argue the matter). This change	No response required. The committee recommends correcting form FL-957 to reflect that it is an optional form. The committee agrees to expand the language of the rule and form to include that the attorney has filed and served an order after hearing or judgment within the scope of the representation, if so directed by the court. However, the committee has decided to recommend deleting language about the attorney performing any acts ordered by the court." The committee believes that the language is ambiguous and could unduly interfere with the attorney withdrawing from the case on completion of the limited scope services

	Commentator	Position	Comment	Committee Response
			would make it similar to the language used in FL-958, Item 4.	agreement with the client.
			(2) Rule 5.425 (e)(1)(B) -- it is suggested that you add a phrase at the end of (e)(1)(B) to reference the section on the procedures to follow: E.g. add the phrase "in accordance with the procedures set forth in (e)(3)." This would add clarity for a pro per reading through the rule.	Based on comments received from this and other commentators, the committee recommends an alternative procedure for the attorney to use to withdraw as counsel of record after completing limited scope services. The procedure no longer includes language in the rule on which the comment is based.
			Several concerns: The one conceptual problem I see with this new process/procedure is that it creates a "limbo" period where it is a little murky as to responsibilities (in terms of who is on the hook so to speak and who to serve) if RFO's, etc. are filed after the filing of the Notice of Completion (but before 15 days has passed), or after a Notice of Objection has been filed (and before a hearing and order has been made). I am not sure the rule as amended is clear here. Which leads me to another concern.	The committee agrees with the commentator and believes that the new recommended procedures will provide more clarity about the actual date of the attorney's withdrawal, impose fewer requirements on the client who objects to the attorney's *Notice of Completion of Limited Scope Representation*, and further reduce court staff's workload to implement the rule's procedures.
			The one other concern I have has to do with looking at the process from a case management system view point. The current proposal will cause there to likely be a more heavy manual system adjustment for finally removing a limited scope attorney from a court's case management system...because the status of the Notice of Completion has to be monitored by a clerk.	Same as above response.

SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
			Suggestion: Rather than have the "Notice of Completion" document and a waiting period of 15 days be determinative of when removal of the name from the system can occur (or not), what about making the procedure be a simple two-step process by the filing of a "PRELIMINARY Notice of Completion" and then, if no objection, requiring the filing of a FINAL Notice of Completion (once the 15 days is up and no objection was filed). While it would mean one additional form, perhaps the attorney could be allowed to provide them both at the same time under the current proposed process (akin to submitting an initial or preliminary Notice and a "proposed" Final Notice) -- so it is really not much more of a burden at all. The BENEFITs of having this done in this manner would not only be to provide absolute clarity as to the date the actual withdrawal occurs, but it would allow courts to configure their case management systems to automatically remove the attorney from their list upon the filing of the FINAL notice. (This two-notice process is obviously for the "no objection" situation; nothing would need to change if there were an objection, although the FINAL could be a part and parcel of the final order on objection if it would help from a case management system viewpoint).	The committee considered the process suggested by the commentator and agreed that it would provide more clarity as to the effective date of the attorney's withdrawal. The committee incorporated the suggestions, with some modifications, into the recommendations being made to the Judicial Council. Same as above response.

SPR16-18

Family Law: Simplifying Limited Scope Representation Procedures (amend rule California Rules of Court, rule 5.425, adopt forms FL-957, revise forms FL-950, FL-955, FL-956, and FL-958)

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

	Commentator	Position	Comment	Committee Response
			having to do a lot of manual monitoring.	

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

Item number: 06

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 19, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Orders

Committee or other entity submitting the proposal:
Family and Juvenile Law Advisory Committee

Staff contact (name, phone and e-mail): Gabrielle Selden, 415-865-8085, gabrielle.selden@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Approved December 10, 2015. Item 1
Project description from annual agenda: Provide subject matter expertise to the council by reviewing recent legislative changes directing Judicial Council action or as compiled by the Office of Governmental Affairs, and developing rules or form proposals as appropriate. Legislation for considerations includes: AB 1081 (Quirk) Protective orders Chapter 411, Statutes of 2015 Summary: Amends protective and restraining order statutes to allow either party to request a continuance of a hearing, and automatically extends temporary orders to the date of the new hearing, rather than having the temporary order lapse and be reissued.

If requesting July 1 or out of cycle, explain:

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
The recommended changes respond to specific suggestions from court professionals about the rules and forms adopted by the Judicial Council, effective July 1, 2016, which were mandated by AB 1081.

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 March 23–24, 2017

Title
Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Orders

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 5.94; adopt forms FL-306 and FL-307; revise form FL-303; revoke form FL-306

Recommended by
Family and Juvenile Law Advisory Committee
Hon. Jerilyn L. Borack, Cochair
Hon. Mark A. Juhas, Cochair

Agenda Item Type
Action Required

Effective Date
September 1, 2017

Date of Report
March 29, 2017

Contact
Bonnie R. Hough, 415-865-7668
bonnie.hough@jud.ca.gov
Gabrielle D. Selden, 415-865-8085
gabrielle.selden@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee proposes revising the form used to ask for an order to continue a hearing by expanding its use beyond cases in which temporary emergency (ex parte) orders had been previously issued. The committee also proposes revising the form used to show compliance with the notice and service requirements when requesting a temporary emergency (ex parte) order by including a new space for the date, time, and location of the proposed emergency hearing or submission of documents. The proposed changes respond to specific suggestions from court professionals and help increase efficiencies in the way courts process requests to continue hearings and requests for temporary emergency orders.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective September 1, 2017:

1. Amend rule 5.94 of the California Rules of Court to:
   a. Remove "and extend temporary emergency (ex parte) orders" from the title; and
   b. Reflect revised procedures relating to continuances and use of forms FL-306 and FL-307;

2. Revise *Declaration Regarding Notice of Service and Request for Temporary Emergency (Ex Parte) Orders* (form FL-303) to provide a space for a party to specify the hearing date requested for the no-notice hearing or the date that the party will submit the request for the court to decide based on declarations; and

3. Revoke *Request and Order to Continue Hearing and Extend Temporary Emergency (Ex Parte) Orders* (form FL-306) and replace it with two new forms, *Request to Continue Hearing* (form FL-306) and *Order on Request to Continue Hearing* (form FL-307).

The text of the amended rule is attached at pages 9–13. The new and revised forms are attached at pages 14–18.

Previous Council Action

Effective July 1, 2016, the Judicial Council approved *Declaration Regarding Notice and Service of Request for Temporary Emergency (Ex Parte) Orders* (form FL-303) to help fill a need for a standard form that can be accepted for filing in family courts across the state.

Also effective July 1, 2016, the Judicial Council revised form FL-306, changing its title from "Application for Order and Reissuance of Request for Order and Temporary Emergency (Ex Parte) Orders" to "Request and Order to Continue Hearing and Extend Temporary Emergency (Ex Parte) Orders." The form was also revised to delete references to any filing other than a request for order and temporary emergency (ex parte) orders.

Rationale for Recommendation

Declaration Regarding Notice and Service of Request for Temporary Emergency (Ex Parte) Orders (form FL-303)

Form FL-303 is an optional form that can be used by a party to demonstrate compliance with the notice requirements of rule 5.165 of the California Rules of Court when requesting temporary emergency (ex parte) orders. The Judicial Council approved the form, effective July 1, 2016, to help fill a need for a standard form that can be accepted for filing in family courts across the state.

Following publication, family law facilitators noted that the form was deficient in one respect: for situations in which the party was requesting waiver of the ex parte notice requirements, the form does not provide a space for a party to specify the hearing date requested for the no-notice hearing or the date that the party will submit the request for the court to decide based on

declarations, without a hearing. With no prompt on the form for a party to insert either date, the court clerk is unable to set the matter on the court's calendar.

To address this issue, the committee recommends adding an item on the first page for the person completing the form to indicate the type of proceeding requested and specify the date, time, and location of the proposed emergency hearing or submission of documents. Former item 2a(2), which previously addressed notice of the new hearing date in certain situations, would be deleted, and the remaining items would be renumbered accordingly. The committee also recommends making other nonsubstantive, clarifying changes, such as adding headings to some of the items.

Request and Order to Continue Hearing and Extend Temporary Emergency (Ex Parte) Orders **(form FL-306)**

FL-306 is a mandatory form used by a party to ask the court to continue a hearing on a *Request for Order* (form FL-300) and extend the temporary emergency (ex parte) orders granted by the court. The form also includes the court order on the request. The most recent changes to the form were made to comply with the amendments to Family Code section 245.[1]

Some of the revisions to form FL-306 made effective July 1, 2016, had unintended consequences. For example, court professionals noted that form FL-306 previously could be, and frequently was, used in parentage cases by the Department of Child Support Services to ask for the reissuance of an order to show cause for a party to seek work, an order to show cause regarding contempt, an order for appearance and examination, and other matters. However, the most recent revisions to form FL-306 no longer allow the form to support these uses.

In addition, many courts reported that they relied on form FL-306 to continue a hearing on a *Request for Order* that did not include temporary emergency (ex parte) orders. Courts have reported that they no longer have a form to note the information for the continued hearing. As a result, court clerks in some counties have to take additional time to alter form FL-306. In other counties, in the absence of a form to continue a hearing to allow for service on the other party before the hearing, parties are required to refile the *Request for Order* (form FL-300) or file an

---

[1] Family Code section 245 provides:

"(a) The respondent shall be entitled, as a matter of course, to one continuance for a reasonable period, to respond to the petition.

(b) Either party may request a continuance of the hearing, which the court shall grant on a showing of good cause. The request may be made in writing before or at the hearing or orally at the hearing. The court may also grant a continuance on its own motion.

(c) If the court grants a continuance, any temporary restraining order that has been issued shall remain in effect until the end of the continued hearing, unless otherwise ordered by the court. In granting a continuance, the court may modify or terminate a temporary restraining order.

(d) If the court grants a continuance, the extended temporary restraining order shall state on its face the new date of expiration of the order.

(e) A fee shall not be charged for the extension of the temporary restraining order."

amended form FL-300. In either case, additional, duplicative papers are added to the court file. The party is also required to pay an additional filing fee for the matter to be continued to a new date.

In response, the committee recommends revoking current form FL-306 and replacing it with two new forms—an application and an order. The title of new form FL-306 is "Request to Continue Hearing." Its content is expanded to cover actions filed by the Department of Child Support Services in parentage cases and to allow a party to use the form to ask the court to continue a hearing on a *Request for Order* (form FL-300), order to show cause, or other moving papers without temporary emergency orders to allow time for service before the hearing.

The new form for the order, form FL-307, is titled "Order on Request to Continue Hearing" and covers orders on continuances in all the types of proceedings covered by new form FL-306.

Having a separate form for each function will:

- Make it easier for the party to complete the forms;

- Allow a party to more easily see and understand the orders on the request because they will be on the first page instead of the back of an application;

- Harmonize the process that is used to continue hearings in other types of civil cases, including civil harassment, elder abuse, domestic violence, and workplace violence (for example, to continue a hearing in which domestic violence temporary restraining orders have been issued, a party completes a *Request to Continue Hearing* (form DV-115), and the order is then made using *Order on Request to Continue Hearing* (form DV-116)); and

- Reflect the policy of reducing hybrid application and order forms to improve the processing of forms in courts' case management systems.

Rule 5.94. Order shortening time; other filing requirements; request to continue hearing and extend temporary emergency (ex parte) orders

In addition to the above form changes, the committee recommends amending rule 5.94, changing the title to "Order shortening time; other filing requirements; request to continue hearing" and amending the content generally to reflect the new forms FL-306 and FL-307.

Comments, Alternatives Considered, and Policy Implications

The current proposal circulated for comment as part of the winter 2017 invitation to comment cycle, from December 16, 2016, to February 14, 2017, to the standard mailing list for family and juvenile law proposals. Included on the list were appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks, attorneys, family law facilitators and self-help center staff, social

workers, probation officers, Court Appointed Special Advocate (CASA) programs, and other juvenile and family law professionals.

The committee received comments from seven individuals or organizations. Of these commenters, two agreed with the proposal, three agreed if modified, no one disagreed with the proposal, and two expressed no position but included comments and suggestions to improve the rule and forms. A chart with the full text of the comments received and the committee's responses is attached at pages 19–41.

Rule 5.94. Order shortening time; other filing requirements; request to continue hearing and extend temporary emergency (ex parte) orders

Four commenters suggested amendments to the rule. Most suggested minor changes such as word deletions or substitutions to help clarify the meaning of the rule. Others suggested formatting changes along with substantive changes to clarify the procedures that apply to the moving party, the responding party, or both. The specific changes are noted in the commentchart. However, because the substantive and formatting changes to the rule require so many changes to subdivision (f), the committee recommends striking subdivision (f) in its entirety and rewriting the subdivision to incorporate the commenters' suggestions.

One commenter suggested more extensive amendments to the rule and submitted a complete overhaul, including detailed procedures for requesting a continuance of a matter that includes and does not include temporary emergency orders. See Attachment A for the proposed changes to rule 5.94 submitted by Ms. Virginia Johnson.

In response, the committee does not recommend extensive amendments to the rule at this time. Although the committee recognizes the benefit of having very specific, uniform procedures for continuing hearings in family law courts across the state, the focus of this proposal was to address specific concerns from courts about the changes to form FL-306 effective July 1, 2016, that rendered the form unusable in some counties. Therefore, the committee recommends reviewing the additional suggested revisions in a future cycle to determine if the committee should propose a process for simplifying requests to continue a *Request for Order* with and without temporary emergency orders that can work in courts across the state.

***Declaration Regarding Notice and Service of Request for Temporary Emergency (Ex Parte) Orders* (form FL-303)**

One commenter recommended making this form mandatory to create consistency in document entries in a court's case management system. In response, the committee prefers that the form remain available for optional use. The committee recognizes that courts have produced their own local forms to help parties satisfy notice requirements when seeking temporary emergency orders and prefers that courts retain the ability to use their local forms.

Another commenter recommended that the form be revised to require court staff to fill in the information required by item 2, including date, time, and location of the hearing and whether the

request is for an ex parte hearing or a request that the court make orders based on the pleadings. The commenter stated that attorneys may not have a problem with completing this section, but self-represented parties will most likely not understand the difference between nor are they often aware of the local court's ex parte request processing procedures. In addition, the commenter suggested that there should be an advisement that not all counties have hearings on ex parte requests and a referral to local rules.

The committee does not recommend requiring the court hearing section to be completed by the court. The form is meant to be available for use in all counties in a manner that is consistent with their local rules. In some counties, the clerk is not required to fill in the information; instead, the party or attorney chooses the date and confirms with the court clerk that the date is available. Instead of recommending the suggested changes, the committee recommends revising the note above item 1 to state, "Before completing this form, read your court's local procedures for requesting temporary emergency orders and obtaining the information needed to complete item 2 of this form," and providing a link to local court rules.

A commenter suggested a minor, substantive change to the proposed revised form to help parties complete the form correctly: revising item 4 to clarify that parties who did not give notice of the request for temporary emergency (ex parte) orders (and who checked item 3b) do not have to serve any papers on the other party. In response, the committee notes that item 4c includes a check box for the party to specify that the documents were not served on the opposing party. However, instead of providing fillable space for the party to repeat the exceptional circumstances for not serving the documents, the committee recommends adding three check boxes below item 4c to allow the party to note that the exceptional circumstances were previously described in item 3b or 3c or are described in an attachment marked "4c."

Finally, a commenter stated that her court does not see form FL-303 very often because the court's local form is used most of the time. She also stated that providing an area to request waiver of the notice requirements makes sense.

Request to Continue Hearing **(form FL-306)**

Four commenters provided suggestions to improve proposed form FL-306. In response to the comments, the committee recommends the following changes:

- Delete the "Other (specify):" check box in the form's title caption to prevent parties from using the box to ask for orders that are inappropriate to the form.

- Add a notice box under the title caption to state that this form cannot be used to continue a domestic violence restraining order hearing. A link to an information sheet has also been included in the notice box.

- Add blank space for a party to specify the issues raised in the R*equest for Order* that are being continued, to clarify which moving paper is being continued in cases where multiple requests are filed on the same date.

- Clarifying in certain items that the word "continue" has the same meaning as "reschedule."

- Create a separate item for the filing date of the request to continue the hearing.

- Change the wording in 5b to better convey that a party should check the box if he or she has been unable to meet with the child custody mediator or child custody recommending counselor as ordered by the court.

- Revise item 5c to specify that the responding party must show good cause for the continuance if he or she has asked to continue the request for temporary emergency orders more than one time.

- Emphasize the importance of the Notice under item 6 by using bold type.

- Add an item at the bottom of the form so the party understands that the *Order on Request to Continue Hearing* (form FL-307) must be submitted with form FL-306.

***Order on Request to Continue Hearing* (form FL-307)**

Four commenters provided suggestions to improve proposed form FL-307. In response to the suggestions, the committee recommends the following changes:

- Add instructions at the top of the form to specify that the party must complete items 1–4.

- Bold the statement "The court will complete the rest of this form," and add a line that separates the two sections of the form.

- Avoid redundancy in the form by revising item 5 as the check box for the court to indicate that it is denying the request to continue the hearing.

- Revise item 6 to serve as the check box for the court to specify that it is granting the request to continue the hearing.

- Revise item 6a to include the address of the court.

- Revise item 7a(2) to better state that the continuance is needed so that the parties can attend mediation or child custody recommending counseling before the hearing.

Additional comments and request for specific comments

A commenter from a superior court stated that the court has a local order that authorizes the clerk's office to grant continuances under certain circumstances. In these instances, the order

would be stamped by a clerk and wouldn't require judicial review. For this reason, the commenter suggested making form FL-307 an optional form. In response, the committee does not recommend that form FL-307 be made optional. Instead, the committee recommends that, in a future cycle, it should consider a proposal to amend rule 5.94 to add language similar to that in rule 5.92(e) to allow the court clerk to continue a hearing as a ministerial act in certain circumstances.[2]

Alternatives considered

The committee considered amending rule 5.94 to add specific procedures that include and do not include temporary emergency orders for requests to continue a hearing. However, the committee decided to amend the rule only as needed to reflect changes to Family Code section 245. The committee also decided to further consider the comments that supported more extensive changes to the rule at a later date to determine if it should propose a process that can work in courts across the state. Considering the suggestions for more extensive changes to the rule at a later date will allow the committee to obtain input from other courts about their local procedures and avoid disrupting local procedures that now work for courts in large and small counties.

Implementation Requirements, Costs, and Operational Impacts

The committee anticipates that this proposal will result in some costs incurred by the courts to revise forms, train court staff about the changes to the rules and forms included in this proposal, and revise relevant local court rules and forms so they are consistent with the changes adopted by the Judicial Council. However, the committee expects that the changes will save resources for the courts in the long term by clarifying and simplifying procedures.

Attachments

1. Cal. Rules of Court, rule 5.94, at pages 9–13
2. Forms FL-303, FL-306, and FL-307, at pages 14–18
3. Chart of comments, at pages 19–41
4. Attachment A: Additional comments submitted by Virginia Johnson

[2] Rule 5.92(e) provides: "The court clerk's authority to issue a *Request for Order* (form FL-300) as a ministerial act is limited to those orders or notices: [¶] (1) For the parties to attend orientation and confidential mediation or child custody recommending counseling; and [¶] (2) That may be delegated by a judicial officer and do not require the use of judicial discretion."

Rules 5.94 of the California Rules of Court is amended, effective September 1, 2017, to read:

Rule 5.94. Order shortening time; other filing requirements; request to continue hearing ~~and extend temporary emergency (ex parte) orders~~

(a)−(d) * * *

(e) Failure to timely serve request for order ~~and temporary emergency (ex parte) orders~~

The *Request for Order* (form FL-300) or other moving papers such as an order to show cause, along with any ~~and~~ temporary emergency (ex parte) orders ~~(form FL-305),~~ will expire on the date and time of the scheduled hearing if the requesting party fails to:

(1) Have the other party timely served before the hearing with the *Request for Order* (form FL-300) or other moving papers, such as an order to show cause; supporting documents; and any ~~orders issued on~~ temporary emergency (ex parte) orders ~~(form FL-305)~~; or

(2) Obtain a court order to continue the hearing.

(f) Procedures to request continued hearing date ~~and extension of temporary emergency (ex parte) orders~~

~~(1) If a *Request for Order* (form FL-300) that includes temporary emergency orders is not timely served on the other party before the date of the hearing, and the party granted the temporary emergency (ex parte) orders wishes to proceed with the request, he or she must ask the court to continue the hearing date. On a showing of good cause, or on its own motion, the court may:~~

~~(A) Continue the hearing and extend the expiration date of the temporary emergency orders until the end of the continued hearing or to another date ordered by the court.~~

~~(B) Modify the temporary emergency (ex parte) orders.~~

~~(C) Terminate the temporary emergency (ex parte) orders.~~

~~(2) The party served with a *Request for Order* (form FL-300) that includes temporary emergency (ex parte) orders:~~

~~(A) Is entitled to one continuance for a reasonable period of time to respond and, thereafter, to a continuance based on a showing of good cause.~~

(B) Must file and serve a *Responsive Declaration to Request for Order* (form FL-320) as required by the court order.

(3) The following procedures apply to either party's request to continue the hearing:

(A) The party asking for the continuance must complete and submit an original *Request and Order to Continue Hearing and Extend Temporary Emergency (Ex Parte) Orders* (form FL-306) with two copies for the court to review, as follows:

(i) The form should be submitted to the court no later than five court days before the hearing date originally set on the *Request for Order*.

(ii) The party may present the form to the court at the hearing of the *Request for Order*.

(iii) The party who makes an oral request to the court on the date of the hearing is also required to complete and submit form FL-306 if the court grants the request.

(B) After the court signs and files form FL-306, a filed copy must be served on the other party, unless the court orders otherwise. If the continuance is granted:

(i) Before the other party is served with notice of the hearing and temporary emergency (ex parte) orders, then form FL-306 must be attached as the cover page and served along with the *Request for Order* (form FL-300), the original or modified temporary emergency (ex parte) orders, and supporting documents.

(ii) To the responding party, and the party who asked for the temporary emergency order was absent when the continuance was granted, then form FL-306 must be attached as the cover page to any documents the court orders served on that party.

(iii) Service must be in the manner required by rule 5.92 or as ordered by the court.

(C) If the *Request and Order to Continue Hearing and Extend Temporary Emergency (Ex Parte) Orders* (form FL-306), *Request for Order* (FL-

~~300), original or modified temporary emergency order, and supporting documents are not timely served on the other party, and the requesting party wishes to proceed with the hearing, he or she must repeat the procedures in this rule.~~

(1) If a *Request for Order* (form FL-300), order to show cause, or other moving paper is not timely served on the other party before the date of the hearing, and the party requesting the orders wishes to proceed with the request, he or she must ask the court to continue the hearing date.

(2) On a showing of good cause or on its own motion, the court may:

(A) Continue the hearing and set a new date; and

(B) Modify or terminate any temporary emergency (ex parte) orders initially granted with the *Request for Order*, order to show cause, or other moving paper.

(3) If the court grants a continuance and makes no change to the temporary emergency (ex parte) orders, those orders are extended until the time of the continued hearing or to another date specified by the court.

(4) The party served with a *Request for Order* (form FL-300), order to show cause, or other moving paper that includes temporary emergency (ex parte) orders:

(A) Is entitled to one continuance as a matter of course for a reasonable period of time to respond. A second or subsequent request by the responding party to continue the hearing must be supported by facts showing good cause for the continuance;

(B) May ask the court to continue the hearing by using *Request to Continue Hearing* (form FL-306); and

(C) Must file and serve a *Responsive Declaration to Request for Order* (form FL-320) before the date of the new hearing, as required by law or or described in *Order on Request to Continue Hearing* (form FL-307).

(5) The following procedures apply to either party's request to continue the hearing:

(A) The party asking for the continuance must complete and submit an original *Request to Continue Hearing* (form FL-306) with two copies for the court to review, as follows:

(i) The form should be submitted to the court no later than five court days before the hearing date set on the *Request for Order,* order to show cause, or other moving papers.

(ii) The party may present the form to the court on the date of the hearing.

(iii) The party who, on the date of the hearing, makes an oral request to the court to continue the hearing, is not required to complete form FL-306, but must complete and submit an *Order on Request to Continue Hearing* (form FL-307) if the court grants the request.

(B) Along with form FL-306, the party asking for the continuance must submit to the court an *Order on Request to Continue Hearing* (form FL-307) with the caption and initial items completed as described on the form.

(C) After the court signs and files form FL-307, a filed copy must be served on the other party as follows, unless the court orders otherwise:

(i) If the continuance is granted, *Order on Request to Continue Hearing* (form FL-307) must be attached as the cover page and served along with: the *Request for Order* (form FL-300) or other moving papers such as an order to show cause; any temporary emergency (ex parte) orders; and supporting documents.

(ii) If the court grants the responding party's request for a continuance, and the party who asked for the orders was absent when the continuance was granted, then *Order on Request to Continue Hearing* (form FL-307) must be attached as the cover page to any documents the court orders served on that party.

(iii) Service must be in the manner required by rule 5.92 or as ordered by the court.

(D) If the *Order on Request to Continue Hearing* (form FL-307), *Request for Order* (FL-300) or order to show cause, original or modified temporary emergency (ex parte) order, and supporting documents are

not timely served on the other party, and the requesting party wishes to proceed with the hearing, he or she must repeat the procedures in this rule, unless the opposing party agrees to waive notice and proceed with the hearing.

PARTY WITHOUT ATTORNEY OR ATTORNEY NAME: STATE BAR NUMBER:	FOR COURT USE ONLY
FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	***DRAFT*** ***NOT ADOPTED BY THE JUDICIAL COUNCIL***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	
DECLARATION REGARDING NOTICE AND SERVICE OF REQUEST FOR TEMPORARY EMERGENCY (EX PARTE) ORDERS	CASE NUMBER:

NOTICE : Do not use this form to ask for domestic violence restraining orders. Before completing this form, read your court's local procedures for requesting temporary emergency orders and obtaining the information needed to complete item 2 of this form. Courts may grant temporary emergency orders with or without an emergency hearing. Find local rules at courts.ca.gov/3027.htm.

1. I am *(specify)* ☐ attorney for ☐ petitioner ☐ respondent ☐ other parent/party
   ☐ not a party in the case *(name and title):*

2. I ☐ did ☐ did not give notice that
   ☐ there will be an emergency court hearing on a request for temporary emergency (ex parte) orders.
   ☐ papers will be submitted to the court asking a judicial officer to grant temporary emergency orders without a hearing.
   on the date, time, and location indicated below:

   a. Date: Time: ☐ Dept.: ☐ Room:
   b. Address of court: ☐ same as noted above ☐ other *(specify):*

3. **NOTICE** *(If you gave notice, complete item 3a. If you did not give notice complete item 3b or 3c.)*
   a. ☐ I gave notice as described in items (1) through (5):
      (1) I gave notice to *(select all that apply)*
      ☐ petitioner ☐ petitioner's attorney
      ☐ respondent ☐ respondent's attorney
      ☐ other parent/party ☐ other parent's/party's attorney
      ☐ child's attorney ☐ Other *(specify):*

      (2) I gave notice
      ☐ personally on *(date):* at *(location):* , California; at ☐ a.m. ☐ p.m.
      ☐ by telephone on *(date):* telephone no.: at ☐ a.m. ☐ p.m.
      ☐ by voicemail on *(date):* voicemail no.: at ☐ a.m. ☐ p.m.
      ☐ by fax on *(date):* fax no.: at ☐ a.m. ☐ p.m.

      (3) I gave notice *(select one):*
      ☐ by 10 a.m. the court day before this emergency hearing.
      ☐ after 10 a.m. the court day before this emergency hearing because of the following exceptional circumstances *(specify):*

Form Approved for Optional Use
Judicial Council of California
FL-303 Rev. September 1, 2017]

Family Law, §§ 2045, 3062–3064, 4620, 7710
Cal. Rules of Court, rules 5.151–5.169
www.courts.ca.gov

PETITIONER: RESPONDENT: OTHER PARENT/PARTY:	CASE NUMBER:

3. a. (4) I notified the person in 3a(1) that the following temporary emergency orders are being requested *(specify):*

(5) The person in 3a(1) responded as follows: ☐ Attachment 3a(5)

(6) I ☐ do ☐ do not believe that the person in 3a(1) will oppose the request for temporary emergency orders.

b. ☐ **Request for waiver of notice.** I did not give notice about the request for temporary emergency orders. I ask that the court waive notice to the other party to help prevent an immediate *(identify the exceptional circumstances)*

(1) ☐ danger or irreparable harm to myself (or my client) or to the children in the case.
(2) ☐ risk that the children in the case will be removed from the state of California.
(3) ☐ loss or damage to property subject to disposition in the case.
(4) ☐ Other exceptional circumstances *(specify):*

Facts in support of the request to waive notice *(specify):* ☐ Attachment 3b.

c. ☐ **Unable to provide notice.** I did not give notice about the request for temporary emergency orders. I used my best efforts to tell the opposing party when and where this hearing would take place but was unable to do so. The efforts I made to inform the other person were *(specify below):* ☐ Attachment 3c.

4. ☐ **SERVICE OF FORMS**

a. An unfiled copy of *Request for Order* (form FL-300) for temporary emergency orders, *Temporary Emergency (Ex Parte) Orders* (form FL-305), and related documents were served on

☐ petitioner ☐ petitioner's attorney ☐ other parent/party ☐ other parent/party's attorney
☐ respondent ☐ respondent's attorney ☐ child's attorney
☐ Other*(specify):*

b. Method of service:

☐ Personal service on *(date):* at *(location):* , California; at ☐ a.m. ☐ p.m.

☐ Fax on *(date):* fax no.: at ☐ a.m. ☐ p.m.

☐ Overnight mail or other overnight carrier

c. ☐ **Documents were not served on the opposing party** due to the exceptional circumstances specified in
☐ 3b, above ☐ 3c, above ☐ Attachment 4c.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE)

PARTY WITHOUT ATTORNEY OR ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):		***DRAFT*** ***NOT ADOPTED BY THE JUDICIAL COUNCIL***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:		
PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARENT/PARTY:		
REQUEST TO CONTINUE HEARING ☐ And Extend Temporary Emergency (Ex Parte) Orders		CASE NUMBER:

Do not use this form to ask to change the date of a domestic violence restraining order hearing. Read DV-115-INFO, *How to Ask for a New Hearing Date*, for more information.

1. Name of person seeking a continuance *(specify):*
2. I ask that the court reschedule (continue) the hearing date for the *(select one)*
   a. ☐ *Request for Order* regarding *(specify issues):*
   b. ☐ *Order to Show Cause for* ☐ Contempt ☐ Seek Work
   c. ☐ Other *(specify):*
3. The item in 2 was filed on *(date):*
4. The hearing is currently set for *(date):*
5. I ask that the court reschedule (continue) the hearing to another date because *(check all boxes that apply)*
   a. ☐ the papers could not be served as required before the hearing date.
   b. ☐ the parties have not been able to meet with a child custody mediator or child custody recommending counselor as ordered by the court.
   c. ☐ I am entitled, as a matter of course, to one continuance for a reasonable period to respond to the request for temporary emergency (ex parte) orders. This is my first request for a continuance. *(The responding party must complete item 5d if requesting more than one continuance of the hearing.)*
   d. ☐ Other good cause as stated ☐ below ☐ on Attachment 5(d):
6. The request to continue ☐ includes ☐ does not include temporary emergency (ex parte) orders previously issued. ***Notice: If the court grants the continuance, the expiration date of any temporary emergency (ex parte) orders will be extended to the end of the new hearing, unless otherwise ordered by the court.***
7. I have completed the required sections of *Order on Request to Continue Hearing* (form FL-307). *(Note: Form FL-307 must be submitted to the court with this form.)*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

▶ SIGNATURE

Form Adopted for Mandatory Use
Judicial Council of California
FL-306 [New September 1, 2017]

REQUEST TO CONTINUE HEARING
(Family Law—Governmental—Uniform Parentage—Custody and Support)

Family Code, § 245
Cal. Rules of Court, rule 5.94
www.courts.ca.gov

PARTY WITHOUT ATTORNEY OR ATTORNEY NAME: STATE BAR NUMBER: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* ***DRAFT*** ***NOT ADOPTED BY THE JUDICIAL COUNCIL***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARENT/PARTY:	
ORDER ON REQUEST TO CONTINUE HEARING	CASE NUMBER:

Complete items 1, 2, 3, and 4.

1. The hearing is currently scheduled for *(date):*
2. Name of party who filed the *Request for Order*, *Order to Show Cause,* or other matter is *(specify):*
3. Name of party asking to continue the hearing is *(specify):*
4. The request to continue ☐ includes ☐ does not include temporary emergency (ex parte) orders previously issued.

The court will complete the rest of this form.

5. ☐ **Order denying request to continue hearing**
   The request to continue the hearing is DENIED for the reasons specified ☐ below ☐ on Attachment 5.

6. ☐ **Order granting request to continue hearing and notice of new hearing**
   a. The court hearing is continued to the date, time, and location shown below:

New Hearing Date:	Time:	Dept.:	Room:
Address of court: ☐ Same as noted above ☐ Other*(specify):*			

   b. ☐ By granting the continuance, any temporary emergency (ex parte) orders previously issued remain in effect until
      (1) ☐ the end of the new hearing in 6a.
      (2) ☐ *(date):*

7. **Reason for the continuance**
   a. The continuance is needed because
      (1) ☐ the papers could not be served as required before the hearing date.
      (2) ☐ the parties need to attend child custody mediation or child custody recommending counseling before the hearing.
      (3) ☐ the responding party asked for a first continuance in a matter involving temporary emergency (ex parte) orders.
      (4) ☐ Other good cause as stated ☐ below ☐ on Attachment 7(a)(4)

   b. ☐ The court finds good cause and orders a continuance in its discretion.

Form Adopted for Mandatory Use
Judicial Council of California
FL-307 [New September 1, 2017]

ORDER ON REQUEST TO CONTINUE HEARING
(Family Law—Governmental—Uniform Parentage—Custody and Support)

Family Code, § 245
Cal. Rules of Court, rule 5.94
www.courts.ca.gov

PETITIONER/PLAINTIFF: RESPONDENT/DEFENDANT: OTHER PARENT/PARTY:	CASE NUMBER:

8. **Temporary emergency (ex parte) orders**

a. ☐ No temporary emergency (ex parte) orders were changed.

b. ☐ The temporary emergency (ex parte) orders are MODIFIED as of this date. The new orders are stated in the attached

(1) ☐ *Request for Order* (form FL-300)

(2) ☐ *Temporary Emergency (Ex Parte) Orders* (form FL-305)

(3) ☐ *Order to Show Cause* ☐ Contempt ☐ Seek Work ☐ Other *(specify):*

(4) ☐ Other *(specify):*

c. ☐ The temporary emergency (ex parte) orders are TERMINATED for the reasons stated ☐ on Attachment 8c ☐ in this section:

9. **Service of order**

a. ☐ No further service is required. Both parties were present at the hearing when the court granted this order.

b. ☐ The documents listed in 10 must be served by *(date):* on *(specify)*

(1) ☐ petitioner/plaintiff

(2) ☐ respondent/defendant

(3) ☐ other parent/party

(4) ☐ Other *(specify):*

c. ☐ All documents must be ☐ personally served ☐ served by mail.

d. ☐ Other orders regarding service *(specify):*

10. **Documents for service**

A filed copy of this order (form FL-307) must be presented as the cover page to the following documents when served:

a. ☐ A copy of the previously filed *Request for Order*, *Order to Show Cause,* or other moving paper

b. ☐ A copy of the extended or modified *Temporary Emergency (Ex Parte) Orders* (form FL-305)

c. ☐ Other *(specify):*

11. ☐ A *Responsive Declaration to Request for Order* (form FL-320) must be filed and served on or before *(date):*

12. ☐ Other orders:

Date:

JUDICIAL OFFICER

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

List of All Commenters, Overall Positions on the Proposal, and General Comments				
	Commenter	**Position**	**Comment**	**Committee Response**
1.	Virginia Johnson Staff Attorney Superior Court of San Diego County	N/I	All comments are included under specific headings below.	See responses to specific provisions below.
2.	State Bar of California The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) Saul Bercovitch Legislative Counsel	A	FLEXCOM members are in favor of the changes to Judicial Council forms and California Rules of Court set out in this proposal. Additional comments and suggestions are included under specific headings below.	No response required. See responses to specific provisions below.
3.	State Bar of California Standing Commission on the Delivery of Legal Services Sharon Ngim Program Development & Staff Liaison	A	All comments are included under specific headings below.	No response required.
4.	Superior Court of Los Angeles County Los Angeles County Superior Court	AM	All comments are included under specific headings below.	See responses to specific provisions below.
5.	Superior Court of Orange County Family and Juvenile Orange County Court Managers	N/I	All comments are included under specific headings below.	See responses to specific provisions below.
6.	Superior Court of Riverside County Susan Ryan Chief Deputy of Legal Services	AM	All comments are included under specific headings below.	See responses to specific provisions below.
7.	Superior Court of San Diego County Michael M. Roddy Executive Officer	AM	All comments are included under specific headings below.	See responses to specific provisions below.

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO RULE 5.94		
Commenter	**Comment**	**Committee Response**
Virginia Johnson Staff Attorney Superior Court of San Diego County	The commenter recommends the following changes to the rule: Rule 5.94. Order shortening time; other filing requirements; request to continue hearing ~~and extend temporary emergency (ex parte) orders~~ (e) Failure to timely serve request for order ~~and temporary emergency (ex parte)orders~~ T Any temporary emergency (ex parte) orders ~~(form FL-305)~~ granted as part of a *Request for Order* (form FL-300) ~~,~~ will expire on the date and time of the scheduled hearing if the moving party fails to: I think including the following language will cause confusion and questions particularly by SRLs. Ex: Why do I have to file an RFO? Why can't I file an OSC? Is the filing fee the same? What's the difference? (1) Have the other party timely served before the hearing with the *Request for Order* (form FL-300) ; supporting documents; and any ~~orders issued on *Temporary Emergency (Ex Parte) Orders* (form FL-305)~~ temporary emergency (ex parte) orders granted; or	The committee prefers to amend (e) as follows: The Request for Order (form FL-300) or other moving papers such as an order to show cause, including any ~~and~~ temporary emergency (ex parte) orders ~~(form FL-305),~~ will expire on the date and time of the scheduled hearing if the requesting party fails to: The rule is meant to apply to all requests for continuances, whether applicable to a Request for Order or other moving paper. The committee prefers to recommend the following language: (1) Have the other party timely served before the hearing with the *Request for Order* (form

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

SPR17-06
Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO RULE 5.94		
Commenter	**Comment**	**Committee Response**
	(2) Obtain a court order to continue the hearing. **(f) Procedures to request continued hearing date ~~and extension of temporary emergency (ex parte) orders~~** (1) If a *Request for Order* (form FL-300), ~~, that includes temporary emergency orders~~ are not timely served on the other party before the date of the hearing, and the party ~~granted the temporary emergency (ex parte) orders~~ wishes to proceed with the request, he or she must ask the court to continue the hearing date. ~~On a showing of good cause, or on its own motion,~~ The court ~~may~~: I don't know of a situation where the court would continue an RFO on its own motion when the moving papers have not been timely served. So, I suggest deleting the reference in the rule, as follows: (A) May continue the hearing on a showing of good cause. ~~and extend the expiration date of the temporary emergency orders until the end of the continued~~	FL-300) or other moving papers, such as an order to show cause; supporting documents; and any ~~orders issued on *Temporary Emergency (Ex Parte) Orders* (form FL-305)~~ temporary emergency (ex parte) orders; or (2) Obtain a court order to continue the hearing. The committee prefers to recommend the following change to (f)(1): (1) If a *Request for Order* (form FL-300), order to show cause, or other moving paper is not timely served on the other party before the date of the hearing, and the party requesting the orders wishes to proceed with the request, he or she must ask the court to continue the hearing date. The committee does not recommend the suggestions made by the commenter. Family Code section 245 authorizes the court to continue a hearing relating to temporary emergency orders on its own motion. The committee recommends the following changes to

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO RULE 5.94		
Commenter	**Comment**	**Committee Response**
	~~hearing or to another date ordered by the court.~~ (B) May m~~o~~dify ~~the~~ or terminate any temporary emergency (ex parte) orders granted as part of the *Request for Order* or order to show cause. The extension of the temporary emergency orders is not mandatory if the court, in its discretion, terminates the temporary emergency orders. (C) By granting a continuance, must extend the expiration date of any ~~Terminate the~~ temporary emergency (ex parte) orders until the end of the continued hearing or to another date. The commenter also submitted a proposed full amendment of the rule for the committee to consider. It is included as Attachment A.	the rule: (2) On a showing of good cause or on its own motion, the court may: (A) Continue the hearing and set a new date; and (B) Modify or terminate any temporary emergency (ex parte) orders initially granted with the *Request for Order*, order to show cause, or other moving paper. In response, the committee recommends that the rule provide: (3) If the court grants a continuance and makes no change to the restraining orders, those temporary emergency (ex parte) orders are extended until the time of the continued hearing or to another date specified by the court. In response, the committee recognizes that there is a benefit to having very specific, uniform procedures for continuing hearings in family law courts across the state. However, this was not the purpose of the proposal that circulated for comment. The focus was to address

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

SPR17-06
Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO RULE 5.94		
Commenter	**Comment**	**Committee Response**
		specific concerns from courts about the changes made to form FL-306, effective July 1, 2016, which rendered the form unusable in some counties. Therefore, the committee recommends considering the additional suggestions for revising the rule in a future cycle to determine if the committee should propose a process that can work in courts across the state to simplify requests to continue a *Request for Order* with and without temporary emergency orders.
State Bar of California The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) Saul Bercovitch Legislative Counsel	Please consider the following recommendations when amending Rule 5.94 of the California Rules of Court: (f)(1)(C)*(now (f)(2) and (f)(3))*: This is potentially confusing as written in view of the language in (f)(B). We recommend the following changes: (C) By granting a continuance, must extend the expiration date of any temporary emergency (ex parte) orders, **as modified per subdivision (B) above,** until the end of the continued hearing or to another date, **unless terminated per subdivision (B) above.**	In response to the commenter's comment, the committee recommends amending subdivision (f) to include a new item 2, as follows: (2) On a showing of good cause or on its own motion, the court may: (A) Continue the hearing and set a new date; and (B) Modify or terminate a temporary emergency (ex parte) order initially granted with the Request for Order or order to show cause. (3) If the court grants a continuance and makes no changes to the restraining orders, those temporary emergency (ex parte) orders are extended until the time of the continued hearing or to another date specified by the court.

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO RULE 5.94		
Commenter	**Comment**	**Committee Response**
	(f)(2)(C) *(now (f)(4)(C))*: What is required by the court will be described in FL-307 (section 11 of the form) and if, as it happens sometimes, the court is silent on this issue (filing and service of responsive papers), then it should be as required by law. We recommend the following changes: (C) Must file and serve . . . as required by ~~the court~~ law or described . . .	The committee agrees with the commenter and recommends amending the rule (f)(4)(C) as suggested. The committee agrees with the commenter and recommends amending the rule (f)(4)(C) as suggested.
	(f)(3) *(now (5))*: We recommend that subdivision (B) be eliminated and subdivision (A) include language to require submission of an FL-307 with caption completed, along with FL-306. We recommend that (i) and (ii) be amended as follows and (iii) be omitted: (i) **If submitting a request prior to hearing, t**he form**s** . . . . (ii) The party may **also** present the form**s** to the court. A note as to (ii): Why is submission of FL-306 being required	The committee does not agree with the suggested changes. Subdivision 5(A) is drafted to include time frames for requesting the continuance in writing or verbally at the time of the hearing. The committee recommends that (f)(5)(B) include that form FL-307 with caption completed, must be submitted with form FL-306. The committee does not agree to recommend the proposed changes to these subsections.

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO RULE 5.94		
Commenter	**Comment**	**Committee Response**
	when the request is being made on the record? Should an oral request in court be sufficient, especially since the request form is simplified and most details will be discussed on the record? This is a hardship if the party or attorney forgets to bring a form with them and cannot get access to print the form while at the courthouse.	In response, the committee recommends amending section (iii) to clarify that the party who makes an oral request to the court on the date of the hearing must complete and submit an *Order on Request to Continue Hearing* (form FL-307) if the court grants the request.
Superior Court of Los Angeles County Los Angeles County Superior Court	Rule 5.94 (f) (3) (A) (ii)*(now (f)(5)(A)(ii))* - End the sentence after "originally set" and delete "on the matter."	The committee agrees with the suggestion made by the commenter and incorporates the change along with other amendments recommended for adoption.
Superior Court of San Diego County Michael M. Roddy Executive Officer	Consider deleting the word "granted" after temporary emergency (ex parte) orders in the following subsections: 5.94(e), 5.94(e)(1), and 5.94(f)(1)(B)*(now (f)(2)(B))*. The word isn't necessary and it doesn't flow with the sentences. If temporary emergency (ex parte) orders exist it is because they were granted. Alternatively, if the word "granted" is going to be used, make it consistent and use it in 5.94 (f)(1)(C) and (f)(2). Rule 5.94(f) and the Rule generally: Is this rule and the forms, FL-306 and FL-307, intended to be used in the situation where the RFO or other moving papers have been timely served and the parties agree to a continuance of the hearing? Rule 5.94(f)(1)(A): Consider adding "stipulation" or "agreement" as an additional basis upon which the court may continue the hearing as hearings are frequently continued upon the stipulation of the parties whether or not the RFO/moving papers is timely served.	The committee agrees with the suggestion made by the commenter about 5.94(e), 5.94(e)(1). The committee, however, prefers not to delete the word "granted" from (f)(2)(B), as it is appropriate in the context of the sentence. No. The forms and rule do not apply to stipulated continuances. The committee does not recommend the change to the rule suggested by the commenter. The rule does not cover stipulations or agreements to continue a hearing.

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO RULE 5.94		
Commenter	**Comment**	**Committee Response**
	Rule 5.94(f)(2)(B)*(now (f)(4)(B))*: Consider rephrasing this sentence, because the FL-306 form is a mandatory form, to: "May ask the court to continue the hearing by using *Request to Continue Hearing* (form FL-306)."	The committee agrees with the commenter's suggestion and incorporates it into the amendments being recommended for adoption.
	Rule 5.94(f)(3)(A)(i) and (f)(3)(A)(ii) *(Note: (f)(3) is now (f)(5))*: Consider deleting the word "originally" as it is not needed and because it may cause confusion for self-represented litigants when seeking a second or third continuance.	The committee agrees with the commenter's suggestion and incorporates it into the amendments being recommended for adoption.
	Rule 5.94(f)(3)(A)(i) and (f)(3)(A)(ii) *(Note: (f)(3) is now (f)(5))*. In what manner should the form be submitted to the court no later than five court days before the hearing? By an ex parte appearance, or as a "drop" not requiring an ex parte application/appearance or in some other manner?	The language of the rule is meant to help implement the requirements of Family Code section 245(b) that the request may be in writing before or at the hearing or orally at the hearing. The rule specifies that form (form FL-306) will serve as the "writing" in the statute. The rule is not meant to cover the manner in which the form should be submitted.
	May a fee be charged?	Family Code section 245 provides that a fee shall not be charged for the extension of the temporary restraining order. The statute does not cover a request to continue a matter without emergency orders. Therefore, a fee may be charged for all requests to continue a hearing that do not include temporary emergency orders.
	Rule 5.94(f)(3)(C)(ii) *(Note: (f)(3) is now (f)(5))*: The sentence as proposed is problematic for two reasons:	In response to the comment, the committee recommends amending 5.94(f)(5)(C)(ii) to require that form FL-307 be served on the absent party or attached as the cover

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO RULE 5.94		
Commenter	**Comment**	**Committee Response**
		page to any documents that the court orders served on that party.
	1) The court may not always order documents to be served so the requirement of attaching the FL-307 should not be tied to what documents the court orders served; and	The committee believes the additional language recommended by the commenter is not needed. The general language in 5.94(f)(5)(C) ("unless the court orders otherwise") is sufficient to cover the issue raised by the commenter.
	2) The sentence appears to only address the situation where the moving party is absent from a hearing on a request to continue the hearing. It should also include the situation where the responding party submits the FL-307 prior to the hearing as set forth in (f)(3)(A)(i) *(Note: (f)(3) is now (f)(5))* above.	If the parties are at the hearing, the moving party will most likely be served with the order. The rule does not need to address this situation.

COMMENTS APPLICABLE TO FORM FL-303		
Commenter	**Comment**	**Committee Response**
State Bar of California The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) Saul Bercovitch Legislative Counsel	Section 2: It seems that line two and three of this section should be completed by court staff. While attorneys may not have a problem with this, SRLs will most likely not understand the difference nor are they often aware of the local court's ex parte request processing procedures.	The committee does not recommend requiring the court hearing section to be completed by the court. The form is meant to be available for use in all counties Instead, the committee recommends revising the note above item 1 to state: "Before completing this form, read your court's local procedures for requesting temporary emergency orders and obtaining the information needed

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO FORM FL-303		
Commenter	**Comment**	**Committee Response**
		to complete item 2 of this form.
	Additionally, in some counties the court determines if there will be a hearing on an ex parte requests on a case by case basis. Please consider moving these two lines in the box directly underneath where court staff will be writing in the date and time of the ex parte hearing, if any.	Same as above response.
	Also, sometimes the only ex parte order requested is for shortening time. That language should be added in this section. For example, when there is already a hearing scheduled for custody and visitation and the responding party wants to add child support as an issue.	The committee does not recommend this change. If an order shortening time is sought, that information can be included in item 3a(4).
	Section 3: Somewhere in this section, there should be an advisement that not all counties have hearings on ex parte requests and referral to local rules.	This information is already included in the notice above item 1.
	Section 4: SRLs (and some attorneys) do not understand the difference between notice and service in this context. We believe that changing the title of this section to "Service of Ex Parte Forms" or something similar to that would be helpful.	The committee agrees to recommend revising the heading to "Service of Forms." The description of the forms in this section makes it clear the type of forms required for service.
Superior Court of Orange County Family and Juvenile Orange County Court Managers	We recommend making this a mandatory form. Rule 5.92(f) specifies service requirements for Request for Court Order forms (FL-300). Making this form mandatory would eliminate the need for counsel and parties to prepare on pleading. It would also create consistency in document entries into our case management system.	The committee prefers that the form remain available for optional use. The committee recognizes that courts have produced their own local forms to help parties satisfy the notice requirements when seeking temporary emergency orders, and prefers that courts retain use of their local forms.

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO FORM FL-303		
Commenter	**Comment**	**Committee Response**
Superior Court of Riverside County Susan Ryan Chief Deputy of Legal Services	The Declaration Regarding Notice of Request for Temp Orders is an optional form that we do not see too often, as the Court's Local Form is used most of the time. Providing an area to request waiver of the notice requirements makes sense.	No response required.
Superior Court of San Diego County Michael M. Roddy Executive Officer	Item 4a: A checkbox should be added following the "a." As it is currently listed, it is conflicting if the party did not serve. This would also be consisted with Service of Order (item 9) on the proposed FL-307.	There is a check box after item 4, which is intended to indicate whether the paperwork was served. To increase clarity on this point, the committee recommends revising item 4 to state "Service *(Do not complete this section if you checked item 3b.)"*

COMMENTS APPLICABLE TO FORM FL-306		
Commenter	**Comment**	**Committee Response**
Virginia Johnson Staff Attorney Superior Court of San Diego County	I would agree that FL-306 should be replaced with two forms, but suggest that instead of dividing the forms between a request and an order, divide them between a request and order to continue an RFO with a TEO and a request and order to continue an RFO without a TEO. It just seems so much simpler and more logical. Rule 5.94 would need to be revised accordingly. Attorneys and SRLs alike seem to believe that the responding party has a statutory right to one continuance even in a plain RFO with no temporary orders. I do not believe this was the intent of Fam. Code §245. The proposed new FL-306, option #4.c., even with the limiting language, would promote this	The committee does not agree with the suggestion to create separate forms for the request to continue a hearing with and without temporary emergency orders. The committee prefers one multiuse request form and one order rather than creating three new forms from the current form FL-306, which is an application and an order. Family Code section 245 (a) provides that "The respondent shall be entitled, as a matter of course, to one continuance for a reasonable period, to respond to the petition." The committee believes that form FL-306 correctly reflects the language of the statute.

SPR17-06
Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO FORM FL-306		
Commenter	**Comment**	**Committee Response**
	misinterpretation of the law. I believe a request to continue a hearing on contempt should only be done, at best, by ex parte application. There are too many variables involved, at least in San Diego, such as the availability of appointed counsel, a court reporter, and a criminal judge. The proposed new FL-306 also does not indicate if there was a time waiver. I would oppose expanding the form to cover any type of DCSS cases. DCSS already has its own "RFO" type forms (*see* FL-680, FL-683, FL-684). Any continuance of a government support hearing should be on a government form. Court practices and procedures for Title IV cases are different throughout the state. For counties like San Diego who segregate Title IV cases from standard dissolution, parentage, etc. cases, any integrated or cross-over forms could only cause confusion and misuse of the proper forms. Also, I believe DCSS forms must include the Title IV Commissioner objection language.	 The committee recommends that the revised form reflect the various ways that local courts have used the form and, therefore, recommends that the check box for contempt hearings be added to form FL-306. Same as above response.
State Bar of California The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) Saul Bercovitch Legislative Counsel	Title: W recommend that the title be changed to add the work "and" ("ReEQUEST TO CONTINUE HEARING **AND**") for clarification that the applicant can ask for the additional order at the same time. We also recommend that the box for "other" be removed as some applicants, especially SRLs, may use it to ask for orders that are not appropriate for this form. Also, there is no	The committee prefers to keep the title as is and revise the check box beneath it to provide "And extend temporary emergency (ex parte) orders. The committee agrees with the suggestion and has incorporated it with the other recommendation being made to the Judicial Council relating to this form.

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO FORM FL-306		
Commenter	**Comment**	**Committee Response**
	corresponding box in the body of the request to allow the applicant to make other requests than the continuance. Finally, we recommend that an advisement be added to this section that this form cannot be used to continue DVRO hearings.	The committee agrees with the suggestion and has incorporated it with the other recommendation being made to the Judicial Council relating to this form.
Superior Court of Los Angeles County Los Angeles County Superior Court	Item 5 *(now 6)*- Add "Proposed Order FL-307 and form FL-303 shall be submitted with this request to continue hearing."	The committee does not agree with the commenter that form FL-303 is part of the process to ask the court to continue a hearing. Form FL-303, or another similar declaration, is needed when a party is seeking a temporary emergency (ex parte) order. The form is not required a part of the process to ask the court to continue the hearing because the court would have already granted the temporary emergency (ex parte) order at the time that the party seeks to continue the hearing. The committee does, however, recommend revising form FL-306 to add a note at the bottom of the form stating that the sections on *Order on Request to Continue Hearing* (form FL-307) that are required to be completed and that the Order must be submitted with form FL-306.
Superior Court of Orange County Family and Juvenile Orange County Court Managers	On page 1, in the title section, we recommend adding a checkbox titled, "RFO Reissuance." This would support Code of Civil Procedure section 527(d)(5), wherein if the opposing party could not be served within the required time, the court may reissue any temporary restraining order previously issued.	By recommending the title change to *Request to Continue Hearing*, the committee believes that it will cover a request to continue a hearing, whether the moving paper is a Request for Order or Order to Show Cause. The committee recommends a check box in the

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO FORM FL-306		
Commenter	**Comment**	**Committee Response**
		title be reserved for cases in which the court previously granted a temporary emergency (ex parte) order.
	On page 1, section 2, we recommend making the *filed on (date)* a subsection so it is not so readily missed or left blank.	The committee recommends that the form be revised to create a separate item 3 for the party to insert the date that the matter was filed. The committee recommends revising the language on the form to inform the person completing it that the word "continuance" has the same meaning as "reschedule." The committee believes that the word "continuance" should be included on the form to be consistent with the language used in Family Code section 245.
	On page 1, section 4 *(now 5)*, we recommend adding a *reset/reschedule* option instead of a *continuance* option when service has not occurred. Continuance refers to a hearing that has started.	
	Proposed rule 5.94(2)(a), indicates a second or subsequent request by the responding party to continue the hearing must be supported by facts showing good cause. We recommend adding checkboxes in the title section to indicate if it is a *first, second or subsequent* filing.	The second or subsequent request relates to a party responding to a request for a temporary emergency (ex parte) order under Family Code section 245(a). The committee prefers to recommend revising section 4 (c) to state " I am entitled, as a matter of course, to one continuance for a reasonable period of time to respond to the request for temporary emergency (ex parte) orders. *(The responding party must complete item 4d if requesting additional continuances.)*"
	On page 1, section 3 *(now 4)*, we recommend adding a hearing information section that includes the date, time and department. Not all matters are heard by the assigned judge. Adding this information would allow parties to easily identify their hearing date, time and location.	The committee does not recommend adding this requirement to the form. Requiring a party to insert the date that the request was filed, the issues specified in the filing, and the date of the filing, is sufficient to ensure that the party has referred to the Request for Order and will know this information.

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO FORM FL-306		
Commenter	**Comment**	**Committee Response**
	On page 1, we recommend adding a section to notify the party they are to partially complete the *Order on Request to Continue Hearing (FL-307).* Otherwise, a self-represented litigant would not be aware that they are to file the Order along with the Request.	The committee agrees with the suggestion and has incorporated it with the other recommendation being made to the Judicial Council relating to this form.
Superior Court of Riverside County Susan Ryan Chief Deputy of Legal Services	Change the wording on #4 (b) *(now 5(b)*) to read: We have not been able to meet with the child custody mediator or child custody recommending counselor as ordered by the court. Recommend on box #5 *(now 6)* where it reads Notice: If the court grants the continuance, the expiration date of any temporary emergency (ex parte) orders will be extended to the end of the new hearing, unless otherwise ordered by the court. That this statement should be made to stand out in bold letters. (**Notice: If the court grants the continuance, the expiration date of any temporary emergency (ex parte) orders will be extended to the end of the new hearing, unless otherwise ordered by the court.)**	The committee agrees with the suggestion and has incorporated it with the other recommendation being made to the Judicial Council relating to this form. The committee agrees with the suggestion and has incorporate it with the other recommendation being made to the Judicial Council relating to this form.

COMMENTS APPLICABLE TO FORM FL-307		
Commenter	**Comment**	**Committee Response**

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO FORM FL-307		
Commenter	**Comment**	**Committee Response**
Superior Court of Los Angeles County Los Angeles County Superior Court	Item 1 - delete "on this matter."	The committee agrees with the suggestion and has incorporated into the other recommendation being made to the Judicial Council relating to this form.
	Item 4 - Make bold "***The court will complete the rest of this form***." and below it add a solid line in bold to clearly separate the below sections.	Same as above response.
	Item 7(a) (2) - change the entire sentence to read "the parties were unable to schedule an appointment prior to the court hearing with the child custody mediator or child custody counselor."	To limit the sentence to one line, the committee recommends revising item 7(a)(2) to state "the parties need to attend child custody mediation or child custody recommending counseling before the hearing."
Superior Court of Orange County Family and Juvenile Orange County Court Managers	We recommend making this form optional. We have a local order that authorizes our Clerk's Office to grant continuances under certain circumstances. In these instances, the order would be stamped by a clerk and wouldn't require judicial review.	In response, the committee does not recommend that form FL-307 be made an optional form. Instead, the committee recommends that, in a future cycle, it should consider a proposal to amend rule 5.94 to add language similar to rule 5.92(e) to allow the court clerk to continue a hearing as a ministerial act in certain circumstances.
	On page 1, in the title section, we recommend adding two checkboxes to titled¸ *Reset* and *Continuance* to allow for consistency of our recommendations for FL-306.	To be consistent with the recommendations made by the committee regarding form FL-306, the committee does not agree to add check boxes as suggested by the commenter.
	On page 1, section 2, we recommend adding party checkboxes similar to section 9 to ensure consistency.	The committee believes that the section 2 and 3 are the clearest and simplest way to show on the first page who is in the case. Therefore, the committee does not agree to

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO FORM FL-307		
Commenter	**Comment**	**Committee Response**
		recommend the changes suggested by the commenter.
	On page 1, section 5, we recommend retitling it to *Order on Request to Continue Hearing Denied* and adding a checkbox before the title.	The committee agrees with the suggestion and has incorporated it, with modifications, into the other recommendation being made to the Judicial Council.
	On page 1, section 2, we recommend making the *filed on (date)* a subsection so it is not so readily missed or left blank.	Section two is used to insert the name of the party who filed the Request for Order. The committee recommends revising this section to clarify the purpose of this section.
	On page 1, we recommend deleting the existing 5a, *the request to continue the hearing is GRANTED as stated below* section since the existing section 6 references the order being granted.	The committee agrees with the suggestion and has incorporated it, with modifications, into the other recommendation being made to the Judicial Council.
	On page 1, we request retitling section 6 to *Order on Request to Continue Hearing Granted and Notice of New Hearing* and adding a checkbox before the title.	The committee recommends revising the heading to read Order granting request to continue hearing and notice of new hearing.
	On page 1, we recommend moving the *Reason for continuance* section to section 5 and the existing sections down accordingly. This would make it easier for the petitioner to transition between the sections he/she needs to complete.	The committee does not recommend the revisions suggested by the commenter. The court, not the party, is required to complete the item that lists the reason for the continuance.
	On page 1, we recommend adding an instructions box that notifies the petitioner they are to complete sections 1-5. The court would complete the remaining sections.	The committee agrees with the suggestion and has incorporated it, with modifications, into the other recommendation being made to the Judicial Council.

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

COMMENTS APPLICABLE TO FORM FL-307		
Commenter	**Comment**	**Committee Response**
	On page 1, in the hearing information section, we recommend adding a checkbox prior to *at the street address of the court shown above* and adding an *other* checkbox option. We mail notices from one facility which would be the address indicated at the top of the form, but the hearing may be scheduled at a different facility.	The committee agrees with the suggestion and has incorporated it, with modifications, into the other recommendation being made to the Judicial Council.
Superior Court of Riverside County Susan Ryan Chief Deputy of Legal Services	FL-307 should be modified to better emphasize the following line: "The court will complete the rest of this form". Further, a line should be included to differentiate the "Order" section of the form.	The committee agrees with the commenter and has incorporated the changes along with other revisions the committee is recommending to this form.
Superior Court of San Diego County Michael M. Roddy Executive Officer	Item 6a: A checkbox should be added following the "a." As it is currently listed, it appears that the court hearing is continued automatically. New Hearing Date caption: Replace "at the street address of the court shown above" with "Address of the court same as noted above" to conform with existing JC forms (e.g. FL-300).	The committee agrees with the commenter and has incorporated the suggestion, with modifications, along with other revisions the committee is recommending to this form. The committee agrees with the suggestion and recommends including it with the other revisions being recommended to this form.

ADDITIONAL COMMENTS /REQUEST FOR SPECIFIC COMMENTS		
	Comment	**Committee Response**

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

ADDITIONAL COMMENTS /REQUEST FOR SPECIFIC COMMENTS		
	Comment	**Committee Response**
State Bar of California The Executive Committee of the Family Law Section of the State Bar of California (FLEXCOM) Saul Bercovitch Legislative Counsel	As for the two specific inquiries, 1) we are in agreement with applying the terminology provided in Family Code section 245, as amended in 2016, to continuance of hearings that do not involve ex parte orders; and 2) we agree that keeping the request form simpler than the order form is helpful, especially to self-represented litigants (SRLS), and at the same time legally sufficient. The order form provides the court with all the details necessary to address issues that may come up in continuing the hearing, such as service.	No response required. No response required.
State Bar of California Standing Commission on the Delivery of Legal Services Sharon Ngim Program Development & Staff Liaison	Forms FL-306 and FL-307: The proposed changes are beneficial for low and moderate income litigants. Splitting the form into two streamlines the process for requesting a continuance and providing notice of the request, which will avoid duplicate filing fees and increase efficiency for the court.	No response required.
Superior Court of Los Angeles County Los Angeles County Superior Court	Additional Recommendation: We recommend that a separate form be created to allow the moving party to obtain an extension for lack of service ONLY, when no temporary orders were previously issued. Prior to the FL-306 being revised in July 2016, this form was routinely used to request a new date when the moving party had been unable to serve the responding party. If there were a separate form for the purpose of continuing the date when the moving party has not been able to timely serve the responding party, and no temporary orders were issued, this function could be delegated to clerical staff. This would create considerable	The committee does not recommend that a separate form be created as suggested by the commenter. The committee's recommended changes to the form cover the issue raised by the commenter. Changes to form FL-306 were drafted to enable a moving party to obtain a continued hearing date when no temporary orders were previously issued. The term "extension" is used on the form reflect the language in Family Code section 245. When no temporary emergency orders are involved, the moving party would only need to request that the court continue the hearing.

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

ADDITIONAL COMMENTS /REQUEST FOR SPECIFIC COMMENTS		
	Comment	**Committee Response**
	savings and efficiencies for the court. Request for Specific Comments: Q: Would the proposal provide cost savings? If so, please quantify. A: The proposal would provide cost savings as to the time spent by court employees modifying the current form to fit the needs of the applicant and/or court. Also it would save time in preparing minute orders to set the cases for hearing. Q: What are the implementation requirements for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? A: The implementation requirements would include adding a new code to the CMS to include form FL-307. Training on use of new forms would be necessary for the filing window, data entry and courtroom staff. Q: Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? A: Two months is sufficient time for the implementation. Q: How well would this proposal work in courts of different sizes? A: The proposal will work in any size court location.	No response required. No response required. No response required. No response required.

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

ADDITIONAL COMMENTS /REQUEST FOR SPECIFIC COMMENTS		
	Comment	**Committee Response**
	Q: Is the information provided in plain language such that it will be accessible to a broad range of litigants, including self-represented litigants? A: Yes, the language used is easy to understand. Q: What would the impact of this change be on low- and moderate-income litigants? A: The impact on low and moderate income litigants will be beneficial as a result of forms being easy to understand.	No response required. No response required.
Superior Court of Orange County Family and Juvenile Orange County Court Managers	Q: What would the implementation requirements be for courts? Staff training, procedures, changing docket codes or modifying case management systems? A: Minor configuration changes to our case management system, procedure updates and training would be needed to implement this change. Q: How well would this proposal work in courts of different sizes? A: After the last revision of FL-306, courts had to create a workaround and amend the form in order to use it on cases that did not include a temporary emergency order. This proposal would eliminate courts of all sizes having to modify the form to fit their needs.	No response required. No response required.
Superior Court of Riverside County Susan Ryan Chief Deputy of Legal Services	Q: Would the proposal provide cost savings? If so, please quantify.	

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

ADDITIONAL COMMENTS /REQUEST FOR SPECIFIC COMMENTS		
	Comment	**Committee Response**
	A: Cost savings is unlikely given that the proposal does not reduce the use of court resources. Riverside Superior Court currently uses a local form for ex parte notice.	No response required.
	Q: What are the implementation requirements for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?	
	A: Court clerks, courtroom assistants, judicial officers, and judicial assistants would need to be trained and the process would need to be integrated into case management systems.	No response required.
	Q: Would two months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?	
	A: For Self Help purposes and updating form packets, two months is sufficient for implementation.	No response required.
	Q: How well would this proposal work in courts of different sizes?	
	A: The volume of requests for various courts is unknown, however, the effect on Riverside Superior Court would be minimal.	No response required.
	Q: Is the information provided in plain language such that it will be accessible to a broad range of litigants, including self-represented litigants?	
	A: Yes.	No response required.

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

SPR17-06

Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Order
(Amend Cal. Rules of Court, rule 5.94; revise form FL-303, revoke form FL-306; adopt forms FL-306 and FL-307)

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

ADDITIONAL COMMENTS /REQUEST FOR SPECIFIC COMMENTS		
	Comment	**Committee Response**
	Q: What would the impact of this change be on low- and moderate-income litigants? A: None.	No response required.

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

CRC, Rule 5.94.
Order shortening time; other filing requirements

(a)-(d) ***

CRC, Rule 5.95
Failure to timely serve request for order; request to continue hearing

(a) Failure to timely serve request for order *with* temporary emergency (ex parte) orders (RFO *with* TEO)

All *Temporary Emergency (Ex Parte) Orders* (form FL-305) granted as part of a *Request for Order* (form FL-300) will expire on the date and time of the scheduled hearing if the moving party fails to:

(1) Have the other party timely served before the hearing with the *Request for Order* (form FL-300), the *Temporary Emergency (Ex Parte) Orders* (form FL-305), and all supporting documents; or

(2) Obtain a court order to continue the hearing which will automatically extend the temporary emergency orders to the new hearing date

(b) Procedures to request continued hearing date of RFO *with* TEO

(1) **Moving Party.** If an RFO with TEO is not timely served on the other party before the date of the hearing, and the party who filed the RFO and was granted the TEO wishes to proceed with the request, he or she must ask the court to continue the hearing date. The request must be supported by facts showing good cause for the continuance.

(2) **Responding Party.** The party served with an RFO with TEO:

(A) Is entitled to one continuance as a matter of course for a reasonable period of time to respond. A second or subsequent request by the responding party to continue the hearing must be supported by facts showing good cause for the continuance.

(B) Must file and serve a *Responsive Declaration to Request for Order* (form FL-320) before the date of the new hearing, as required by the court order or described in the *Request and Order to Continue Hearing on RFO with TEO* (form FL-306).

(3) **Either Party.** The following procedures apply to either party's request to continue the hearing date of an RFO with TEO:

(A) The party asking for the continuance must complete and submit

(1) An original and two copies of the *Request and Order to Continue Hearing on RFO with TEO* (form FL-306).

(2) A new, original *Temporary Emergency (Ex Parte) Orders* (form FL-305) with the caption and item #1 completed. The remainder of the order will be completed by the court if it modifies or terminates the existing temporary emergency orders.

(B) Both forms should be submitted to the court no later than five court days before the hearing date originally set on the *Request for Order*.

(C) The party may present both forms to the court on the hearing date originally set on the *Request for Order*.

(D) The party who makes an oral request to the court at the time of the hearing is also required to complete and both forms if the court grants the request to continue the hearing.

(c) Modification, termination, and extension of temporary emergency orders

(1) The court may continue the hearing on its own motion.

(2) When granting either party's request for a continuance or on the court's own motion, the court may modify or terminate any temporary emergency (ex parte) orders granted as part of the *Request for Order*

(3) By granting a continuance, the expiration date of all temporary emergency (ex parte) orders made or modified will be extended by operation of law until the end of the continued hearing or to another date as ordered by the court.

(d) Service of Process on Order Continuing RFO *with* TEO

(1) After the court signs and files the order (form FL-306), a filed copy must be served on the other party, unless the court orders otherwise.

(A) If the continuance is granted to the moving party based on failure to timely serve the moving papers, the order (form FL-306) must be attached as the cover page to and served along with the *Request for Order* (form FL-300), the original, modified, or terminated *Temporary Emergency (Ex Parte) Orders* (form FL-305), and all supporting documents.

(B) If the continuance is granted to the responding party based on one continuance as a matter of course, the order (form FL-306) must be attached as the cover page to and served along with the *Responsive Declaration to Request for Order* (form FL-320), any modified or terminated *Temporary Emergency (Ex Parte) Orders* (form FL-305) and all supporting documents.

(C) If the continuance is granted to either party for other good cause shown, the order (form FL-306) must be served in accordance with court orders.

(2) Service must be in the manner required by rule 5.92 or as ordered by the court.

(e) If either party fails to timely serve the documents in (d) above, the requesting party must repeat the procedures in this rule, unless the opposing party agrees to waive notice and proceed with the hearing.

(f) Failure to timely serve request for order *without* temporary emergency (ex parte) orders (RFO *without* TEO)

An RFO that does not include any temporary emergency orders will not be heard by the court if the moving party fails to:

(1) Have the other party timely served before the hearing with the *Request for Order* (form FL-300) and all supporting documents; or

(2) Obtain a court order to continue the hearing; or

(3) The parties file a written and signed stipulation to continue the hearing date or comply with any local court procedure for an unopposed continuance.

(g) Procedures to request continued hearing date of RFO *without* TEO

(1) If an RFO is not timely served on the other party before the date of the hearing, or if the moving, opposition, and reply papers have all been timely served and either party wants to continue the hearing for any reason and the other party opposes the continuance, he or she must get a court order to continue the hearing date. The request must be supported by facts showing good cause for the continuance.

(2) The party asking for the continuance must complete and submit an original and two copies of the *Request and Order to Continue Hearing on RFO* (form FL-307).

(A) The form should be submitted to the court no later than five court days before the hearing date originally set on the *Request for Order* with notice to the other party.

(B) The party may present the form to the court on the hearing date originally set on the *Request for Order* with notice to the other party.

(C) The party who makes an oral request to the court at the time of the hearing is also required to complete the form if the court grants the request to continue the hearing.

(h) Service of Process on Continuance of RFO

(1) After the court signs and files the *Request and Order to Continue Hearing on RFO* (form FL-307), a filed copy must be served on the other party, unless the court orders otherwise.

(A) If the continuance is granted to the moving party based on failure to timely serve the moving papers, the order (form FL-307) must be attached as the cover page to and

served along with the *Request for Order* (form FL-300) and all supporting documents.

(B) If the continuance is granted or denied to either party based on a finding of good cause or lack thereof, the requesting party must serve the order (form FL-307) on opposing party forthwith.

(2) Service must be in the manner required by rule 5.92 or as ordered by the court.

(i) If the moving party fails to timely serve the documents in (A)(1) above, he or she must repeat the procedures in this rule.

Item number: 07(a)

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 19, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Recommend to Judicial Council That It Approve Publication of Legally Significant Additions and Revisions (Action Required)

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

Staff contact (name, phone and e-mail): Bruce Greenlee, Attorney, Legal Services 415-865-7698 bruce.greenlee@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: December 15, 2016
Project description from annual agenda: Maintaining and expanding CACI (the committee's ongoing project)

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 30 is the first CACI release for 2017. Release 29 was approved by the Judicial Council on December 13, 2016.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In addition to recommending approval of 35 new and revised CACI instructions and verdict forms to the council, the advisory committee also requests that RUPRO give final approval to 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.

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 May 18–19, 2017

Title
Jury Instructions: New, Revised, and Renumbered 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
May 19, 2017

Date of Report
April 11, 2017

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 new, revised, and renumbered civil jury instructions and verdict forms prepared by the committee. These revisions bring the instructions up to date with developments in the law over the previous six months.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective May 19, 2017, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the civil jury instructions and verdict forms prepared by the committee. On Judicial Council approval, the instructions will be published in the official midyear supplement to the 2017 edition of the *Judicial Council of California Civil Jury Instructions*.

A table of contents and the proposed new, revised, and renumbered civil jury instructions and verdict forms are attached at pages 11–130.

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 30th release of *CACI.* The council approved *CACI* release 29 at its December 2016 meeting.

Rationale for Recommendation

The committee recommends proposed revisions to the following 22 instructions and verdict forms: CACI Nos. 1009B, 1010, VF-1001, 1720, 1722, VF-1700–VF-1705, VF-1900, VF-1903, 2021, VF-2006, 2100, VF-2100, 2547, 3040, 3903D, 4012, and VF-4000. The committee further recommends revising and renumbering five instructions—CACI Nos. 470, 471, and 472 (to be renumbered from 408, 409, and 410, respectively), 3509A (renumbered from 3509), and 3511A (renumbered from 3511)—as explained below. The committee further recommends the addition of eight new instructions: CACI Nos. 429, 473, 1249, 2548, 2549, 3052, 3509B, and 3511B. Finally, the Life Expectancy Tables for females and males have been updated from the November 28, 2016, *National Vital Statistics Reports*, volume 65, number 8.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 64 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 additions and changes recommended to the council.

New instruction

CACI No. 429, **Negligent Sexual Transmission of Disease.** A former committee member who was sitting as an assigned judge reported that because there was no CACI instruction on the

---

[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.

negligent sexual transmission of a disease, a colleague was giving the BAJI instruction. The committee reviewed the BAJI instruction and decided that it was flawed in that it presented certain points as elements, when the case on which it was based did not present elements that would apply under all possible factual scenarios.[3] To provide bench and bar with an alternative instruction, the committee proposes this new instruction.

New instruction *CACI No. 473,* Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk. Since 2014 when the California Supreme Court decided *Gregory v. Cott*, the committee has been considering a new instruction on the so-called "Firefighter Rule," which is a variation on the doctrine of primary assumption of risk.[4] Persons in an inherently dangerous occupation are deemed to have assumed the risk of the occupation.[5] But there are exceptions if (1) the plaintiff is not warned of a known risk, (2) the defendant increases the level of risk beyond that inherent in the occupation, or (3) the cause of injury is unrelated to the inherent risk.[6] Proposed new CACI No. 473 states the rule and its exceptions.

Because this instruction is the fourth instruction on exceptions to the defense of primary assumption of risk, the committee wishes to move and renumber the current three instructions to begin a new range in the Negligence series. In addition, the titles have all been slightly revised to clarify that the instructions provide exceptions to defense of primary assumption of risk.

- CACI No. 408, previously titled *Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Recreational Activity,* would become CACI No. 470, retitled *Primary Assumption of Risk—Exception to Nonliability—Coparticipant in Sport or Other Recreational Activity*.
- CACI No. 409, previously titled *Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches,* would become CACI No. 471, retitled *Primary Assumption of Risk—Exception to Nonliability—Instructors, Trainers, or Coaches*.
- CACI No. 410, previously titled *Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors,* would become CACI No. 472, retitled *Primary Assumption of Risk—Exception to Nonliability—Facilities Owners and Operators and Event Sponsors.*

New instruction *CACI No. 1249,* Affirmative Defense—Reliance on Knowledgeable Intermediary. On May 23, 2016, the California Supreme Court decided *Webb v. Special Electric Co., Inc.* in which the court established rules for when a supplier of asbestos is relieved from any duty to warn because its product has been supplied to an intermediary who can be

[3] *John B. v. Superior Court* (2006) 38 Cal.4th 1177.

[4] *Gregory v. Cott* (2014) 59 Cal. 4th 996.

[5] *Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 435.

[6] *Gregory, supra,* 59 Cal.4th at p. 1000.

reasonably relied on to give warnings to end users.[7] The rules established are complex, and the committee has taken some time to consider and address the numerous aspects of the opinion.

The court provided two options for the supplier: either give the warnings itself or establish that the intermediary could be reasonably relied on to give the warnings. To establish reasonable reliance, the court presented three factors that a jury should consider, one of which is the likelihood that the intermediary will give the warnings. Then to guide the jury on this "likelihood" factor, the court provided three additional factors.[8]

There is perhaps a fourth factor on reasonable reliance: whether the intermediary itself has an independent duty to warn. After considerable debate, the committee majority decided not to include this possible factor in the instruction at this time. First, the paragraph in *Webb* that presents the issue is not clear on how the factor should be addressed.[9] Second, it was felt that whether the intermediary has an independent duty would be for the court to decide as a matter of law.

New instructions *CACI Nos. 2548,* Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing*, and 2549,* Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit. Government Code section 12927(c)(1) creates claims for disability discrimination in housing. A 2015 case brought this statute to the committee's attention.[10] The committee has been working on one or more instructions under the statute since then, and now proposes two new instructions for adoption.

The statute creates a right to reasonable accommodation in providing housing, including the right to reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling. Proposed new CACI 2548, *Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing*, addresses this claim.

A second claim is for the refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the disabled person, if the modifications may be necessary to afford the disabled person full enjoyment of the premises. Proposed new CACI No. 2549, *Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit*, addresses this claim.

***New instruction CACI No. 3052,* Use of Fabricated Evidence—Essential Factual Elements.** A 2011 California appellate case, *Kerkeles v. City of San Jose,* addressed a federal civil rights

[7] *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167.

[8] *Id.* at pp. 189–190.

[9] *Id.* at p. 191.

[10] *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040.

claim for using fabricated evidence to initiate criminal proceedings.[11] The committee considered adding a new instruction on this claim at that time, but decided to defer pending receipt of information from bench and bar as to the prevalence of the claim.

In release 28, approved by the Judicial Council in June 2016, the committee added CACI No. 3051, *Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements*. In a public comment responding to that proposed instruction, an attorney commented that the committee "should also craft a new instruction covering circumstances where government actors present false or misleading evidence to the courts. This is a common occurrence for which no current jury instruction exists." The committee decided to revisit *Kerkeles* and the fabricated-evidence issue.

On posting for public comment, the attorney who requested the instruction objected that the instruction was too narrow in that it did not "address omission of exculpatory evidence, perjury, or the myriad other ways that evidence is typically presented to the courts in a deceptive manner." The committee decided to keep the proposed instruction narrowly focused on the intentional use of fabricated evidence as in *Kerkeles*, though not limited strictly to criminal proceedings. While federal cases might be found to support a broader instruction, the committee does not base the *CACI* civil rights instructions on law from the federal courts of appeal, only on U.S. Supreme Court and California authority. The committee also rejected an objective "should have known" (that the evidence was not true) standard, even though there is some authority for such a standard in a few federal cases.[12]

Finally, a commentator questioned whether the claim would ever apply to fabricated evidence to support probable cause for an arrest if no criminal proceeding is ever filed. While the committee's responses to comments were still under discussion, the U.S. Supreme Court answered this question in the affirmative, holding that when a judge's probable-cause determination is predicated solely on a police officer's false statements, there is a Fourth Amendment violation regardless of what charging decisions are later made.[13]

New instruction *CACI No. 3509B*, Precondemnation Damages—Public Entity's Authorized Entry to Investigate Property's Suitability. Code of Civil Procedure section 1245.010 authorizes a public entity, before condemning property for a public purpose, to enter the property to make photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property. Section 1245.060 provides that if the entry and activities on the property cause actual

---

[11] *Kerkeles v. City of San Jose* (2011) 199 Cal.App.4th 1001.

[12] See, e.g., *Devereaux v. Abbey* (9th Cir. 2001) 263 F.3d 1070, 1076. A U.S. Supreme Court case, *Franks v. Delaware* (1978) 438 U.S. 154, 171–172, on the use of fabricated evidence to obtain a search warrant, required a deliberately or *recklessly* false statement. The committee will consider whether recklessness applies outside of the search warrant context in the next release cycle.

[13] *Manuel v. City of Joliet* (2017) __ U.S. __, 2017 U.S. LEXIS 2021 (14-9496).

damage to or substantial interference with the owner's possession or use of the property, the owner may bring a civil action for the loss caused by the damage or interference.

Recently, in *Property Reserve, Inc. v. Superior Court*, the California Supreme Court held that the amount of any precondemnation damages must be determined by a jury.[14] The committee proposes new instruction 3509B for use under the precondemnation statutes as construed in *Property Reserve*.[15]

New instruction *CACI No. 3511B,* Damage to Remainder During Construction. A judge who is a former member of the committee noted that there is no CACI instruction on what courts have called "temporary severance damages."[16] These are damages to the remainder (the property not condemned) caused by the construction and use of the project for which the property has been condemned, whether or not the damage is caused by activities on the part taken.[17] She had a trial for which she needed such an instruction.

The committee now proposes new instruction 3511B. The committee has elected to use "*Damage to Remainder During Construction*" as the title rather than "Temporary Severance Damages." The statute uses neither "temporary" nor "severance" to describe damages caused during construction. A number of committee members found this term to be inaccurate and misleading; the damages themselves are not temporary, nor are they caused by the severance.

CACI No. 3511, currently titled *Permanent Severance Damages,* would be renumbered as CACI No. 3511A and retitled *Severance Damages to Remainder*. Even though the current title was actually adopted in the last release, several commentators who are experienced in eminent domain law objected to the use of the word "permanent." They pointed out that the activity on the portion taken does not need to be a permanent activity. If the activity causes a loss of fair market value to the remainder, the loss is compensable even if the activity will end at some point in the future.[18]

Revised Instruction *CACI No. 1009B,* Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control. A property owner is generally not liable for injuries to an employee of an independent contractor hired to perform work on the property. However,

---

[14] *Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 207−210.

[15] Former CACI No. 3509, currently titled *Precondemnation Damages (*Klopping *Damages),* would be renumbered as CACI No. 3509A and retitled *.Precondemnation Damages—Unreasonable Delay (*Klopping *Damages).*

[16] See, e.g., *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676.

[17] Code Civ. Proc., § 1263.420(b).

[18] A commentator gave the example of loss of value to the remainder caused by the destruction of trees on the part taken. The fact that the trees are replaced by saplings that will someday grow to replace the trees removed does not make the loss noncompensable.

there is an exception if the owner retains control of the work being performed. But the owner's retained control must have "affirmatively contributed" to the plaintiff's injury.[19]

A number of years ago, the committee debated at length whether the words "affirmatively contributed" had to be in the instruction as an element. The concern was that an affirmative contribution need not be from active conduct, but can be from a failure to act. The committee majority concluded that "affirmative contribution" was simply a rewording of the causation requirement for all tort actions and was subsumed within the element of "substantial factor." The committee explained its reasoning in the Directions for Use as to why it elected not to use "affirmatively contributed" in the elements of the instruction.

In a recent case, the court looked at the committee's explanation and agreed.[20] The court said:

> Although drawn directly from case law, [plaintiff]'s proposed Special Instructions Nos. 2 and 8 are somewhat misleading in that they suggest that in order for the hirer to 'affirmatively contribute' to the plaintiff's injuries, the hirer must have engaged in some form of active direction or conduct. However, 'affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions.' The Advisory Committee on Civil Jury Instructions recognized the potential to confuse the jury by including 'affirmative contribution' language in CACI No. 1009B. The committee's Directions for Use states: 'The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. [Citation.] However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.' (Directions for Use for CACI No. 1009B.) [¶] We agree with the Advisory Committee on Civil Jury Instructions that CACI No. 1009B adequately covers the 'affirmative contribution' requirement set forth in *Hooker*."[21]

The committee now proposes revisions to the Directions for Use to indicate that a court has endorsed the committee's position on "affirmative contribution."

---

[19] *Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202.

[20] *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582.

[21] *Regalado, supra,* 3 Cal.App.5th at pp. 594–595.

***Revised Instruction CACI No. 1010,* Affirmative Defense—Recreation Immunity—Exceptions.**[22] Civil Code section 846 provides immunity to a property owner who permits others to enter or use the property for any recreational purpose, subject to certain exceptions as presented in CACI No. 1010. A court recently held that this immunity extends to injuries to persons who are neither on the property nor engaged in a recreational purpose if the injury was caused by a recreational user of the property.[23]

The committee proposes changes to the instruction and verdict form to indicate that it need not be the plaintiff's entry onto or use of the property that is the cause of the injury.

***Revised instruction CACI No.2100,* Conversion—Essential Factual Elements.**[24] In a recent article in *California Litigation* magazine,[25] the author criticized CACI No. 2100 because element 2 required that the defendant have "intentionally" interfered with the plaintiff's property. In the view of the author, "conversion is a strict liability tort, and that defendant's intent, good faith, lack of knowledge or motive are ordinarily irrelevant."[26]

The question of intent in a conversion action is a complex one. However, the committee concluded that the author is correct in stating that the instruction incorrectly requires intentional *interference* with the plaintiff's property.

In *Taylor v. Forte Hotels International,*[27] the court stated:

[Conversion] must be knowingly or intentionally done, but a *wrongful intent* is not necessary. [Citations.] Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' [Citation.] It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (original italics.)

The committee believes that this passage clarifies the intent requirement. The act that constitutes the conversion must be knowingly or intentionally done. The defendant must intend to take possession of the property at issue. However, it is not necessary that the defendant intend to

[22] And verdict form CACI No. VF-1001, *Premises Liability—Affirmative Defense—Recreation Immunity—Exceptions.*

[23] *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 17.

[24] And verdict form CACI No. VF-2100, *Conversion.*

[25] Travis Burch, "CACIs Compel Litigators to 'Do It In Reverse'" (2016) 29(2) *California Litigation* 21.

[26] *Ibid*. Citing *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 144.

[27] *Taylor v. Forte Hotels Int'l* (1991) 235 Cal.App.3d 1119, 1124.

interfere with the plaintiff's rights to possession of the property.[28] The committee has removed "intentionally" as a modifier of "interfere" in element 2 and has added "knowingly or intentionally" as modifiers of the various acts in element 2 that constitute conversion.

***Revised instruction CACI No. 3903D,* Lost Earning Capacity (Economic Damage).** In the recent case of *Licudine v. Cedars-Sinai Medical Center,* the court addressed the elusive damages award for lost earning capacity, as distinguished from lost future earnings.[29] While lost future earnings compensate for what the plaintiff *would* have earned but for the injury, lost earning capacity compensates for what the plaintiff reasonably *could* have earned.[30]

The jury has two roles: "(1) find [that] the injury that the plaintiff sustained will result in a loss of earning capacity, and (2) assign a value to that loss by comparing what the plaintiff could have earned without the injury to what she can still earn with the injury."[31] CACI No. 3903D currently addresses only the second role, valuation. The committee proposes revising the instruction to address the first role also: whether it is reasonably certain that the injury will cause the plaintiff to earn less money in the future than what he or she otherwise could have earned.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from January 23 through March 3, 2017. Comments were received from 14 different commenters. Of these, 5 addressed the proposed changes to the eminent domain instructions. No other instruction or verdict form garnered any significant legal opposition. Some of the comments are discussed above in presenting issues with particular instructions.

The committee evaluated all comments and, as a result, revised some of the instructions. A summary of the comments received and the committee's responses is attached at pages 131–172.

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. Proposed new and revised instructions are presented semiannually to ensure that the instructions remain clear, accurate, current, and complete; therefore, the advisory committee did not consider any alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the midyear supplement to the 2017

[28] It is similar to the difference between general intent and specific intent in criminal law. The defendant must have intended to do the act, but need not have intended the result.

[29] *Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881.

[30] *Id.* at pp. 893–894.

[31] *Id.* at p. 887.

edition of *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and 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 *CACI* instructions, at pages 11–130
2. Summary of responses to public comments, at pages 131-172

TABLE OF CONTENTS

Release 30: May 2017

429. Negligent Sexual Transmission of Disease

[*Name of plaintiff***] claims that [***name of defendant***] sexually transmitted [***specify sexually transmitted disease, e.g., HIV***] to [him/her]. [***Name of defendant***] may be negligent for this transmission if [***name of plaintiff***] proves that [***name of defendant***] knew, or had reason to know, that [he/she] was infected with [***e.g., HIV***].**

New May 2017

Directions for Use

This instruction should be given with CACI No. 400, *Negligence—Essential Factual Elements*. In a claim for negligent transmission of a sexually communicable disease, the elements of negligence, duty, breach, and causation of harm must be proved. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1188 [45 Cal.Rptr.3d 316, 137 P.3d 153].)

One has a duty to avoid transmission if he or she should have known that he or she was infected with the disease (constructive knowledge). (*John B., supra,* 38 Cal.4th at pp. 1190−1191.) While the existence of a duty is a question of law for the court, what a person should have known is a question of fact.

It must be noted that in *John B.,* the court limited its holding on constructive knowledge to the facts of the case before it, which involved a couple who were engaged and subsequently married; a defendant who was alleged to have falsely represented himself as monogamous and disease-free, and who insisted the couple stop using condoms; and a plaintiff who agreed to stop using condoms in reliance on those allegedly false representations. The court did not consider the existence or scope of a duty for persons whose relationship did not extend beyond the sexual encounter itself, whose relationship did not contemplate sexual exclusivity, who had not represented themselves as disease-free, or who had not insisted on having sex without condoms. (*John B., supra,* 38 Cal.4th at p. 1193.) Therefore, this instruction may not be appropriate on facts that were expressly reserved in *John B.*

Sources and Authority

- "[A] person who unknowingly contracts a sexually transmitted disease such as herpes may maintain an action for damages against one who either negligently or through deceit infects her with the disease." (*Doe v. Roe* (1990) 218 Cal.App.3d 1538, 1543 [267 Cal.Rptr. 564].)

- "[T]o be *stricken with disease* through another's negligence is in legal contemplation as it often is in the seriousness of consequences, no different from *being struck with an automobile* through another's negligence." (*John B., supra,* 38 Cal.4th at p. 1188, original italics.)

- "Because ' "[a]ll persons are required to use ordinary care to prevent others being injured as a result of their conduct" ', this court has repeatedly recognized a cause of action for negligence not only against those who have actual knowledge of unreasonable danger, but also against those who have constructive knowledge of it." (*John B., supra,* 38 Cal.4th at p. 1190, internal citation omitted.)

- " '[C]onstructive knowledge,' which means knowledge 'that one using reasonable care or diligence should have, and therefore is attributed by law to a given person', encompasses a variety of mental states, ranging from one who is deliberately indifferent in the face of an unjustifiably high risk of harm to one who merely should know of a dangerous condition. (*John B., supra,* 38 Cal.4th at pp. 1190−1191, internal citations omitted.)

- "[T]he tort of negligent transmission of HIV does not depend solely on actual knowledge of HIV infection and would extend at least to those situations where the actor, under the totality of the circumstances, has reason to know of the infection. Under the reason-to-know standard, 'the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.' In other words, 'the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.' " (*John B., supra,* 38 Cal.4th at p. 1191, internal citations omitted.)

- "[W]e are mindful that our precedents direct us to consider whether a duty of care exists ' "on a case-by-case basis." ' Accordingly, our conclusion that a claim of negligent transmission of HIV lies against those who know or at least have reason to know of the disease must be understood in the context of the allegations in this case, which involves a couple who were engaged and subsequently married; a defendant who falsely represented himself as monogamous and disease-free and insisted the couple stop using condoms; and a plaintiff who agreed to stop using condoms in reliance on those false representations. We need not consider the existence or scope of a duty for persons whose relationship does not extend beyond the sexual encounter itself, whose relationship does not contemplate sexual exclusivity, who have not represented themselves as disease-free, or who have not insisted on having sex without condoms." (*John B., supra,* 38 Cal.4th at p. 1193.)

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Torts, § 912

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach,* § 1.13 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.32[2] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* § 165.170 (Matthew Bender)

~~408~~470. Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Coparticipant in Sport or Other Recreational Activity

---

[*Name of plaintiff***] claims [he/she] was harmed while participating in [***specify sport or other recreational activity, e.g., touch football***] and that [***name of defendant***] is responsible for that harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] either intentionally injured [***name of plaintiff***] or acted so recklessly that [his/her] conduct was entirely outside the range of ordinary activity involved in [***e.g., touch football***];**

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

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

Conduct is entirely outside the range of ordinary activity involved in [*e.g., touch football***] if that conduct can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the [sport/activity].**

[*Name of defendant***] is not responsible for an injury resulting from conduct that was merely accidental, careless, or negligent.**

New September 2003; Revised April 2004, October 2008, April 2009, December 2011, December 2013; Revised and Renumbered From CACI No. 408 May 2017

Directions for Use

This instruction sets forth a plaintiff's response to the affirmative defense of primary assumption of risk asserted by a defendant who was a coparticipant in the sport or other recreational activity. For an instruction applicable to coaches, instructors, or trainers, see CACI No. ~~409~~471, *Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Instructors, Trainers, or Coaches*. For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. ~~410~~472, *Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Facilities Owners and Operators and Event Sponsors*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk.*

Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) Element 1 sets forth the exceptions in which there is a duty.

While duty is generally a question of law, there may be disputed facts that must be resolved by a jury

before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

Sources and Authority

- "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks." (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)

- " '[A]n activity falls within the meaning of "sport" if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury.' " (*Amezcua v. Los Angeles Harley-Davidson, Inc.* (2011) 200 Cal.App.4th 217, 229 [132 Cal.Rptr.3d 567].)

- "A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30, 834 P.2d 724].)

- "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight, supra*, 3 Cal.4th at p. 320.)

- "The *Knight* rule, however, 'does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that "it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." Thus, even though "defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself," they may not increase the likelihood of injury above that which is inherent.' " (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1261 [102 Cal.Rptr.2d 813], internal citations omitted.)

- "In *Freeman v. Hale,* the Court of Appeal advanced a test ... for determining what risks are inherent in a sport: '[C]onduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent to the sport) if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.' " (*Distefano, supra,* 85 Cal.App.4th at p. 1261.)

- "[G]olfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is 'so reckless as to be totally outside the range of the ordinary activity involved in the sport.' " (*Shin, supra*, 42 Cal.4th at p. 497.)

- "[W]hether defendant breached the limited duty of care he owed other golfers by engaging in conduct that was 'so reckless as to be totally outside the range of the ordinary activity involved in [golf]' depends on resolution of disputed material facts. Thus, defendant's summary judgment motion

was properly denied." (*Shin, supra,* 42 Cal.4th at p. 486, internal citation omitted.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588].)

- "[Plaintiff] has repeatedly argued that primary assumption of the risk does not apply because she did not impliedly consent to having a weight dropped on her head. However, a plaintiff's expectation does not define the limits of primary assumption of the risk. 'Primary assumption of risk focuses on the legal question of duty. It does not depend upon a plaintiff's implied consent to injury, nor is the plaintiff's subjective awareness or expectation relevant. … .' " (*Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 471 [158 Cal.Rptr.3d 474].)

- "A jury could find that, by using a snowboard without the retention strap, in violation of the rules of the ski resort and a county ordinance, defendant unnecessarily increased the danger that his snowboard might escape his control and injure other participants such as plaintiff. The absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury." (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 829 [89 Cal.Rptr.2d 519].)

- "The existence and scope of a defendant's duty depends on the role that defendant played in the activity. Defendants were merely the hosts of a social gathering at their cattle ranch, where [plaintiff] asked to ride one of their horses; they were not instructors and did not assume any of the responsibilities of an instructor." (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1550–1551 [98 Cal.Rptr.3d 779], internal citation omitted.)

- "[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

- "Whether a duty exists 'does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on [(1)] the nature of the activity or sport in which the defendant is engaged and [(2)] the relationship of the defendant and the plaintiff to that activity or sport.' It is the 'nature of the activity' and the parties' relationship to it that determines whether the doctrine applies—not its characterization as a sporting event." (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 999–1000 [70 Cal.Rptr.3d 519], internal citations omitted.)

- "[T]o the extent that ' " 'a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence,' " ' he or she is subject to the defense of comparative negligence but not to an absolute defense. This type of comparative negligence has been referred to as ' "secondary assumption of risk." ' Assumption of risk that is based upon the absence of a defendant's duty of care is called ' "primary assumption of risk." ' 'First, in "primary assumption of risk" cases—where the defendant owes no duty to protect the plaintiff from a particular risk of harm—a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was *reasonable* or unreasonable. Second, in "secondary assumption of risk" cases—involving instances in which the defendant has breached the duty of care owed to the plaintiff—the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff's conduct in encountering the risk of such an injury was reasonable rather than unreasonable.' " (*Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1259 [84 Cal.Rptr.3d 824], original italics, internal citations omitted.)

- "Even were we to conclude that [plaintiff]'s decision to jump off the boat was a voluntary one, and that therefore he assumed a risk inherent in doing so, this is not enough to provide a complete defense. Because voluntary assumption of risk as a complete defense in a negligence action was abandoned in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226], only the absence of duty owed a plaintiff under the doctrine of primary assumption of risk would provide such a defense. But that doctrine does not come into play except when a plaintiff and a defendant are engaged in certain types of activities, such as an 'active sport.' That was not the case here; plaintiff was merely the passenger on a boat. Under *Li*, he may have been contributorily negligent but this would only go to reduce the amount of damages to which he is entitled." (*Kindrich, supra,* 167 Cal.App.4th at p. 1258.)

- "Though most cases in which the doctrine of primary assumption of risk exists involve recreational sports, the doctrine has been applied to dangerous activities in other contexts (see, e.g., *Saville v. Sierra College* (2005) 133 Cal.App.4th 857 [36 Cal.Rptr.3d 515] [training in peace officer takedown maneuvers]; *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 [2 Cal.Rptr.3d 168] [training on physical restraint methods]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112 [75 Cal.Rptr.2d 801] [practice of cheerleader routines]; *Bushnell* [*v. Japanese-American Religious & Cultural Center*], 43 Cal.App.4th 525 [50 Cal.Rptr.2d 671] [practice of moves

in judo class]; and *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 [53 Cal.Rptr.2d 713] [injury to nurse's aide by nursing home patient]).” (*McGarry, supra,* 158 Cal.App.4th at pp. 999–1000, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1339, 1340, 1343–1350

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03, Ch. 15, *General Premises Liability*, § 15.21 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.30 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.172 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.401 (Matthew Bender)

~~409~~471. Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Instructors, Trainers, or Coaches

---

[*Name of plaintiff***] claims [he/she] was harmed by [***name of defendant***]'s [coaching/training/instruction]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [coach/trainer/instructor];**

2. **[That [***name of defendant***] intended to cause [***name of plaintiff***] injury or acted recklessly in that [his/her] conduct was entirely outside the range of ordinary activity involved in teaching or coaching [***sport or other recreational activity, e.g., horseback riding***] in which [***name of plaintiff***] was participating;]**

   [or]

   [That [*name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., horseback riding***];]**

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

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

New September 2003; Revised April 2004, June 2012, December 2013; Revised and Renumbered From CACI No. 409 May 2017

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

There are exceptions, however, in which there is a duty of care. Use the first option for element 2 if it is alleged that the coach or trainer intended to cause the student's injury or engaged in conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport or activity. Use the second option if it is alleged that the coach's or trainer's failure to use ordinary care increased the risk of injury to the plaintiff, for example, by encouraging or allowing him or her to participate in the sport or activity when he or she was physically unfit to participate or by allowing the plaintiff to use unsafe equipment or instruments. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 845 [120 Cal.Rptr.3d 90].) If the second option is selected, also give CACI No. 400, *Negligence—Essential Factual Elements.*

While duty is a question of law, courts have held that whether the defendant has unreasonably increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. ~~408~~470, *Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to facilities owners and operators and to event sponsors, see CACI No. ~~410~~472, *Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Facilities Owners and Operators and Event Sponsors.* For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation with Inherent Risk.*

Sources and Authority

- "In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' involved in teaching or coaching the sport." (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1011 [4 Cal.Rptr.3d 103, 75 P.3d 30], internal citation omitted.)

- "[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

- "Here, we do not deal with the relationship between coparticipants in a sport, or with the duty that an operator may or may not owe to a spectator. Instead, we deal with the duty of a coach or trainer to a student who has entrusted himself to the former's tutelage. There are precedents reaching back for most of this century that find an absence of duty to coparticipants and, often, to spectators, but the law is otherwise as applied to coaches and instructors. For them, the general rule is that coaches and instructors owe a duty of due care to persons in their charge. The coach or instructor is not, of course, an insurer, and a student may be held to notice that which is obvious and to ask appropriate questions. But all of the authorities that comment on the issue have recognized the existence of a duty of care." (*Tan v. Goddard* (1993) 13 Cal.App.4th 1528, 1535–1536 [17 Cal.Rptr.2d 89, internal citations omitted.)

- "[D]ecisions have clarified that the risks associated with learning a sport may themselves be inherent risks of the sport, and that an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence." (*Kahn, supra*, 31 Cal.4th at p. 1006.)

- "To the extent a duty is alleged against a coach for 'pushing' and/or 'challenging' a student to

improve and advance, the plaintiff must show that the coach intended to cause the student's injury or engaged in reckless conduct—that is, conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport. Furthermore, a coach has a duty of ordinary care not to increase the risk of injury to a student by encouraging or allowing the student to participate in the sport when he or she is physically unfit to participate or by allowing the student to use unsafe equipment or instruments." (*Eriksson, supra,* 191 Cal.App.4th at p. 845, internal citation omitted.)

- "[T]he mere existence of an instructor/pupil relationship does not necessarily preclude application of 'primary assumption of the risk.' Learning any sport inevitably involves attempting new skills. A coach or instructor will often urge the student to go beyond what the student has already mastered; that is the nature of (inherent in) sports instruction." (*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1368−1369 [59 Cal.Rptr.2d 813].)

- "Instructors, like commercial operators of recreational activities, 'have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant.' " (*Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 435 [52 Cal.Rptr.2d 812], internal citations omitted.)

- "'Primary assumption of the risk' applies to injuries from risks 'inherent in the sport'; the risks are not any the less 'inherent' simply because an instructor encourages a student to keep trying when attempting a new skill." (*Allan, supra,* 51 Cal.App.4th at p. 1369.)

- Coaches and sports instructors "owe students a duty 'not to increase the risks inherent in the learning process undertaken by the student.' But this does not require them to 'fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether ... .' Instead, '[b]y choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.' " (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436−1437 [89 Cal.Rptr.2d 920], internal citations omitted.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf*

Corp. v. Superior Court (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra,* 169 Cal.App.4th at pp. 112–113.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1339, 1340, 1343–1350

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:234–3:254.30 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics*, § 273.31 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.401 et seq. (Matthew Bender)

~~410~~472. Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Facilities Owners and Operators and Event Sponsors

---

[*Name of plaintiff***] claims [he/she] was harmed while [participating in/watching] [***sport or other recreational activity e.g., snowboarding***] at [***name of defendant***]'s [***specify facility or event where plaintiff was injured, e.g., ski resort***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [owner/operator/sponsor/***other***] of [***e.g., a ski resort***];**

2. **That [***name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., snowboarding***];**

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 December 2013; Revised and Renumbered From CACI No. 410 May 2017

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) There is, however, a duty applicable to facilities owners and operators and to event sponsors not to unreasonably increase the risks of injury to participants and spectators beyond those inherent in the activity. (See *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1162 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [participants]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [spectators].)

While duty is a question of law, courts have held that whether the defendant has increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. ~~408~~470, *Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to instructors, trainers, and coaches, see CACI No. ~~409~~471, *Primary Assumption of Risk—Exception to Nonl~~L~~iability ~~— of~~ Instructors, Trainers, or Coaches*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk—Exception to Nonliability—Occupation With Inherent Risk.*

Sources and Authority

- "[U]nder the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity." (*Nalwa, supra,* 55 Cal.4th at p. 1162.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra,* 169 Cal.App.4th at pp. 112–113.)

- "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant." (*Knight, supra,* 3 Cal.4th at pp. 315−316.)

- "Under *Knight,* defendants had a duty *not to increase* the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume. As a result, a triable issue of fact remained, namely whether the [defendants]' mascot cavorting in the stands and distracting

plaintiff's attention, *while the game was in progress,* constituted a breach of that duty, i.e., constituted negligence in the form of increasing the inherent risk to plaintiff of being struck by a foul ball." (*Lowe, supra,* 56 Cal.App.4th at p. 114, original italics.)

- "[T]hose responsible for maintaining athletic facilities have a … duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162 [41 Cal.Rptr.3d 299, 131 P.3d 383], internal citation omitted.)

- "*Knight,* consistently with established case law, simply requires courts in each instance to examine the question of duty in light of the nature of the defendant's activities and the relationship of the parties to that activity." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482 [63 Cal.Rptr.2d 291, 936 P.2d 70].)

- "Defendants' obligation not to increase the risks inherent in the activity included a duty to provide safe equipment for the trip, such as a safe and sound craft." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 255 [38 Cal.Rptr.2d 65].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1339, 1340, 1343–1350

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:234–3:254.30 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.31 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* § 165.401 et seq. (Matthew Bender)

473. Primary Assumption of Risk—Exception to Nonliability—Occupation Involving Inherent Risk

---

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of defendant***] while [***name of plaintiff***] was performing [his/her] job duties as [***specify, e.g., a firefighter***]. [***Name of defendant***] is not liable if [***name of plaintiff***]'s injury arose from a risk inherent in the occupation of [***e.g., firefighter***]. However, [***name of plaintiff***] may recover if [he/she] proves all of the following:**

[1. That [*name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., firefighting***];]**

[*or*]

[1. That [*name of defendant***] [misrepresented to/failed to warn] [***name of plaintiff***] [of] a dangerous condition that [***name of plaintiff***] could not have known about as part of [his/her] job duties;]**

[*or*]

[1. That the cause of [*name of plaintiff***]'s injury was not related to the inherent risk;]**

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

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

New May 2017

Directions for Use

Give this instruction if the plaintiff asserts an exception to assumption of risk of the injury that he or she suffered because the risk is an inherent part of his or her job duties. This has traditionally been referred to as the "firefighter's rule." (See *Gregory v. Cott* (2014) 59 Cal. 4th 996, 1001 [176 Cal. Rptr. 3d 1, 331 P.3d 179].)

There are, however, exceptions to nonliability under the firefighter's rule. The plaintiff may recover if (1) the defendant's actions have unreasonably increased the risks of injury beyond those inherent in the occupation; (2) the defendant misrepresented or failed to disclose a hazardous condition that the plaintiff had no reason to know about; or (3) the cause of the injury was not related to the inherent risk. This instruction asks the jury to determine whether an exception applies. (*Gregory, supra,* 59 Cal.4th at p. 1010.) These exceptions are presented in the options to element 1.

While duty is a question of law, courts have held that whether the defendant has increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability─ Coparticipant in Sport or Other Recreational Activity.* For an instruction applicable to coaches, instructors, or trainers, see CACI No. 471, *Primary Assumption of Risk─Exception to Nonliability─Instructors, Trainers, or Coaches.* For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk─Exception to Nonliability─Facilities Owners and Operators and Event Sponsors.*

Sources and Authority

- "Primary assumption of risk cases often involve recreational activity, but the doctrine also governs claims arising from inherent occupational hazards. The bar against recovery in that context first developed as the 'firefighter's rule,' which precludes firefighters and police officers from suing members of the public for the conduct that makes their employment necessary. After *Knight,* we have viewed the firefighter's rule 'not … as a separate concept,' but as a variant of primary assumption of risk, 'an illustration of when it is appropriate to find that the defendant owes no duty of care.' Whether a duty of care is owed in a particular context depends on considerations of public policy, viewed in light of the nature of the activity and the relationship of the parties to the activity." (*Gregory, supra,* 59 Cal. 4th at pp. 1001−1002, internal citations omitted.)

- "The firefighter's rule, upon which the [defendant] relies, and the analogous veterinarian's rule, are examples of the primary assumption of risk doctrine applied in the employment context." (*Moore v. William Jessup University* (2015) 243 Cal.App.4th 427, 435 [197 Cal.Rptr.3d 51].)

- "Our holding does not preclude liability in situations where caregivers are not warned of a known risk, where defendants otherwise increase the level of risk beyond that inherent in providing care, or where the cause of injury is unrelated to the symptoms of [Alzheimers] disease." (*Gregory, supra,* 59 Cal.4th at p. 1000.)

- "[T]he principle of assumption of risk, which forms the theoretical basis for the fireman's rule, is not applicable where a fireman's injuries are proximately caused by his being misled as to the nature of the danger to be confronted." (*Lipson v. Superior Court* (1982) 31 Cal.3d 362, 371 [182 Cal. Rptr. 629, 644 P.2d 822].)

- "The firefighter's rule, however, is hedged about with exceptions. The firefighter does not assume every risk of his or her occupation. The rule does not apply to conduct other than that which necessitated the summoning of the firefighter or police officer, and it does not apply to independent acts of misconduct that are committed after the firefighter or police officer has arrived on the scene." (*Neighbarger v. Irwin Industries, Inc.* (1994) 8 Cal.4th 532, 538 [34 Cal. Rptr. 2d 630, 882 P.2d 347], internal citation omitted.)

- "We have noted that the duty to avoid injuring others 'normally extends to those engaged in hazardous work.' 'We have never held that the doctrine of assumption of risk relieves all persons of a duty of care to workers engaged in a hazardous occupation.' However, the doctrine does apply in favor of those who hire workers to handle a dangerous situation, in both the public and the private sectors. Such a worker, 'as a matter of fairness, should not be heard to complain of the

negligence that is the cause of his or her employment. [Citations.] In effect, we have said it is unfair to charge the defendant with a duty of care to prevent injury to the plaintiff arising from the very condition or hazard the defendant has contracted with the plaintiff to remedy or confront.' This rule encourages the remediation of dangerous conditions, an important public policy. Those who hire workers to manage a hazardous situation are sheltered from liability for injuries that result from the risks that necessitated the employment." (*Gregory, supra,* 59 Cal.4th at p. 1002, internal citations omitted.)

- "Because of the nature of the activity, caring for the mentally infirm, and the relationship between the parties, patient and caregiver, mentally incompetent patients should not owe a legal duty to protect caregivers from injuries suffered in attending to them. Here, the very basis of the relationship between plaintiff and [defendant] was to protect [defendant] from harming either herself or others." (*Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761, 1770 [53 Cal.Rptr.2d 713].)

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1355

1 Levy et al., California Torts, Ch. 15, *General Premises Liability,* § 15.23 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.173 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.412 (Matthew Bender)

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

[*Name of plaintiff***] claims that [he/she] was harmed by an unsafe condition while employed by [***name of plaintiff's employer***] and working on [***name of defendant***]'s property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [owned/leased/occupied/controlled] the property;**
2. **That [***name of defendant***] retained control over safety conditions at the worksite;**
3. **That [***name of defendant***] negligently exercised [his/her/its] retained control over safety conditions by [***specify alleged negligent acts or omissions***];**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of defendant***]'s negligent exercise of [his/her/its] retained control over safety conditions was a substantial factor in causing [***name of plaintiff***]'s harm.**

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

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant retained control over the safety conditions at the worksite. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.

The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 [115 Cal.Rptr.2d 853, 38 P.3d 1081].) However, the affirmative contribution need not be active conduct but may be ~~in the form of an omission~~ a failure to act. (*Id.* at p. 212, fn. 3.) ~~The advisory committee believes that the~~ "~~affirmative~~ Affirmative contribution" ~~requirement simply~~ means that there must be causation between the hirer's ~~conduct~~ retained control and the plaintiff's injury. ~~Because~~ But "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act.~~,~~ ~~the committee believes that its~~Element 5, the standard "substantial factor" element,~~.~~ ~~adequately~~ expresses the "affirmative contribution." requirement. (See

Regalado v. Callaghan (2016) 3 Cal.App.5th 582, 594−595 [207 Cal.Rptr.3d 712] [agreeing with committee's position that "affirmatively contributed" need not be specifically stated in instruction].)

Sources and Authority

- "We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker, supra*, 27 Cal.4th at p. 202, original italics.)

- "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette, Toland* and *Camargo* because the liability of the hirer in such a case is not ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." ' To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker, supra*, 27 Cal.4th at pp. 211–212, original italics, internal citations and footnote omitted.)

- "Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3.)

- "If a hirer entrusts work to an independent contractor, but retains control over safety conditions at a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control." (*Tverberg v. Fillner Constr., Inc.* (2012) 202 Cal.App.4th 1439, 1446 [136 Cal.Rptr.3d 521].)

- "A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution." (*Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 [208 Cal.Rptr.3d 699].)

- "Although drawn directly from case law, [plaintiff]'s proposed Special Instructions Nos. 2 and 8 are somewhat misleading in that they suggest that in order for the hirer to 'affirmatively contribute' to the plaintiff's injuries, the hirer must have engaged in some form of active direction or conduct. However, 'affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions.' The Advisory Committee on Civil Jury Instructions recognized the potential to confuse the jury by including 'affirmative contribution' language in CACI No. 1009B. The committee's Directions for Use states: 'The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. [Citation.] However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee

believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.' (Directions for Use for CACI No. 1009B.) [¶] We agree with the Advisory Committee on Civil Jury Instructions that CACI No. 1009B adequately covers the 'affirmative contribution' requirement set forth in *Hooker*." (*Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594−595 [207 Cal.Rptr.3d 712].)

- "When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. When the hirer does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee's injury. [¶] By contrast, passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer or the contractor had agreed to implement these measures. Thus, the failure to exercise retained control does not constitute an affirmative contribution to an injury. Such affirmative contribution must be based on a negligent exercise of control. In order for a worker to recover on a retained control theory, the hirer must engage in some active participation." (*Tverberg, supra,* 202 Cal.App.4th at p. 1446, internal citations omitted.)

- "[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must *negligently* exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor." (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777], original italics.)

- ~~Section 414 of the Restatement Second of Torts provides: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1117

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

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

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

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

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

1010. Affirmative Defense—Recreation Immunity—Exceptions (Civ. Code, § 846)

[*Name of defendant***] is not responsible for [***name of plaintiff***]'s harm if [~~he/she~~*name of defendant*] proves that [***name of plaintiff***]'s harm resulted from [his/her*/name of person causing injury's*] 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*:]

[[*name of defendant***] willfully or maliciously failed to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property.]**

[**or**]

[a charge or fee was paid to [*name of defendant***] to use the property.]**

[**or**]

[[*name of defendant***] expressly invited [***name of plaintiff***] to enter ~~use~~ the property for the recreational purpose.]**

New September 2003; Revised October 2008, December 2014, May 2017

Directions for Use

This instruction sets forth the statutory exceptions to recreational immunity. (See Civ. Code, § 846.) In the opening paragraph, if the plaintiff was not the recreational user of the property, insert the name of the person whose conduct on the property is alleged to have caused plaintiff's injury. Immunity extends to injuries to persons who are neither on the property nor engaged in a recreational purpose if the injury was caused by a recreational user of the property. (See *Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 17 [208 Cal.Rptr.3d 461].)

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.

- "[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].)

- "Subpart (c) of the third paragraph of section 846 is not limited to injuries to persons on the premises and therefore on its face encompasses persons off-premises such as [plaintiff] and her husband. It is not limited to injuries to recreational participants. Had the Legislature wanted to narrow the third paragraph's immunity to injured recreational users, it could have done so, as it did in the first paragraph." (*Wang, supra,* 4 Cal.App.5th at p. 17.)

- "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 § 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/name of person causing injury***] 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 question 5 and answer question 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?**
____ Yes ____ No

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

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

[a. Past economic loss
[lost earnings $ _____]

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, October 2008, December 2010, December 2014, December 2016, May 2017

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.

~~Question 5 should be modified if~~ If either of the other two exceptions to recreational immunity from Civil Code section 846 is at issue, question 5 should be replaced with appropriate language for the applicable exception. (See CACI No. 1010.)

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

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

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

1249. Affirmative Defense—Reliance on Knowledgeable Intermediary

[*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 defendant***] sold [***specify product, e.g., asbestos***] to an intermediary purchaser [***name of intermediary***]; and [***name of defendant***] relied on [***name of intermediary***] to provide adequate warnings to end users of [***e.g., asbestos***]. To succeed on this defense, [***name of defendant***] must prove:**

1. **That [***name of defendant***] sold [***specify product, e.g., asbestos***] to [***name of intermediary***];**

[2. **That [***name of defendant***] conveyed adequate warnings of the particular risks in the use of [***e.g., asbestos***] to [***name of intermediary***].]**

[or]

[2. **That [***name of defendant***] knew that [***name of intermediary***] was aware of, or should have been aware of, the particular risks of [***e.g., asbestos***];]**

and

3. **That [***name of defendant***] actually and reasonably relied on [***name of intermediary***] to convey adequate warnings of the particular risks in the use of [***e.g., asbestos***] to those who, like [***name of plaintiff***], might encounter the risk of [***e.g., asbestos***].**

Reasonable reliance depends on many factors, including, but not limited to:

a. **The degree of risk posed by [***e.g., asbestos***];**

b. **The feasibility of [***name of defendant***]'s directly warning those who might encounter [***e.g., asbestos***] in a finished product; and**

c. **The likelihood that the intermediary purchaser will convey warnings.**

In determining the likelihood that [*name of intermediary***] would convey adequate warnings, consider what a supplier of [***e.g., asbestos***] should know about [***name of intermediary***]. Factors to consider include, but are not limited to:**

(1) **Whether [***name of intermediary***] knew or should have been aware of the specific risks posed by [***e.g., asbestos***];**

(2) **Whether [***name of intermediary***] had a reputation**

for carefulness; and

(3) Whether [*name of intermediary***] was willing to, and had the ability to, communicate adequate warnings to end users.**

New May 2017

Directions for Use

Give this instruction if the defendant supplier of materials claims that it gave warnings to an intermediary purchaser or relied on an intermediary purchaser to provide warnings to end users of the product. Reasonable reliance on an intermediary is an affirmative defense to a claim of failure to warn under both strict liability and negligence theories. (See *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 187 [202 Cal.Rptr.3d 460, 370 P.3d 1022].)

This instruction sets forth all of the elements of the defense. The reasonableness of the defendant's reliance under factors a−c on the intermediary to warn end users is a question of fact. (*Webb, supra,* 63 Cal.4th at p. 180.)

Sources and Authority

- "When a hazardous raw material is supplied for any purpose, including the manufacture of a finished product, the supplier has a duty to warn about the material's dangers. Under the sophisticated intermediary doctrine, the supplier can discharge this duty if it conveys adequate warnings to the material's purchaser, or sells to a sufficiently sophisticated purchaser, and reasonably relies on the purchaser to convey adequate warnings to others, including those who encounter the material in a finished product. Reasonable reliance depends on many circumstances, including the degree of risk posed by the material, the likelihood the purchaser will convey warnings, and the feasibility of directly warning end users. The doctrine balances the competing policies of compensating those injured by dangerous products and encouraging conduct that can feasibly be performed." (*Webb, supra,* 63 Cal.4th at p. 177.)

- "To establish a defense under the sophisticated intermediary doctrine, a product supplier must show not only that it warned or sold to a knowledgeable intermediary, but also that it actually and reasonably relied on the intermediary to convey warnings to end users. This inquiry will typically raise questions of fact for the jury to resolve unless critical facts establishing reasonableness are undisputed." (*Webb, supra,* 63 Cal.4th at pp. 189−190.)

- "Because the sophisticated intermediary doctrine is an affirmative defense, the supplier bears the burden of proving that it adequately warned the intermediary, or knew the intermediary was aware or should have been aware of the specific hazard, and reasonably

relied on the intermediary to transmit warnings." (*Webb, supra,* 63 Cal.4th at p. 187.)

- "Like the sophisticated user defense, the sophisticated intermediary defense applies to failure to warn claims sounding in either strict liability or negligence. As we have previously observed, 'there is little functional difference between the two theories in the failure to warn context.' '[I]n failure to warn cases, whether asserted on negligence or strict liability grounds, there is but one unitary theory of liability which is negligence based—the duty to use reasonable care in promulgating a warning.' " (*Webb, supra,* 63 Cal.4th at p. 187, internal citations omitted.)

- "The goal of products liability law is not merely to spread risk but also 'to "induce conduct that is capable of being performed." ' The sophisticated intermediary doctrine serves this goal by recognizing a product supplier's duty to warn but permitting the supplier to discharge this duty in a responsible and practical way. It appropriately and equitably balances the practical realities of supplying products with the need for consumer safety." (*Webb, supra,* 63 Cal.4th at p. 187, internal citation omitted.)

- "The 'gravity' of risk factor encompasses both the 'serious or trivial character of the harm' that is possible and the likelihood that this harm will result. This factor focuses on the nature of the material supplied. If the substance is extremely dangerous, the supplier may need to take additional steps, such as inquiring about the intermediary's warning practices, to ensure that warnings are communicated. The overarching question is the reasonableness of the supplier's conduct given the potential severity of the harm." (*Webb, supra,* 63 Cal.4th at p. 190, internal citation omitted.)

- "The second Restatement factor, measuring the likelihood that the intermediary will warn, focuses on the reliability of the intermediary. The supplier's knowledge about the intermediary's reliability is judged by an objective standard, based on what a reasonable supplier would have known under the circumstances. Relevant concerns for this factor include, for example, the intermediary's level of knowledge about the hazard, its reputation for carefulness or consideration, and its willingness, and ability, to communicate adequate warnings to end users. Of course, a supplier is always free to inquire about the intermediary's warning policies and practices as a means of assessing the intermediary's reliability. The Second Restatement suggests economic motivations may also be important. For example, an intermediary manufacturer may have an incentive to withhold necessary information about a component material if warnings would make its product less attractive." (*Webb, supra,* 63 Cal.4th at p. 190, internal citations omitted.)

- "It is also significant if, under the circumstances giving rise to the plaintiff's claim, the intermediary itself had a legal duty to warn end users about the particular hazard in question. In general, ' "every person has a right to presume that every other person will perform his duty and obey the law." ' As the Restatement notes, '[m]odern life would be intolerable unless one were permitted to rely to a certain extent on others' doing what they normally do, particularly if it is their duty to do so.' This consideration may be especially relevant in the context of a raw material or other component supplied for use in

making a finished product. Under California law, a product manufacturer has a legal duty to warn its customers of all known or knowable dangers arising from use of the product. However, regardless of the purchaser's independent duty, the supplier cannot reasonably ignore known facts that would provide notice of a substantial risk that the intermediary might fail to warn or that warnings might fail to reach the consumer." (*Webb, supra,* 63 Cal.4th at p. 191, internal citations omitted.)

- "When raw materials are supplied in bulk for the manufacture of a finished product, it may be difficult for the supplier to convey warnings to the product's ultimate consumers. These suppliers likely have no way to identify ultimate product users and no ready means to communicate with them." (*Webb, supra,* 63 Cal.4th at p. 191.)

- "We recognize that direct proof of actual reliance may be difficult to obtain when, as in the case of latent disease, the material was supplied to an intermediary long ago. However, actual reliance is an inference the factfinder should be able to draw from circumstantial evidence about the parties' dealings." (*Webb, supra,* 63 Cal.4th at p. 193.)

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1174A

1 California Products Liability Actions, Ch. 2, *Liability for Defective Products,* § 2.21[3][c] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability,* § 460.11[10][b] (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability,* § 190.263 et seq. (Matthew Bender)

1720. Affirmative Defense—Truth

[*Name of defendant***] is not responsible for [***name of plaintiff***]'s harm, if any, if [~~he/she~~*name of defendant*] proves that [his/her/its] statement(s) about [***name of plaintiff***] [was/were] true. [***Name of defendant***] does not have to prove that the statement(s) [was/were] true in every detail, so long as the statement(s) [was/were] substantially true.**

New September 2003; Revised October 2008, May 2017

Directions for Use

This instruction is to be used only in cases involving private plaintiffs on matters of private concern. In cases involving public figures or matters of public concern, the burden of proving falsity is on the plaintiff. (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802].)

Sources and Authority

- "Truth, of course, is an absolute defense to any libel action." (*Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 581-582 [51 Cal.Rptr.2d 891].)

- "California law permits the defense of substantial truth and would absolve a defendant even if she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' 'Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' " (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 154 [162 Cal.Rptr.3d 831], internal citation omitted.)

- "In defamation actions generally, factual truth is a defense which it is the defendant's burden to prove. [¶] In a defamation action against a newspaper by a private person suing over statements of public concern, however, the First Amendment places the burden of proving falsity on the *plaintiff*. As a matter of constitutional law, therefore, media statements on matters of public interest, including statements of opinion which reasonably imply a knowledge of facts, 'must be provable as false before there can be liability under state defamation law.' " (*Eisenberg, supra*, 74 Cal.App.4th at p. 1382, original italics, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 556–560, 611, 614

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.10 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.55 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.39 (Matthew

Bender)

1 California Civil Practice: Torts §§ 21:19, 21:52 (Thomson Reuters)

1722. Retraction: News Publication or Broadcast (Civ. Code, § 48a)

Because [*name of defendant***] is a [[daily/weekly] ~~[~~news publication/broadcaster], [***name of plaintiff***] may recover only the following:**

(a) Damages to property, business, trade, profession, or occupation; and

(b) Damages for money spent as a result of the defamation.

However, this limitation does not apply if [*name of plaintiff***] proves both of the following:**

1. That [*name of plaintiff***] demanded a correction of the statement within 20 days of discovering the statement; and**

2. That [*name of defendant***] did not publish an adequate correction;**

[or]

That [*name of defendant***]'s correction was not substantially as conspicuous as the original [publication/broadcast];**

[or]

That [*name of defendant***]'s correction was not [published/broadcast] within three weeks of [***name of plaintiff***]'s demand.**

New September 2003; Revised June 2016, May 2017

Directions for Use

The judge should decide whether the demand for a retraction was served in compliance with the statute. (*O'Hara v. Storer Communications, Inc.* (1991) 231 Cal.App.3d 1101, 1110 [282 Cal.Rptr. 712].)

The statute is limited to actions "for damages for the publication of a libel in a daily or weekly news publication, or of a slander by radio broadcast." (Civ. Code, § 48a(a).) However a "radio broadcast" includes television. (Civ. Code, § 48.5(4) [the terms "radio," "radio broadcast," and "broadcast," are defined to include both visual and sound radio broadcasting]; *Kalpoe v. Superior Court* (2013) 222 Cal.App.4th 206, 210, 166 Cal.Rptr.3d 80].)

Sources and Authority

- Demand for Correction. Civil Code section 48a.
- "Under California law, a newspaper gains immunity from liability for all but 'special damages' when

it prints a retraction satisfying the requirements of section 48a." (*Pierce v. San Jose Mercury News* (1989) 214 Cal.App.3d 1626, 1631 [263 Cal.Rptr. 410]; see also *Twin Coast Newspapers, Inc. v. Superior Court* (1989) 208 Cal.App.3d 656, 660-661 [256 Cal.Rptr. 310].)

- "An equivocal or incomplete retraction obviously serves no purpose even if it is published in 'substantially as conspicuous a manner ... as were the statements claimed to be libelous.' " (*Weller v. American Broadcasting Companies, Inc.* (1991) 232 Cal.App.3d 991, 1011 [283 Cal.Rptr. 644].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 629–639

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.24 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.53 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.37 (Matthew Bender)

1 California Civil Practice: Torts §§ 21:55–21:57 (Thomson Reuters)

VF-1700. Defamation per se (Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per se defamatory statement.***]**
   ____ 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 the [person/people] to whom the statement was made reasonably understand that the statement was about** [*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 [this person/these people] reasonably understand the statement to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**
   ____ Yes ____ No

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

4. **Was the statement false?**
   ____ 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***] prove by clear and convincing evidence that [***name of defendant***] knew the statement was false or had serious doubts about the truth of the statement?**
   ____ Yes ____ No

   If your answer to question 5 is yes, then answer questions 6, 7, and 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

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

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [*name of plaintiff***]'s actual damages for:**

[a. Harm to [*name of plaintiff***]'s property, business, trade, profession, or occupation? $_____]**

[b. Expenses [*name of plaintiff***] had to pay as a result of the defamatory statements? $_____]**

[c. Harm to [*name of plaintiff***]'s reputation? $_____]**

[d. Shame, mortification, or hurt feelings? $_____]

[If [*name of plaintiff***] has not proved any actual damages for either c or d, then answer question 8. If [***name of plaintiff***] has proved actual damages for both c and d, skip question 8 and answer question 9.]**

ASSUMED DAMAGES

8. What are the damages you award [*name of plaintiff***] for the assumed harm to [his/her] reputation, and for shame, mortification, or hurt feelings? You must award at least a nominal sum.**

$_____

PUNITIVE DAMAGES

9. Did [*name of plaintiff***] prove by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud?**

____ Yes ____ No

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

10. What is your award of punitive damages, if any, against [*name of defendant***]?**

$_____

Signed: _____

Presiding Juror

Dated: _____

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

New September 2003; Revised December 2005, April, 2008, October 2008, December 2010, December 2016, May 2017

Directions for Use

This verdict form is based on CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

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.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

Omit question 10 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

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

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

VF-1701. Defamation per quod (Public Officer/Figure and Limited Public Figure)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per quod defamatory statement.***]**
   ____ 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 the [person/people] to whom the statement was made reasonably understand that the statement was about [***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. **Was the statement false?**
   ____ 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***] prove by clear and convincing evidence that [***name of defendant***] knew the statement was false or had serious doubts about the truth of the statement?**
   ____ 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. **Is the statement, because of facts known to the people who heard or read it, the kind that would tend to injure [***name of plaintiff***] in [his/her] occupation?**
   ____ 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 plaintiff***] suffer Harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement]?**
   ____ 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.

ACTUAL DAMAGES

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

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

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

[$_____]

PUNITIVE DAMAGES

9. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?
____ Yes ____ No

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

10. What is your award of punitive damages, if any, against [*name of defendant*]?

$_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2005, December 2010, December 2016, May 2017

Directions for Use

This verdict form is based on CACI No. 1701, *Defamation per quod--Essential Factual Elements (Public Officer/Figure and Limited Public Figure).*

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.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*, depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 10 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

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

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

VF-1702. Defamation per se (Private Figure—Matter of Public Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per se defamatory statement.***]**
   ____ 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 the [person/people] to whom the statement was made reasonably understand that the statement was about [***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 [this person/these people] reasonably understand the statement to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**
   ____ Yes ____ No

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

4. **Was the statement false?**
   ____ Yes ____ No

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

5. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**
   ____ 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.

ACTUAL DAMAGES

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

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [*name of plaintiff*]'s actual damages for:

[a. Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation? $_____]

[b. Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements? $_____]

[c. Harm to [*name of plaintiff*]'s reputation? $_____]

[d. Shame, mortification, or hurt feelings? $_____]

[If [*name of plaintiff*] has not proved any actual damages for either c or d, answer question 8. If [*name of plaintiff*] has proved actual damages for both c and d, skip questions 8 and 9 and answer question 10.]

ASSUMED DAMAGES

8. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement was false or had serious doubts about the truth of the statement?

____ Yes ____ No

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

9. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation and for shame, mortification, or hurt feelings? You must award at least a nominal sum.

$_____

Regardless of your answer to question 9, skip question 10 and answer question 11.

PUNITIVE DAMAGES

10. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] knew the statement was false or had serious doubts about the truth of the statement?

____ Yes ____ No

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

11. Did [*name of plaintiff*] prove by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?
____ Yes ____ No

If your answer to question 11 is yes, then answer question 12. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

12. What amount, if any, do you award as punitive damages against [*name of defendant*]?
$_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2005, April 2008, October 2008, December 2010, December 2016, May 2017

Directions for Use

This verdict form is based on CACI No. 1702, *Defamation per se—Essential Factual Elements (Private Figure-Matter of Public Concern).*

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.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame, mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 12 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

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

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

VF-1703. Defamation per quod (Private Figure—Matter of Public Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per quod defamatory statement.***]**
____ 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 the [**person/people] to whom the statement was made reasonably understand that the statement was about [*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. **Was the statement false?**
____ Yes ____ No

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

4. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**
____ 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. **Is the statement, because of facts known to the people who heard or read the statement, the kind of statement that would tend to injure [***name of plaintiff***] in [his/her] occupation?**
____ 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 plaintiff***] suffer Harm to [his/her] property, business, profession, or**

occupation [including money spent as a result of the statement]?
____ 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 statement a substantial factor in causing [*name of plaintiff***]'s harm?**
____ 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.

ACTUAL DAMAGES

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

[$_____]

If [*name of plaintiff***] has not proved any actual damages, stop here, answer no further questions, and have the presiding juror sign and date this form. If you awarded actual damages, answer question 9.**

PUNITIVE DAMAGES

9. Did [*name of plaintiff***] prove by clear and convincing evidence that [***name of defendant***] knew the statement was false or had serious doubts about the truth of the statement?**
____ Yes ____ No

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

10. Has [*name of plaintiff***] proved by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud?**
____ Yes ____ No

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

11. What amount, if any, do you award as punitive damages against [*name of defendant***]?**

$_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2005, December 2010, December 2016, May 2017

Directions for Use

This verdict form is based on CACI No. 1703, *Defamation per quod—Essential Factual Elements (Private Figure-Matter of Public Concern).*

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.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

Users may need to itemize all the damages listed in question 8 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Question 5 may be modified by referring to one of the other two grounds listed in element 3 of CACI No. 1703, *Defamation per quod—Essential Factual Elements (Private Figure-Matter of Public Concern),* depending on which ground is applicable in the case.

Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Omit question 11 if the issue of punitive damages has been bifurcated.

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion.*

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

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

VF-1704. Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per se defamatory statement.***]**
____ 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 the [person/people] to whom the statement was made reasonably understand that the statement was about [*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 [this person/these people] reasonably understand the statement to mean that [*insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**
____ Yes ____ No

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

4. Was the statement substantially true?
____ Yes ____ No

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

5. Did [*name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**
____ 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.

ACTUAL DAMAGES

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

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, skip question 7 and answer question 8.

7. What are [*name of plaintiff*]'s actual damages for:

[a. Harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation? $_____]

[b. Expenses [*name of plaintiff*] had to pay as a result of the defamatory statements? $_____]

[c. Harm to [*name of plaintiff*]'s reputation? $_____]

[d. Shame, mortification, or hurt feelings? $_____]

TOTAL $ _____

[If [*name of plaintiff*] has not proved any actual damages for either c or d, then answer question 8. If [*name of plaintiff*] has proved actual damages for both c and d, skip question 8 and answer question 9.]

ASSUMED DAMAGES

8. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation and for shame, mortification, or hurt feelings? You must award at least a nominal sum.

$_____

Regardless of your answer to question 8, answer question 9.

PUNITIVE DAMAGES

9. Has [*name of plaintiff*] proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?

____ Yes ____ No

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

10. What amount, if any, do you award as punitive damages against [*name of defendant*]?

$_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2005, April 2008, October 2008, December 2010, December 2016, May 2017

Directions for Use

This verdict form is based on CACI No. 1704, *Defamation per se—Essential Factual Elements (Private Figure—Matter of Private Concern),* and CACI No. 1720, Affirmative *Defense—Truth*. Delete question 4 if the affirmative defense of the truth is not at issue.

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

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

-Multiple statements may need to be set out separately in question 1, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements ~~may~~ will need to be found as to each statement.

~~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.~~

Give the jury question 3 only if the statement is not defamatory on its face.

In question 7, omit damage items c and d if the plaintiff elects not to present proof of actual damages for harm to reputation and for shame, mortification, or hurt feelings. Whether or not proof for both categories is offered, include question 8. For these categories, the jury may find that no actual damages have been proven but must still make an award of assumed damages.

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.

Additional questions on the issue of punitive damages may be needed if the defendant is a corporate or other entity.

Omit question 10 if the issue of punitive damages has been bifurcated.

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

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

VF-1705. Defamation per quod (Private Figure—Matter of Private Concern)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make the following statement to [a person/persons] other than [***name of plaintiff***]? [***Insert claimed per quod defamatory statement.***]**
   ____ 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 the [person/people] to whom the statement was made reasonably understand that the statement was about [***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 [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement?**
   ____ Yes ____ No

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

4. **Did the statement tend to injure [***name of plaintiff***] in [his/her] occupation?**
   ____ Yes ____ No

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

5. **Did [***name of plaintiff***] suffer Harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement]?**
   ____ 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 the statement a substantial factor in causing [***name of plaintiff***]'s harm?**
   ____ Yes ____ No

If your answer to question 6 is yes, then answer questions 7 and 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

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

[a. Past economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] had to pay as a result of the defamatory statements

$ _____]

[b. Future economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] will have to pay as a result of the defamatory statements

$ _____]

[c. Past noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation

$ _____]

[d. Future noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation

$ _____]

TOTAL $ _____

If [*name of plaintiff*] has not proved any actual damages, stop here, answer no further questions, and have the presiding juror sign and date this form. If you awarded actual damages, answer question 8.

PUNITIVE DAMAGES

8. Has [*name of plaintiff*] proved by clear and convincing evidence that [*name of defendant*] acted with malice, oppression, or fraud?
____ Yes ____ No

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

9. What amount, if any, do you award as punitive damages against [*name of defendant***]?**
$_____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised December 2005, December 2010, December 2016, May 2017

Directions for Use

This verdict form is based on CACI No. 1703, *Defamation per quod—Essential Factual Elements (Private Figure-Matter of Public Concern).*

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

If there is a dispute as to whether the statement in question 1 is one of fact or opinion, an additional question or questions will be needed. See CACI No. 1707, *Fact Versus Opinion*.

Multiple statements may need to be set out separately in question 1, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements ~~may~~ will need to be found as to each statement.

~~Users may need to itemize all the damages listed in question 7 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.~~

Question 4 may be modified by referring to one of the other two grounds listed in element 3 of CACI No. 1705, *Defamation per quod—Essential Factual Elements (Private Figure-Matter of Private Concern),* depending on which ground is applicable in the case.

If the affirmative defense of truth is at issue (see CACI No. 1720, *Affirmative Defense—Truth*), include question 4 from VF-1704, *Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)* Additional questions may be needed on the issue of punitive damages if the defendant is a corporate or other entity.

Users may need to itemize all the damages listed in question 7 if, for example, there are multiple defendants and issues regarding apportionment of damages under Proposition 51.

Omit question 9 if the issue of punitive damages has been bifurcated.

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

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

VF-1900. Intentional Misrepresentation

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make a false representation of [a] fact[s] to [***name of plaintiff***]?**
   ____ Yes ____ No

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

2. **Did [***name of defendant***] know that the representation was false, or did [he/she] make the representation recklessly and without regard for its truth?**
   ____ Yes ____ No

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

3. **Did [***name of defendant***] intend that [***name of plaintiff***] rely on the representation?**
   ____ 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***] reasonably rely on the representation?**
   ____ Yes ____ No

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

5. **Was [***name of plaintiff***]'s reliance on [***name of defendant***]'s representation a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

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

   [a. Past economic loss
   [lost earnings $ _____]

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

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

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

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

TOTAL $ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2009, December 2010, June 2014, December 2016, May 2017

Directions for Use

This verdict form is based on CACI No. 1900, *Intentional Misrepresentation.*

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

If the defendant alleges that the representations referred to in question 1 were opinions only, additional questions may be required on this issue. See CACI No. 1904, *Opinions as Statements of Fact.*

If specificity is not required, users do not have to itemize all the damages listed in question 6. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. However, if both intentional misrepresentation and negligent misrepresentation (see CACI No. 1903) are to be presented to the jury in the alternative, the preferred practice would seem to be that this verdict form and VF-1903, *Negligent Misrepresentation*, be kept separate and presented in the alternative. 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*.

With respect to the same misrepresentation, question 2 above cannot be answered "yes" and question 3 of VF-1903 cannot also be answered "no." The jury may continue to answer the next question from one form or the other, but not both.

If both intentional and negligent misrepresentation are before the jury, it is important to distinguish between a statement made recklessly and without regard for the truth (see question 2 above) and one made without reasonable grounds for believing it is true (see CACI No. VF-1903, question 3). Question 2 of VF-1903 should be included to clarify that the difference is that for negligent misrepresentation, the defendant honestly believes that the statement is true. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

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

VF-1903. Negligent Misrepresentation

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make a false representation of [a] fact[s] to [***name of plaintiff***]?**
____ Yes ____ No

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

[2. Did [*name of defendant***] honestly believe that the representation was true when [he/she] made it?**
____ Yes ____ No

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

3. Did [*name of defendant***] have reasonable grounds for believing the representation was true when [he/she] made it?**
____ 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. Did [*name of defendant***] intend that [***name of plaintiff***] rely on the representation?**
____ 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***] reasonably rely on the representation?**
____ Yes ____ No

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

6. Was [*name of plaintiff***]'s reliance on [***name of defendant***]'s representation a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

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

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

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2009, December 2010, June 2014, December 2016, May 2017

Directions for Use

This verdict form is based on CACI No. 1903, *Negligent Misrepresentation.*

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

If the defendant alleges that the representations referred to in question 1 were opinions only, additional questions may be required on this issue. See CACI No. 1904, *Opinions as Statements of Fact.*

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. However, if both negligent misrepresentation and intentional misrepresentation (see CACI No. 1903) are to be presented to the jury in the alternative, the preferred practice would seem to be that this verdict form and VF-1900, *Intentional Misrepresentation*, be kept separate and presented in the alternative. 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*.

With respect to the same misrepresentation, question 3 above cannot be answered "no" and question 2 of VF-1900 cannot also be answered "yes." The jury may continue to answer the next question from one form or the other, but not both.

If both intentional and negligent misrepresentation are before the jury, it is important to distinguish between a statement made without reasonable grounds for believing it is true (see question 3 above) and one made recklessly and without regard for the truth (see CACI No. VF-1900, question 2). Include question 2 to clarify that the difference is that for negligent misrepresentation, the defendant honestly believes that the statement is true. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

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

2021. Private Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] interfered with [***name of plaintiff***]'s use and enjoyment of [his/her] land. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of defendant***], by acting or failing to act, created a condition or permitted a condition to exist that [***insert one or more of the following:***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;] [or]

   [was [a/an] [fire hazard/*specify other potentially dangerous condition***] to [***name of plaintiff***]'s property;]**

3. **That this condition substantially interfered with [***name of plaintiff***]'s use or enjoyment of [his/her] land;**

4. **That an ordinary person would reasonably be annoyed or disturbed by [***name of defendant***]'s conduct;**

4~~5~~. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

~~5. That an ordinary person would be reasonably annoyed or disturbed by [*name of defendant*]'s conduct;~~

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

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

8. **That the seriousness of the harm outweighs the public benefit of [***name of defendant***]'s conduct.**

New September 2003; Revised February 2007, December 2011, December 2015, June 2016, May 2017

Directions for Use

Element 8 must be supplemented with CACI No. 2022, *Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit*. (See *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 160−165 [184 Cal.Rptr.3d 26].) For instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Acts Done Under Express Authority of Statute. Civil Code section 3482.
- "A nuisance is considered a 'public nuisance' when it 'affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.' A 'private nuisance' is defined to include any nuisance not covered by the definition of a public nuisance, and also includes some public nuisances. 'In other words, it is possible for a nuisance to be public and, from the perspective of individuals who suffer an interference with their use and enjoyment of land, to be private as well.' " (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 261-262 [207 Cal.Rptr.3d 532], internal citations omitted.)
- ~~"[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ... ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.' " " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)~~
- "In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724, 920 P.2d 669].)
- "[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must 'disturb or prevent the comfortable enjoyment of property,' such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491], internal citations omitted.)

- ~~"Unlike public nuisance, which is an interference with the rights of the community at large, private nuisance is a civil wrong based on disturbance of rights in land. A nuisance may be both public and private, but~~ [T]~~t~~o proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664], internal citation omitted.)

- "~~Examples of interferences with the use and enjoyment of land actionable under a private nuisance theory are legion. '~~So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance; … ." ~~'~~" (~~*Koll-Irvine Center Property Owners Assn.*~~*Mendez*, *supra*, 3~~2~~4 Cal.App.5~~4~~th at p. 262~~1041, internal citation omitted~~.)

- "The requirements of *substantial damage* and *unreasonableness* are not inconsequential. These requirements stem from the law's recognition that: ' "Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and *therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another*. Liability … is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation." ' " (*Mendez*, *supra*, 3 Cal.App.5th at p. 263, original italics.)

- "The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage.' The Restatement recognizes the same requirement as the need for proof of 'significant harm,' which it variously defines as 'harm of importance' and a 'real and appreciable invasion of the plaintiff's interests' and an invasion that is 'definitely offensive, seriously annoying or intolerable.' The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? 'If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.' This is, of course, a question of fact that turns on the circumstances of each case." (*San Diego Gas & Electric Co.*, *supra*, 13 Cal.4th at p. 938, internal citations omitted.)

- "The second additional requirement for nuisance is superficially similar but analytically distinct: 'The interference with the protected interest must not only be substantial, but it must also be unreasonable', i.e., it must be 'of such a nature, duration or amount as to constitute

unreasonable interference with the use and enjoyment of the land.' The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' "(*San Diego Gas & Electric Co., supra,* 13 Cal.4th at pp. 938-939, internal citations omitted.)

- "Appellant first argues that the judgment is erroneous because there is no showing that any act or conduct of his caused the damage. It is true that there is neither showing nor finding of any negligent or wrongful act or omission of defendant proximately causing the falling of the trees. But no such showing is required. If the trees remained upright, with some of their branches extending over or upon plaintiff's land, they clearly would constitute a nuisance, which defendant could be required to abate." (*Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 42 [328 P.2d 269].)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1552 [87 Cal.Rptr.3d 602], internal citations omitted.)

- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' " 'where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. …" [Citations.]' " (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422, internal citations omitted.)

- "We acknowledge that to recover on a nuisance claim the harm the plaintiff suffers need not be a physical injury. Thus, the absence of evidence in this case to establish that [plaintiff] 's physical injuries were caused by the stray voltage would not preclude recovery on her nuisance claim." (*Wilson, supra,* 234 Cal.App.4th at p. 159, internal citations omitted.)

- "[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property… ." (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)

- "A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated." (*People v. Oliver* (1948) 86 Cal.App.2d 885, 889 [195 P.2d 926].)

- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of

this court. ... ‘ “A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.’ ” ” (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)

- ~~Restatement Second of Torts, section 822 provides:~~

  ~~One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either~~

  ~~(a) intentional and unreasonable, or~~

  ~~(b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.~~

- ~~Restatement Second of Torts, section 826 provides:~~

  ~~An intentional invasion of another’s interest in the use and enjoyment of land is unreasonable if~~

  ~~(a) the gravity of the harm outweighs the utility of the actor’s conduct, or~~

  ~~(b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.~~

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 153

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.05 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.13 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 (Matthew Bender)

California Civil Practice: Torts §§ 17:1, 17:2, 17:4 (Thomson Reuters)

VF-2006. Private Nuisance

We answer the questions submitted to us as follows:

1. Did [*name of plaintiff*] [own/lease/occupy/control] the property?
____ Yes ____ No

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

2. Did [*name of defendant*], by acting or failing to act, create a condition or permit a condition to exist that was harmful to health?
____ 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 this condition substantially interfere with [*name of plaintiff*]'s use or enjoyment of [his/her] land?
____ 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 an ordinary person have reasonably been annoyed or disturbed by [*name of defendant*]'s conduct?
____ Yes ____ No

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

~~4~~5. Did [*name of plaintiff*] consent to [*name of defendant*]'s conduct?
____ Yes ____ No

If your answer to question ~~4~~ 5 is no, then answer question ~~5~~6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~**5. Would an ordinary person have been reasonably annoyed or disturbed by [*name of defendant*]'s conduct?**~~
~~**____ 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 conduct a substantial factor in causing harm to [***name of plaintiff***]?**

____ Yes ____ No

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

7. Did the seriousness of the harm outweigh the public benefit of [*name of defendant***]'s conduct?**

____ Yes ____ No

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

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

[a. Past economic loss

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

Total Past Economic Damages: $ _____]

[b. Future economic loss

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

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2007, December 2010, December 2011, December 2016, May 2017

Directions for Use

This form is based on CACI No. 2021, *Private Nuisance—Essential Factual Elements*.

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

Depending on the facts of the case, question 2 may be replaced with one of the other options from ~~can be modified, as in~~ element 2 of CACI No. 2021.

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

2100. Conversion—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully exercised control over [his/her/its] personal property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/possessed/had a right to possess] [a/an] [***insert item of personal property***];**

2. **That [***name of defendant***] ~~intentionally and~~ substantially interfered with [***name of plaintiff***]'s property by knowingly or intentionally [***insert one or more of the following:***]**

   [taking possession of the [*insert item of personal property***];] [or]**

   [preventing [*name of plaintiff***] from having access to the [***insert item of personal property***];] [or]**

   [destroying the [*insert item of personal property***];] [or]**

   [refusing to return the [*insert item of personal property***] after [***name of plaintiff***] demanded its return.]**

3. **That [***name of plaintiff***] did not consent;**

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

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

New September 2003; Revised December 2009, December 2010, May 2017

Directions for Use

The last option for element 2 may be used if the defendant's original possession of the property was not tortious. (See *Atwood v. S. Cal. Ice Co.* (1923) 63 Cal.App. 343, 345 [218 P. 283], disapproved on other grounds in *Wilson v. Crown Transfer & Storage Co.* (1927) 201 Cal. 701 [258 P. 596].)

Sources and Authority

- "Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

- "It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use." …' " (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507 [85 Cal.Rptr.3d 268].)

- "[A]ny act of dominion wrongfully exerted over the personal property of another inconsistent with the owner's rights thereto constitutes conversion." (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 50 [108 Cal.Rptr.3d 455].)

- "[Conversion] must be knowingly or intentionally done, but a *wrongful intent* is not necessary. Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (*Taylor v. Forte Hotels Int'l* (1991) 235 Cal.App.3d 1119, 1124 [1 Cal.Rptr.2d 189], original italics, internal citations omitted.)

- "Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial. The basis of a conversion action ' "rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action." [Citations.]' " (*Los Angeles Federal Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1387 [147 Cal.Rptr.3d 768].)

- "The rule of strict liability applies equally to purchasers of converted goods, or more generally to purchasers from sellers who lack the power to transfer ownership of the goods sold. That is, there is no general exception for bona fide purchasers." (*Regent Alliance Ltd. v. Rabizadeh~~, supra~~*, (2014) 231 Cal.App.4th 1177,~~at p.~~ 1181 [180 Cal.Rptr.3d 610], internal citations omitted.)

- "There are recognized exceptions to the general rule of strict liability. Some exceptions are based on circumstances in which 'the person transferring possession may have the legal power to convey to a bona fide transferee a good title,' as, for example, when 'a principal has clothed an agent in apparent authority exceeding that which was intended.' Another exception concerns goods obtained by means of a fraudulent misrepresentation. If the party who committed the fraud then sells the goods to 'a bona fide purchaser' who 'takes for value and without notice of the fraud, then such purchaser gets good title to the chattel and may not be held for conversion (though the original converter may be).' " (*Regent Alliance Ltd., supra,* 231 Cal.App.4th at p. 1183, internal citation omitted.)

- "[I]t is generally acknowledged that conversion is a tort that may be committed only with relation to personal property and not real property." (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7 [89 Cal.Rptr. 323], disagreeing with *Katz v. Enos* (1945) 68 Cal.App.2d 266, 269 [156 P.2d 461].)

- "The first element of that cause of action is his ownership or right to possession of the property at the time of the conversion. Once it is determined that [plaintiff] has a right to reinstate the contract, he has a right to possession of the vehicle and standing to bring conversion. Unjustified refusal to turn

over possession on demand constitutes conversion even where possession by the withholder was originally obtained lawfully and of course so does an unauthorized sale." (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609 [218 Cal.Rptr. 15], internal citations omitted.)

- " 'To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. … Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.' " (*Moore v. Regents of the Univ. of Cal.* (1990) 51 Cal.3d 120, 136 [271 Cal.Rptr. 146, 793 P.2d 479], internal citations omitted.)

- "In a conversion action the plaintiff need show only that he was entitled to possession at the time of conversion; the fact that plaintiff regained possession of the converted property does not prevent him from suing for damages for the conversion." (*Enterprise Leasing Corp. v. Shugart Corp*. (1991) 231 Cal.App.3d 737, 748 [282 Cal.Rptr. 620], internal citation omitted.)

- "Neither legal title nor absolute ownership of the property is necessary. … A party need only allege it is 'entitled to immediate possession at the time of conversion. … ' … However, a mere contractual right of payment, without more, will not suffice." (*Plummer, supra,* 184 Cal.App.4th at p. 45, internal citation omitted.)

- "The existence of a lien … can establish the immediate right to possess needed for conversion. 'One who holds property by virtue of a lien upon it may maintain an action for conversion if the property was wrongfully disposed of by the owner and without authority … .' Thus, attorneys may maintain conversion actions against those who wrongfully withhold or disburse funds subject to their attorney's liens." (*Plummer, supra,* 184 Cal.App.4th at p. 45, internal citation omitted.)

- "Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. As [plaintiff] was a cotenant and had the right of possession of the realty, which included the right to keep his personal property thereon, [defendant]'s act of placing the goods in storage, although not constituting the assertion of ownership and a substantial interference with possession to the extent of a conversion, amounted to an intermeddling. Therefore, [plaintiff] is entitled to actual damages in an amount sufficient to compensate him for any impairment of the property or loss of its use." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551–552 [176 P.2d 1], internal citation omitted.)

- "[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property." (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 [139 P.2d 80], internal citations omitted.)

- "As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. 'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass." (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 552 [51 Cal.Rptr. 575], internal citations omitted.)

- " 'Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment.' A 'generalized claim for money [is] not actionable as conversion.' " (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 [58 Cal.Rptr.3d 516], internal citations omitted.)

- "Generally, conversion has been held to apply to the taking of intangible property rights when 'represented by documents, such as bonds, notes, bills of exchange, stock certificates, and warehouse receipts.' As one authority has written, 'courts have permitted a recovery for conversion of assets reflected in such documents as accounts showing amounts owed, life insurance policies, and other evidentiary documents. These cases are far removed from the paradigm case of physical conversion; they are essentially financial or economic tort cases, not physical interference cases.' " (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 209 [166 Cal.Rptr.3d 877], internal citation omitted.)

- "Credit card, debit card, or PayPal information may be the subject of a conversion." (*Welco Electronics, Inc., supra,* 223 Cal.App.4th at p. 212, footnote omitted.)

- "One who buys property in good faith from a party lacking title and the right to sell may be liable for conversion. The remedies for conversion include specific recovery of the property, damages, and a quieting of title." (*State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1076, 1081–1082 [62 Cal.Rptr.2d 178], internal citations omitted.)

- ~~"[Conversion] must be knowingly or intentionally done, but a wrongful intent is not necessary. Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (*Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119, 1124 [1 Cal.Rptr.2d 189], internal citations omitted.)~~

- "In order to establish a conversion, the plaintiff 'must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.' Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort." (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 812 [26 Cal.Rptr.2d 391], internal citations omitted.)

- "A conversion can occur when a willful failure to return property deprives the owner of possession." (*Fearon v. Department of Corrections* (1984) 162 Cal.App.3d 1254, 1257 [209 Cal.Rptr. 309], internal citation omitted.)

- "A demand for return of the property is not a condition precedent to institution of the action when possession was originally acquired by a tort as it was in this case." (*Igauye v. Howard* (1952) 114 Cal.App.2d 122, 127 [249 P.2d 558].)

- " 'Negligence in caring for the goods is not an act of dominion over them such as is necessary to

make the bailee liable as a converter.' Thus a warehouseman's negligence in causing a fire which destroyed the plaintiffs' goods will not support a conversion claim." (*Gonzales v. Pers. Storage* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473], internal citations omitted.)

- "Although damages for conversion are frequently the equivalent to the damages for negligence, i.e., specific recovery of the property or damages based on the value of the property, negligence is no part of an action for conversion." (*Taylor, supra,* 235 Cal.App.3d at p. 1123, internal citation omitted.)

- "A person without legal title to property may recover from a converter if the plaintiff is responsible to the true owner, such as in the case of a bailee or pledgee of the property." (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1096 [64 Cal.Rptr.2d 457], internal citation omitted.)

- "With respect to plaintiffs' causes of action for conversion, '[o]ne is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the possession of another, for the purpose of defending himself or a third person against the other, under the same conditions which would afford a privilege to inflict a harmful or offensive contact upon the other for the same purpose.' 'For the purpose of defending his own person, an actor is privileged to make intentional invasions of another's interests or personality when the actor reasonably believes that such other person intends to cause a confinement or a harmful or offensive contact to the actor, of that such invasion of his interests is reasonably probable, and the actor reasonably believes that the apprehended harm can be safely prevented only by the infliction of such harm upon the other. A similar privilege is afforded an actor for the protection of certain third persons.' " (*Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1072 [283 Cal.Rptr. 917], internal citations omitted.)

- "We recognize that the common law of conversion, which developed initially as a remedy for the dispossession or other loss of chattel, may be inappropriate for some modern intangible personal property, the unauthorized use of which can take many forms. In some circumstances, newer economic torts have developed that may better take into account the nature and uses of intangible property, the interests at stake, and the appropriate measure of damages. On the other hand, if the law of conversion can be adapted to particular types of intangible property and will not displace other, more suitable law, it may be appropriate to do so. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 124 [55 Cal.Rptr.3d 621], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 699–719

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Tort Liability*, ¶ 2:427.4 et seq. (The Rutter Group)

Rylaarsdam & Turner, California Practice Guide: Civil Procedure Before Trial--Statutes of Limitations, Ch. 4-D, *Actions Involving Personal Property (Including Intangibles)*, ¶ 4:1101 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.40 (Matthew

Bender)

13 California Forms of Pleading and Practice, Ch. 150, *Conversion,* §§ 150.10, 150.40, 150.41 (Matthew Bender)

5 California Points and Authorities, Ch. 51, *Conversion*, § 51.21[3][b] (Matthew Bender)

VF-2100. Conversion

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [own/possess/have a right to possess] a [***insert description of personal property***]?**
   ____ Yes ____ No

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

2. **Did [***name of defendant***] ~~intentionally and~~ substantially interfere with [***name of plaintiff***]'s property by knowingly or intentionally [[taking possession of/preventing [***name of plaintiff***] from having access to] the [***insert description of personal property***]]/[destroying the [***insert description of personal property***]/refusing to return [***name of plaintiff***]'s [***insert description of personal property***] after [***name of plaintiff***] demanded its return]?**
   ____ Yes ____ No

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

3. **Did [***name of plaintiff***] consent?**
   ____ Yes ____ No

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

4. **Was [***name of plaintiff***] harmed?**
   ____ Yes ____ No

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New December 2005; Revised December 2009, December 2010, June 2011, December 2016, May 2017

Directions for Use

This verdict form is based on CACI No. 2100, *Conversion—Essential Factual Elements.*

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

If the case involves multiple items of personal property as to which the evidence differs, users may need to modify question 2 to focus the jury on the different items.

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

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

2547. Disability-Based Associational Discrimination—Essential Factual Elements

[*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;]**

   [or]

   [[*Specify other basis for associational discrimination***];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties;**

~~5~~6. **[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~~7. 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~~8. That [*name of plaintiff***] was harmed; and**

~~8~~9. That [*name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2014; Revised May 2017

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. But the versions are illustrative rather than exhaustive; therefore, an "other" option is provided. (See *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1042 [207 Cal.Rptr.3d 120].)

An element of a disability discrimination case is that the plaintiff must be otherwise qualified to do the job, with or without reasonable accommodation. (*Green v. State of California* (2007) 42 Cal.4th 254, 262 [64 Cal.Rptr.3d 390, 165 P.3d 118] (see element 5).) However, the FEHA does not expressly require reasonable accommodation for association with a disabled person. (Gov. Code, § 12940(m) [employer must reasonably accommodate applicant or employee].) Nevertheless, one court has suggested that such a requirement may exist, without expressly deciding the issue. (See *Castro-Ramirez, supra*, 2 Cal.App.5th at pp. 1038−1039.) A reference to reasonable accommodation may be added to element 5 if the court decides to impose this requirement.

Read the first option for element ~~5~~ 6 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~~ 6 and also give CACI

No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 76 if either the second or third option is included for element 54.

Element 6 7 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]; *Castro-Ramirez, supra*, 2 Cal.App.5th at p. 1037; 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.)
- "We agree with *Rope* [*supra*] that *Larimer* [*Larimer v. International Business Machines Corp.* (7th Cir. 2004) 370 F.3d 698] provides an illustrative, rather than an exhaustive, list of the kinds of circumstances in which we might find associational disability discrimination. The common thread among the *Larimer* categories is simply that they are instances in which the 'employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person.' As we discuss above, this is an element of a plaintiff's prima facie case—that the plaintiff's association with a disabled person was a substantial motivating factor for the employer's adverse employment action.

Rope held the alleged facts in that case could give rise to an inference of such discriminatory motive. Our facts do not fit neatly within one of the *Larimer* categories either, but a jury could reasonably infer the requisite discriminatory motive." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1042, internal citation omitted.)

- " '[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, original italics.)

- "A prima facie case of disability discrimination under FEHA requires a showing that (1) the plaintiff suffered from a disability, (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation, and (3) the plaintiff was subjected to adverse employment action because of the disability. Adapting this [disability discrimination] framework to the associational discrimination context, the 'disability' from which the plaintiff suffers is his or her association with a disabled person. … [T]he disability must be a substantial factor motivating the employer's adverse employment action." (*Castro-Ramirez, supra,* 2 Cal.App.5th at p. 1037.)

- "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.)

- "[W]hen section 12940, subdivision (m) requires employers to reasonably accommodate 'the known physical … disability of an applicant or employee,' read in conjunction with other relevant provisions, subdivision (m) may reasonably be interpreted to require accommodation based on the employee's association with a physically disabled person." (*Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038–1039.)

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)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.32[2] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34 (Matthew Bender)

2548. Disability Discrimination—Refusal to Make Reasonable Accommodation in Housing (Gov. Code, § 12927(c)(1))

[*Name of plaintiff***] claims that [***name of defendant***] refused to reasonably accommodate [his/her] [***select term to describe basis of limitations, e.g., physical disability***] as necessary to afford [him/her] an equal opportunity to use and enjoy a dwelling. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [***specify defendant's source of authority to provide housing, e.g., owner***] of [a/an] [***specify nature of housing at issue, e.g., apartment building***];**

2. **That [***name of plaintiff***] [sought to rent/was living in/[***specify other efforts to obtain housing***]] the [***e.g., apartment***];**

3. **That [***name of plaintiff***] had [a history of having] [a] [***e.g., physical disability***] [that limited [***insert major life activity***]];**

4. **That [***name of defendant***] knew of, or should have known of, [***name of plaintiff***]'s disability;**

5. **That in order to afford [***name of plaintiff***] an equal opportunity to use and enjoy the [***e.g., apartment***], it was necessary to [***specify accommodation required***];**

6. **That it was reasonable to [***specify accommodation***];**

7. **That [***name of defendant***] refused to make this accommodation.**

New May 2017

Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to reasonably accommodate a disability. Under the Fair Employment and Housing Act, "discrimination" includes the refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling. (Gov. Code, § 12927(c)(1).)

In the introductory paragraph, select a term 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." Use the term in element 3.

In element 2, if the plaintiff encountered a barrier before actually submitting an application, such as discovering a policy that would make it impossible to live in the unit, specify what he or she did to obtain the housing.

In element 3, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

Modify element 3 if plaintiff was not actually disabled or had a history of disability, but alleges denial of accommodation because he or she was perceived to be disabled or associated with someone who has, or is perceived to have, a disability. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

In element 5, explain the accommodation in rules, policies, practices that is alleged to be needed.

Sources and Authority

- Discrimination Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).

- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.

- "Housing" Defined. Government Code section 12927(d).

- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)

- "[T]he basic principles applicable in employment cases should also apply in the housing context." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)

- "In order to establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation." (*Auburn Woods I Homeowners Assn., supra*, 121 Cal.App.4th at p.1592.)

- "FEHA prohibits, as unlawful discrimination, a 'refusal to make reasonable accommodations in rules, policies, practices, or services when these accommodations may be necessary to afford a disabled person equal opportunity to use and enjoy a dwelling.' 'In order to establish discrimination based on a refusal to provide reasonable accommodations, a party must establish that he or she (1) suffers from a disability as defined in FEHA, (2) the discriminating party knew of, or should have known of, the disability, (3) accommodation is necessary to afford an equal opportunity to use and enjoy the dwelling, and (4) the discriminating party refused to make this accommodation.' " (*Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1051 [188

Cal.Rptr.3d 537], internal citation omitted.)

- "We note that, currently, section 12955.3 explicitly states that 'disability' includes 'any physical or mental disability as defined in Section 12926.' That statute in turn defines 'mental disability' to include "any mental or psychological disorder or condition … that limits a major life activity', that is, 'makes the achievement of the major life activity difficult.' 'Major life activities' is to be broadly construed, and includes 'physical, mental, and social activities and working.' " (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1592, internal citations omitted.)

- " 'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.' This obligation to 'open a dialogue' with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1598, internal citation omitted.)

- "This evidence established the requisite causal link between the [defendant]'s no-pets policy and the interference with the [plaintiffs]' use and enjoyment of their condominium." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1593.)

- "When the reasons for a delay in offering a reasonable accommodation are subject to dispute, the matter is left for the trier of fact to resolve. The administrative law judge properly characterized this lengthy delay as a refusal to provide reasonable accommodation." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1599, internal citation omitted.)

- "We reiterate that the FEHC did not rule that companion pets are always a reasonable accommodation for individuals with mental disabilities. Each inquiry is fact specific and requires a case-by-case determination." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1593.)

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Reasonable Accommodations under the Fair Housing Act (May 17, 2004) https://www.hud.gov/offices/fheo/library/huddojstatement.pdf

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 946

California Real Estate Law and Practice, Ch. 214, Government Regulations and Enforcement, § 214.41 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, Civil Rights: Housing Discrimination, § 117.14 (Matthew Bender)

2549. Disability Discrimination—Refusal to Permit Reasonable Modification to Housing Unit (Gov. Code, § 12927(c)(1))

[*Name of plaintiff***] claims that [***name of defendant***] refused to permit reasonable modifications of [***name of plaintiff***]'s [***specify type of housing, e.g., apartment***] necessary to afford [***name of plaintiff***] full enjoyment of the premises. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [***specify defendant's source of authority to provide housing, e.g., owner***] of [a/an] [***e.g., apartment building***];**

2. **That [***name of plaintiff***] [sought to rent/was living in/[***specify other efforts to obtain housing***]] the [***e.g., apartment***];**

3. **That [***name of plaintiff***] had [a history of having] [a] [***select term to describe basis of limitations, e.g., physical disability***] [that limited [***insert major life activity***]];**

4. **That [***name of defendant***] knew of, or should have known of, [***name of plaintiff***]'s disability;**

5. **That in order to afford [***name of plaintiff***] an equal opportunity to use and enjoy the [***e.g., apartment***], it was necessary to [***specify modification(s) required***];**

6. **That it was reasonable to expect [***name of defendant***] to [***specify modification(s) required***];**

7. **That [***name of plaintiff***] agreed to pay for [this/these] modification[s]; [and]**

8. **[That [***name of plaintiff***] agreed that [he/she] would restore the interior of the unit to the condition that existed before the modifications, other than for reasonable wear and tear; and]**

9. **That [***name of defendant***] refused to permit [this/these] modification[s].**

New May 2017

Directions for Use

This instruction is for use in a case alleging discrimination in housing based on a failure to permit reasonable modifications to a living unit to accommodate a disability. Under the Fair Employment and Housing Act, "discrimination" includes the refusal to permit, at the expense of the disabled person, reasonable modifications of existing premises occupied or to be occupied by the disabled person, if the modifications may be necessary to afford the disabled person full enjoyment of the premises. (Gov. Code, § 12927(c)(1).)

In element 2, if the plaintiff encountered a barrier before actually submitting an application, such as discovering a policy that would make it impossible to live in the unit, specify what he or she did to obtain

the housing.

In element 3, select a term 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 element 3, select the bracketed language on "history" of disability if the claim of discrimination is based on a history of disability rather than a current actual disability.

Modify element 3 if plaintiff was not actually disabled or had a history of disability, but alleges denial of accommodation because he or she was perceived to be disabled or associated with someone who has, or is perceived to have, a disability. (See Gov. Code, § 12926(o); see also Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].)

In element 5, specify the modifications that are alleged to be needed.

Element 7 may not apply if section 504 of the Rehabilitation Act of 1973 (applicable to federal subsidized housing) or Title II of the Americans With Disabilities Act requires the landlord to incur the cost of reasonable modifications.

In the case of a rental, the landlord may, if it is reasonable to do so, condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear). (Gov. Code, § 12927(c)(1).) Include element 8 if the premises to be physically altered is a rental unit, and the plaintiff agreed to restoration. If the parties dispute whether restoration is reasonable, presumably the defendant would have to prove reasonableness. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that s/he is asserting].)

Sources and Authority

- Discrimination Defined Regarding Housing Disability Accommodations. Government Code section 12927(c)(1).
- "Disability" Defined for Housing Discrimination. Government Code section 12955.3.
- "Housing" Defined. Government Code section 12927(d).
- " 'FEHA in the housing area is thus intended to conform to the general requirements of federal law in the area and may provide greater protection against discrimination.' In other words, the FHA provides a minimum level of protection that FEHA may exceed. Courts often look to cases construing the FHA, the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990 when interpreting FEHA." (*Auburn Woods I Homeowners Assn. v. Fair Employment & Housing Com.* (2004) 121 Cal.App.4th 1578, 1591 [18 Cal.Rptr.3d 669], internal citations omitted.)

- "[T]he basic principles applicable in employment cases should also apply in the housing context." (*Brown v. Smith* (1997) 55 Cal.App.4th 767, 782 [64 Cal.Rptr.2d 301].)

- "We note that, currently, section 12955.3 explicitly states that 'disability' includes 'any physical or mental disability as defined in Section 12926.' That statute in turn defines 'mental disability' to include "any mental or psychological disorder or condition … that limits a major life activity', that is, 'makes the achievement of the major life activity difficult.' 'Major life activities' is to be broadly construed, and includes 'physical, mental, and social activities and working.' " (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1592, internal citations omitted.)

- " 'If a landlord is skeptical of a tenant's alleged disability or the landlord's ability to provide an accommodation, it is incumbent upon the landlord to request documentation or open a dialogue.' This obligation to 'open a dialogue' with a party requesting a reasonable accommodation is part of an interactive process in which each party seeks and shares information." (*Auburn Woods I Homeowners Assn., supra,* 121 Cal.App.4th at p. 1598, internal citation omitted.)

Secondary Sources

Joint Statement of the Department of Housing and Urban Development and the Department of Justice on Reasonable Modifications under the Fair Housing Act (March 3, 2008) https://www.hud.gov/offices/fheo/disabilities/reasonable_modifications_mar08.pdf

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 946

California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement,* § 214.41 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination,* § 117.14 (Matthew Bender)

3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—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, [***describe violation that created risk, e.g., [name of plaintiff] was placed in a cell block with rival gang members***];**

2. **That [***name of defendant***]'s [conduct/failure to act] created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

3. **That [***name of defendant***] knew that [his/her] [conduct/failure to act] created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

4. **That [***name of defendant***] disregarded the risk by failing to take reasonable measures to address it;**

~~4~~5. **That there was no reasonable justification for the [conduct/failure to act];**

~~5~~6. **That [***name of defendant***] was performing ~~acting or purporting to act in the performance of~~ [his/her] official duties when [he/she] [acted/purported to act/failed to act];**

~~6~~7. **That [***name of plaintiff***] was harmed; and**

~~7~~8. **That [***name of defendant***]'s [conduct/failure to act] 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, June 2015, May 2017

Directions for Use

Give this instruction in a case involving conduct that allegedly created a substantial risk of serious harm to an inmate. (See *Farmer v. Brennan* (1994) 511 U.S. 825 [114 S.Ct. 1970, 128 L.Ed.2d 811].) For an instruction on deprivation of medical care, see CACI No. 3041, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight Amendment—Deprivation of Necessities*.

In element 1, describe the act or omission that created the risk. In elements 2 and 3, choose "conduct" if the risk was created by affirmative action. Choose "failure to act" if the risk was created by an omission.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. (*Farmer, supra*, 511 U.S. at p. 834.) "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, but failed to act to address the danger. (See *Castro v. Cnty. of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1073.) Second, the inmate must show that the prison officials had no "reasonable" justification for the conduct, in spite of that risk. (*Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150.) Elements 3, 4, and ~~4~~ 5 express the deliberate-indifference components.

The "official duties" referred to in element ~~5~~ 6 must be duties created by 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 6~~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.)

- "[D]irect causation by affirmative action is not necessary: 'a prison official may be held liable under the Eighth Amendment if he knows that inmates face a substantial risk of serious harm and disregards that risk *by failing to take reasonable measures to abate it.*' " (*Castro, supra*, 833 F.3d at p. 1067, original italics.)

- "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.)

- "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 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.)

- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in … conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security." (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citation 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

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)

3052. Use of Fabricated Evidence—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] deliberately fabricated evidence against [him/her], and that as a result of this evidence being used against [him/her], [he/she] was deprived of [his/her] [***specify right, privilege, or immunity secured by the Constitution, e.g., liberty***] without due process of law. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***specify fabricated evidence, e.g., informed the district attorney that plaintiff's DNA was found at the scene of the crime***];**

2. **That this [***e.g., statement***] was not true;**

3. **That [***name of defendant***] knew that the [***e.g., statement***] was not true; and**

4. **That because of [***name of defendant***]'s conduct, [***name of plaintiff***] was deprived of [his/her] [***e.g., liberty***].**

To decide whether there was a deprivation of rights because of the fabrication, you must determine what would have happened if the [*e.g., statement***] had not been used against [***name of plaintiff***].**

[Deprivation of liberty does not require that [*name of plaintiff***] have been put in jail. Nor is it necessary that [he/she] prove that [he/she] was wrongly convicted of a crime.]**

New May 2017

Directions for Use

This instruction is for use if the plaintiff claims to have been deprived of a constitutional or legal right based on false evidence. Give also CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*.

What would have happened had the fabricated evidence not been presented (i.e., causation) is a question of fact. (*Kerkeles v. City of San Jose* (2011) 199 Cal.App.4th 1001, 1013 [132 Cal.Rptr.3d 143].)

Give the last optional paragraph if the alleged fabrication occurred in a criminal case. It would appear that the use of fabricated evidence for prosecution may be a constitutional violation even if the arrest was lawful or objectively reasonable. (See *Kerkeles, supra,* 199 Cal.App.4th at pp. 1010–1012, quoting favorably *Ricciuti v. New York City Transit Authority* (2d Cir. 1997) 124 F.3d 123, 130.)

Sources and Authority

- "Substantive due process protects individuals from arbitrary deprivation of their liberty by government." (*Costanich v. Dep't of Soc. & Health Servs.* (9th Cir. 2010) 627 F.3d 1101, 1110.)

- "[T]here is a clearly established constitutional due process right not to be subjected to criminal

charges on the basis of false evidence that was deliberately fabricated by the government." (*Devereaux v. Abbey* (9th Cir. 2001) 263 F.3d 1070, 1074–1075.)

- " 'No arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee. To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will, would make a mockery of the notion that Americans enjoy the protection of due process of the law and fundamental justice. Like a prosecutor's knowing use of false evidence to obtain a tainted conviction, a police officer's fabrication and forwarding to prosecutors of known false evidence works an unacceptable "corruption of the truth-seeking function of the trial process." [Citations.]' " (*Ricciuti, supra,* 124 F.3d at p. 130.)

- "Even if there was probable cause to arrest plaintiff, we cannot say as a matter of law on the record before us that he would have been subjected to continued prosecution and an unfavorable preliminary hearing without the use of the false lab report and testimony derived from it. These are questions of fact which defendants appear to concede are material to the issue of causation, and which cannot be determined without weighing the evidence presented and conclusions reached at the preliminary hearing. Defendants' statement of undisputed facts does not establish lack of causation as a matter of law." (*Kerkeles, supra,* 199 Cal.App.4th at p. 1013.)

- "There is no authority for defendants' argument that a due process claim cannot be established unless the false evidence is used to *convict* the plaintiff. … [T]he right to be free from criminal *charges,* not necessarily the right to be free from conviction, is a clearly established constitutional right supporting a section 1983 claim." (*Kerkeles, supra,* 199 Cal.App.4th at p. 1010.)

- "There is no sound reason to impose a narrow restriction on a plaintiff's case by requiring incarceration as a sine qua non of a deprivation of a liberty interest." (*Kerkeles, supra,* 199 Cal.App.4th at p. 1011.)

- "[T]here is no such thing as a minor amount of actionable perjury or of false evidence that is somehow permissible. Why? Because government perjury and the knowing use of false evidence are absolutely and obviously irreconcilable with the Fourteenth Amendment's guarantee of Due Process in our courts. Furthermore, the social workers' alleged transgressions were not made under pressing circumstances requiring prompt action, or those providing ambiguous or conflicting guidance. There are no circumstances in a dependency proceeding that would permit government officials to bear false witness against a parent." (*Hardwick v. Cnty. of Orange* (9th Cir. 2017) 844 F.3d 1112, 1119.)

- "[T]o the extent that [plaintiff] has raised a deliberate-fabrication-of-evidence claim, he has not adduced or pointed to any evidence in the record that supports it. For purposes of our analysis, we assume that, in order to support such a claim, [plaintiff] must, at a minimum, point to evidence that supports at least one of the following two propositions: (1) Defendants continued their investigation of [plaintiff] despite the fact that they knew or should have known that he was innocent; or (2) Defendants used investigative techniques that were so coercive and abusive that they knew or should have known that those techniques would yield false information." (*Devereeax, supra,* 263 F.3d at p. 1076.)

- "The *Devereaux* test envisions an investigator whose unlawful motivation is illustrated by her state of mind regarding the alleged perpetrator's innocence, or one who surreptitiously fabricates evidence by using coercive investigative methods. These are circumstantial methods of proving deliberate falsification. Here, [plaintiff] argues that the record directly reflects [defendant]'s false statements. If, under *Devereaux*, an interviewer who uses coercive interviewing techniques that are known to yield false evidence commits a constitutional violation, then an interviewer who deliberately mischaracterizes witness statements in her investigative report also commits a constitutional violation. Similarly, an investigator who purposefully reports that she has interviewed witnesses, when she has actually only attempted to make contact with them, deliberately fabricates evidence." (*Costanich, supra,* 627 F.3d at p. 1111.)

- "In light of long-standing criminal prohibitions on making deliberately false statements under oath, no social worker could reasonably believe that she was acting lawfully in making deliberately false statements to the juvenile court in connection with the removal of a dependent child from a caregiver." (*Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1113 [190 Cal.Rptr.3d 97], footnotes omitted.)

- "[P]retrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case. The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification." (*Manuel v. City of Joliet* (2017) __ U.S. __, 2017 U.S. LEXIS 2021 (No. 14-9496), internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 826 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)

3509A. Precondemnation Damages—Unreasonable Delay (*Klopping* Damages)

I have determined that [*insert one or both of the following:***]**

[there was an unreasonable delay between [*date of announcement of intent to condemn***], when the [***name of condemnor***] announced its intent to condemn [***name of property owner***]'s property, and [***date of filing***], when this case was filed] [and]**

[*insert description of unreasonable conduct***].**

In determining just compensation you must award damages that [*name of property owner***] has suffered as a result of the [***name of condemnor***]'s [delay/[***describe unreasonable conduct***]]. ~~Such~~ These damages may include [***insert damages appropriate to the facts, e.g., the cost of repairs, the loss of use of the property, loss of rent, loss of profits, or increased operating expenses pending repairs, and diminution of market value***].**

New September 2003; Revised and Renumbered May 2017

Directions for Use

This instruction will need to be modified ~~in cases where~~if the entity does not ultimately proceed with the condemnation, or ~~where~~ if there has been another type of unreasonable conduct other than ~~"~~unreasonable delay.~~"~~

For an instruction on precondemnation damages arising from the public entity's authorized entry to investigate suitability of the property for the project, see CACI No. 3509B, *Precondemnation Damages—Public Entity's Authorized Entry to Investigate Property's Suitability.*

Sources and Authority

- "[A] condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value." (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 52 [104 Cal.Rptr. 1, 500 P.2d 1345].)

- "The measure of damages may be the cost of repairs, the loss of use of the property, loss of rent, loss of profits, or increased operating expenses pending repairs." (*City of Los Angeles v. Tilem* (1983) 142 Cal.App.3d 694, 703 [191 Cal.Rptr. 229], internal citations omitted.)

- "[A]bsent a formal resolution of condemnation, recovery under *Klopping* requires that the public entity's conduct 'directly and specially affect the landowner to his injury.' This requirement mandates that the plaintiff demonstrate conduct on the part of the public entity 'which significantly invaded or appropriated the use or enjoyment' of the property." (*Barthelemy v. Orange County Flood Control*

Dist. (1998) 65 Cal.App.4th 558, 570 [76 Cal.Rptr.2d 575], internal citations omitted.)

- "[S]ince *Klopping* damages compensate a landowner for a public entity's unreasonable *precondemnation* conduct, their recovery 'is permitted irrespective of whether condemnation proceedings are abandoned or whether they are instituted at all.' " (*Barthelemy, supra,* 65 Cal.App.4th at p. 569, original italics, internal citation omitted.)

- "*Klopping* does not permit an owner to recover precondemnation damages for general market decline as that is not attributable to the condemner." (*People ex rel. Dept. of Transportation v. McNamara* (2013) 218 Cal.App.4th 1200, 1209 [160 Cal.Rptr.3d 812].)

- "Whether there has been unreasonable delay by the condemner and whether the condemner has engaged in unreasonable conduct are both questions of fact. What constitutes a direct and substantial impairment of property rights for purposes of compensation is also a factual question. In deciding factual matters on conflicting testimony and inferences, it is for the trier of fact to determine which evidence and inferences it finds more reasonable." (*Contra Costa County Water Dist. v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 897 [68 Cal.Rptr.2d 272], internal citations omitted.)

- "Whether the public entity has acted unreasonably is a question of fact. 'However, the threshold question of liability for unreasonable precondemnation conduct is to be determined by the court, with the issue of the *amount* of damages to be thereafter submitted to the jury only upon a sufficient showing of liability by the condemnee.' Because inverse condemnation damages for precondemnation conduct must be claimed in a pending eminent domain action, the appropriate procedure is to bifurcate the trial of the action so that the question of the liability of the public entity is first adjudicated by the court without a jury." (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 897 [122 Cal.Rptr.2d 802], original italics, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1235

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) § 4.8

14 California Real Estate Law and Practice, Ch. 512, *Compensation*, § 512.12 (Matthew Bender)

6 Nichols on Eminent Domain, Ch. 26D, *Abandonment, Dismissal of Action and Assessment of Damages*, § 26D.01 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.202 (Matthew Bender)

9 California Points and Authorities, Ch. 95, *Eminent Domain*, § 95.123 (Matthew Bender)

3509B. Precondemnation Damages—Public Entity's Authorized Entry to Investigate Property's Suitability (Code Civ. Proc., § 1245.060)

A public entity that is considering condemning property for public use may enter the property before condemnation to conduct activities that are reasonably related to acquiring the property for a public project. However, the property owner may recover for any actual damage to, or substantial interference with, the owner's possession and use of the property caused by the public entity's entry for these purposes.

[*Name of property owner***] claims that [he/she/it] suffered damage to, or substantial interference with, the use or possession of [his/her/its] property because of [***name of condemnor***]'s precondemnation activities on the property.**

[If you determine that [*name of property owner***] suffered actual damage to, or substantial interference with, the use or possession of [his/her/its] property during precondemnation activities], [Y/y]ou must determine the amount of this loss and include it in determining just compensation.**

New May 2017

Directions for Use

Give this instruction if the property owner alleges that the public entity's precondemnation entry onto the property to investigate its suitability for a public project caused actual damage or substantially interfered with the owner's possession or use of the property. (See Code Civ. Proc., §§ 1245.010, 1245.060.) The amount of any such damages must be determined by a jury. (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 207−210 [204 Cal.Rptr.3d 770, 375 P.3d 887].)

The last paragraph is partially bracketed because it is not clear whether the jury is also to determine whether in fact the owner has suffered any precondemnation harm from the entry. (See *City of Perris v. Stamper* (2016) 1 Cal.5th 576, 593−595 [205 Cal.Rptr.3d 797, 376 P.3d 1221.) But for the similar claim for severance damages, the California Supreme Court has held that it is for the jury to determine if such a loss has actually occurred as long as the claim is not speculative, conjectural, or remote. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 973 [62 Cal.Rptr.3d 623, 161 P.3d 1175].)

For an instruction on a claim for precondemnation damages because of the public entity's unreasonable delay in condemnation, see CACI No. 3509A, *Precondemnation Damages—Unreasonable Delay (Klopping Damages)*.

Sources and Authority

- Public Entity's Precondemnation Entry to Investigate Property's Suitability for Public Project. Code of Civil Procedure section 1245.010 et seq.

- Public Entity's Precondemnation Entry Authorized for Particular Purposes. Code of Civil

Procedure 1245.010.

- Damages to or Interference With Possession and Use of Property During Precondemnation Entry. Code of Civil Procedure section 1245.060.

- "[T]he current precondemnation entry and testing statutes not only establish a statutory compensation procedure but also expressly preserve a property owner's right to pursue and obtain damages in a statutorily authorized civil action or an ordinary inverse condemnation action. Taken as a whole, state law clearly provides 'a " 'reasonable, certain and adequate' " ' procedure to enable a property owner to recover money damages for any injury caused by the activities authorized by the statutes." (*Property Reserve, Inc., supra,* 1 Cal.5th at pp. 186−187, internal citations omitted.)

- "[T]he statutory damages that a property owner is entitled to obtain under section 1245.060, the applicable precondemnation entry and testing statute, are a constitutionally adequate measure of just compensation under the state takings clause for the precondemnation activities authorized by the statutory scheme. [¶] Like the concept of just compensation under the federal takings clause, the just compensation required by the state takings clause is the amount required to compensate the property owner for what the owner has lost." (*Property Reserve, Inc., supra,* 1 Cal.5th at pp. 203−204, internal citation omitted.)

- "[T]he compensation authorized by section 1245.060, subdivision (a)—damages for any 'actual damage' to the property and for 'substantial interference with the [property owner's] possession or use of the property'—appears on its face to be a reasonable means of measuring what the property owner has lost by reason of the specific precondemnation activities that are authorized by the trial court's environmental order." (*Property Reserve, Inc., supra,* 1 Cal.5th at p. 205.)

- "The statutes at issue in the present case involve a factual setting—precondemnation entry and testing—that falls between the classic condemnation proceeding where the public entity is seeking to obtain title to or a compensable property interest in the property and the typical inverse condemnation action where the public entity does not intend to enter or intrude upon private property but damage to such property nonetheless ensues. Here, the proposed precondemnation entry and testing activities upon the subject property are intentional, but the public entity is not seeking to obtain title to or exclusive possession of the property for a significant period of time. Rather, the public entity is seeking temporary access to the property to conduct investigations that are needed to decide whether the property is suitable for a proposed project and should thereafter be acquired by the public entity." (*Property Reserve, Inc., supra,* 1 Cal.5th at p. 190.)

- "Although the measure of compensation that is 'just' for purposes of both the federal and state takings clause is often determined by the 'fair market value' of what has been lost, both federal and state takings cases uniformly recognize that the fair market value standard is not applicable in all circumstances and that there is no rigid or fixed standard that is appropriate in all settings." (*Property Reserve, Inc., supra,* 1 Cal.5th at pp. 203–204.)

- "In light of the nature of the environmental order at issue here, however, granting a property owner the rental value of the property in addition to any damages the owner sustains for actual

injury or substantial interference with the possession or use of the property would afford the owner an unwarranted windfall. Under the trial court's environmental order, the owner retains full possession and use of the property over the period covered by the order, notwithstanding the authorized testing activities. Under these circumstances, the rental value of the property would not be a valid measure of what the property owner has lost as a result of the trial court's environmental order." (*Property Reserve, Inc., supra,* 1 Cal.5th at p. 204.)

- "We have long held that this jury right applies only to determining the appropriate amount of compensation, not to any other issues that arise in the course of condemnation proceedings. ' "[A]ll issues except the sole issue relating to compensation[] are to be tried by the court," including, "except those relating to compensation, the issues of fact." ' " ' " 'It is only the 'compensation,' the 'award,' which our constitution declares shall be found and fixed by a jury. All other questions of fact, or of mixed fact and law, are to be tried, as in many other jurisdictions they are tried, without reference to a jury.' " ' " (*City of Perris, supra,* 1 Cal.5th at p. 593, internal citations omitted.)

- "By contrast, *Campus Crusade* held that two pure questions of fact directly pertaining to the proper amount of compensation were reserved to the jury. First, we said that whether it is reasonably probable a city would change the zoning status of the landowners' property in the near future was a jury question. Second, because the landowner had introduced credible evidence that the remaining portion of its property would be worth less after the proposed taking due to hazards associated with a pipeline the government proposed to install on the property, the extent of the resulting severance damages was a jury question." (*City of Perris, supra,* 1 Cal.5th at p. 595, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 1198

14 California Real Estate Law and Practice, Ch. 503, *Preliminary Case Evaluation and Preparation for the Condemnor*, § 503.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.72 (Matthew Bender)

3511A. ~~Permanent~~ Severance Damages to Remainder (Code Civ. Proc., §§ 1263.410, 1263.420(a))

The [*name of condemnor***] has taken only a part of [***name of property owner***]'s property. [***Name of property owner***] claims that [his/her/its] remaining property has lost value as a result of the taking because [***specify reasons alleged for diminution of value of remaining property***]. This loss in value is called "severance damages."**

~~Permanent s~~Severance damages are the ~~permanent~~ damages to [*name of property owner***]'s remaining property caused by the taking. If you determine that the remaining property has lost value ~~permanently~~ because of the taking, ~~permanent~~ severance damages must be included in determining just compensation.**

Severance damages are determined as follows:

1. **Determine the fair market value of the remaining property on [***date of valuation***] by subtracting the fair market value of the part taken from the fair market value of the entire property;**

2. **Determine the fair market value of the remaining property after the [***name of condemnor***]'s proposed project is completed; and**

3. **Subtract the fair market value of the remaining property after the [***name of condemnor***]'s proposed project is completed from the fair market value of the remaining property on [***date of valuation***].**

New September 2003; Revised December 2016; Revised and Renumbered May 2017

Directions for Use

Give this instruction if the owner claims that property not taken has lost value ~~permanently~~ because of the taking, for example because a view has been lost. It is for the jury to determine if such a loss has actually occurred as long as the claim is not speculative, conjectural, or remote. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 973 [62 Cal.Rptr.3d 623, 161 P.3d 1175].) Read CACI No. 3512, *Severance Damages—Offset for Benefits*, if benefits to the owner's remaining property are at issue.

A property owner may also be able to recover for ~~temporary~~ economic loss to the remaining property incurred during the construction of the project. (Code Civ. Proc., § 1263.420(b); see *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676 [73 Cal.Rptr.3d 54].) For an instruction on this loss, see CACI No. 3511B, *Damage to Remainder During Construction*.~~This recovery has been called "temporary severance damages." This instruction is not for use to compute loss during construction.~~

Sources and Authority

- Right to Severance Damages. Code of Civil Procedure section 1263.410.
- Damages to Remainder After Severance. Code of Civil Procedure section 1263.420(a).
- Benefit to Remainder. Code of Civil Procedure section 1263.430.
- "When property acquired by eminent domain is part of a larger parcel, compensation must be awarded for the injury, if any, to the remainder. Such compensation is commonly called severance damages. When the property taken is but part of a single legal parcel, the property owner need only demonstrate injury to the portion that remains to recover severance damages." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 741 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)
- "The claimed loss in market value must directly and proximately flow from the taking. Thus, recovery may not be based on ' " 'speculative, remote, imaginary, contingent, or merely possible' " ' events." (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1466 [141 Cal.Rptr.3d 271].)
- The court determines as a matter of law what constitutes the "larger parcel" for which severance damages may be obtained: "The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a 'larger parcel'." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations omitted.)
- "As we said in *Pierpont Inn*, 'Where the property taken constitutes only a part of a larger parcel, the owner is entitled to recover, inter alia, the difference in the fair market value of his property in its "before" condition and the fair market value of the remaining portion thereof after the construction of the improvement on the portion taken. Items such as view, access to beach property, freedom from noise, etc. are unquestionably matters which a willing buyer in the open market would consider in determining the price he would pay for any given piece of real property.' Severance damages are not limited to special and direct damages, but can be based on any factor, resulting from the project, that causes a decline in the fair market value of the property." (*Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 712 [66 Cal.Rptr.2d 630, 941 P.2d 809], internal citations omitted.)
- "Both sides here thus agree that the court, not the jury, must make certain determinations that are a predicate to the award of severance damages. But [condemnor] is on weaker ground when it attempts to derive … a general rule that 'as a matter of constitutional and decisional law, *all* issues having to do with the existence of, or entitlement to, severance damages are entrusted to the trial judge,' such that '[o]nly after the trial judge has determined that severance damages exist does the jury consider the amount of those severance damages.' [Condemnor]'s proposed rule assumes that questions relating to the measurement of severance damages can be readily distinguished from questions relating to the entitlement to them in the first place but, as we have previously cautioned, the two concepts are not necessarily 'so easily separable.' " (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 972, original italics, internal citations omitted.)
- "[W]here the property owner produces evidence tending to show that some other aspect of the taking … 'naturally tends to and actually does decrease the market value' of the remaining property, it is for

the jury to weigh its effect on the value of the property, as long as the effect is not speculative, conjectural, or remote." (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 973.)

- "In determining severance damage, the jury must assume 'the most serious damage' which will be caused to the remainder by the taking of the easement and construction of the property. The value of the remainder after the condemnation has occurred is referred to as the 'after' value of the property. The diminution in fair market value is determined by comparing the before and after values. This is the amount of the severance damage." (*San Diego Gas & Electric Co. v. Daley* (1988) 205 Cal.App.3d 1334, 1345 [253 Cal.Rptr. 144], internal citations omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority, supra,* 16 Cal.4th at p. 720.)

- "[S]everance damages are not limited to specific direct damages but can be based on any indirect factors that cause a decline in the market value of the property. California decisions have indicated the following are compensable as direct damages under section 1263.410: (1) impairment of view, (2) restriction of access, (3) increased noise, (4) invasion of privacy, (5) unsightliness of the project, (6) lack of maintenance of the easement and (7) nuisances in general such as trespassers and safety risks. Several courts have recognized that the condemnee should be compensated for any characteristic of the project which causes 'an adverse impact on the fair market value of the remainder.'" (*San Diego Gas & Electric Co., supra,* 205 Cal.App.3d at p. 1345.)

- "When 'the property acquired [by eminent domain] is part of a larger parcel,' in addition to compensation for the property actually taken, the property owner must be compensated for the injury, if any, to the land that he retains. Once it is determined that the owner is entitled to severance damages, they, too, normally are measured by comparing the fair market value of the remainder before and after the taking." (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations and footnote omitted.)

- "[W]hether access to a property has been 'substantially impaired' for purposes of determining severance damages is a question for the court, even though '[s]ubstantial impairment cannot be fixed by abstract definition; it must be found in each case upon the basis of the factual situation.' " (*City of Perris v. Stamper* (2016) 1 Cal.5th 576, 594 [205 Cal.Rptr.3d 797, 376 P.3d 1221].)

- ~~"Temporary severance damages resulting from the construction of a public project are also compensable. A property owner 'generally should be able "to present evidence to show whether and to what extent the delay disrupted its use of the remaining property." ' However, 'the mere fact of a delay associated with construction' does not, without more, entitle the property owner to temporary severance damages. The temporary easement or taking must interfere with the owner's *actual* intended use of the property." (*City of Fremont, supra*, 160 Cal.App.4th at p. 676, original italics.)~~

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1236–1244

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) Ch. 5

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, §§ 508.24, 508.25 (Matthew Bender)

4A Nichols on Eminent Domain, Ch. 14, *Damages for Partial Takings*, §§ 14.01–14.03 (Matthew Bender)

5 Nichols on Eminent Domain, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01–16.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.140 (Matthew Bender)

3511B. Damage to Remainder During Construction (Code Civ. Proc, § 1263.420(b))

The [*name of condemnor***] has taken only a part of [***name of property owner***]'s property. [***Name of property owner***] claims that [he/she/it] suffered damage to the remaining property during construction of the project for which the property was taken. This loss was because of [***specify reasons alleged for damage due to construction, e.g., reduced business because construction made access to owner's business more difficult***].**

If you determine that [*name of property owner***] suffered damage to [his/her/its] remaining property during construction, you must determine the amount of this damage and include it in determining just compensation.**

New May 2017

Directions for Use

Give this instruction if the owner claims that he or she suffered an economic loss on the property not taken during construction of the project, for example because of decreased business due to access being made more difficult. (See *City of Fremont v. Fisher* (2008) 160 Cal.App.4th 666, 676 [73 Cal.Rptr.3d 54].) Courts have referred to these damages as "temporary severance damages" (see, e.g., *City of Fremont, supra,* 160 Cal.App.4th at p. 676.), though the statute does not call them either "temporary" or "severance." (See Code Civ. Proc., § 1263.420(b) [damage to the remainder caused by the construction and use of the project for which the property is taken].)

It is for the jury to determine if such a loss has actually occurred as long as the claim is not speculative, conjectural, or remote. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 973 [62 Cal.Rptr.3d 623, 161 P.3d 1175.)

A property owner may also be able to recover severance damages if the remaining property has decreased in value because of the partial taking. If severance damages are sought, give CACI No. 3511A, *Severance Damages to Remainder*. Read CACI No. 3512, *Severance Damages—Offset for Benefits,* if benefits to the owner's remaining property are at issue.

Sources and Authority

- Damages to Remainder During Construction. Code of Civil Procedure section 1263.420(b).
- Benefit to Remainder. Code of Civil Procedure section 1263.430.
- "When property acquired by eminent domain is part of a larger parcel, compensation must be awarded for the injury, if any, to the remainder. Such compensation is commonly called severance damages. When the property taken is but part of a single legal parcel, the property owner need only demonstrate injury to the portion that remains to recover severance damages." (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 741 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)

- "Temporary severance damages resulting from the construction of a public project are also compensable. A property owner 'generally should be able "to present evidence to show whether and to what extent the delay disrupted its use of the remaining property." ' However, 'the mere fact of a delay associated with construction' does not, without more, entitle the property owner to temporary severance damages. The temporary easement or taking must interfere with the owner's *actual* intended use of the property." (*City of Fremont, supra,* 160 Cal.App.4th at p. 676, original italics.)

- "If [owner] had sold the property during the construction period and if the ongoing construction had temporarily lowered the sales price of the property, it would appear that [owner] would be entitled to recover that loss from [city]. But the mere fact of a delay associated with construction of the pipeline did not, without more, entitle [owner] to temporary severance damages relating to the financing or marketing of the property in this eminent domain action. [¶] This is not to say, however, that [owner] is barred from recovering damages for actual injury it may have suffered during the construction of the pipeline. On remand, [owner] may have the opportunity before the trial court to create an appropriate record to support its claim of severance damages. In addition, '[w]hen the condemnation action is tried before the improvement is constructed, and substantial although temporary interference with the property owner's rights of possession or access occurs during construction, the property owner may maintain a subsequent action for such damage occurring during construction.' " (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 975, internal citations omitted.)

- "[Owner] sought temporary severance damages for impairment to his property because of construction activities associated with the project. Specifically, [owner] asserted the effect of removal of all landscaping for a period of one year, and the closure of two of four driveways on his property for four months during construction entitles him to temporary severance damages. In addition, [owner] asserts the access to his property was substantially impaired by the traffic detour traveling east through the intersection of East Airway Boulevard and Isabel Avenue created by the construction project." (*City of Livermore v. Baca* (2012) 205 Cal.App.4th 1460, 1471 [141 Cal.Rptr.3d 271] [court erred in excluding evidence of the above].)

- "The Legislature has framed the question of whether property should be viewed as an integrated whole in terms of whether the land remaining after the taking forms part of a 'larger parcel); the issue is one of law for decision by the court.' " (*City of San Diego, supra*, 6 Cal.4th at p. 745, internal citations omitted.)

- "Both sides here thus agree that the court, not the jury, must make certain determinations that are a predicate to the award of severance damages. But [condemnor] is on weaker ground when it attempts to derive … a general rule that 'as a matter of constitutional and decisional law, *all* issues having to do with the existence of, or entitlement to, severance damages are entrusted to the trial judge,' such that '[o]nly after the trial judge has determined that severance damages exist does the jury consider the amount of those severance damages.' [Condemnor]'s proposed rule assumes that questions relating to the measurement of severance damages can be readily distinguished from questions relating to the entitlement to them in the first place but, as we have previously cautioned, the two concepts are not necessarily 'so easily separable.' " (*Metropolitan Water Dist. of So. California, supra,* 41 Cal.4th at p. 972, original italics, internal citations omitted.)

- "In determining severance damage, the jury must assume 'the most serious damage' which will be caused to the remainder by the taking of the easement and construction of the property." (*San Diego Gas & Electric Co. v. Daley* (1988) 205 Cal.App.3d 1334, 1345 [253 Cal.Rptr. 144], internal citations omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694, 720 [66 Cal.Rptr.2d 630, 941 P.2d 809].)

- "[W]hether access to a property has been 'substantially impaired' for purposes of determining severance damages is a question for the court, even though '[s]ubstantial impairment cannot be fixed by abstract definition; it must be found in each case upon the basis of the factual situation.' " (*City of Perris v. Stamper* (2016) 1 Cal.5th 576, 594 [205 Cal.Rptr.3d 797, 376 P.3d 1221].)

- "Although the measure of compensation that is 'just' for purposes of both the federal and state takings clause is often determined by the 'fair market value' of what has been lost, both federal and state takings cases uniformly recognize that the fair market value standard is not applicable in all circumstances and that there is no rigid or fixed standard that is appropriate in all settings." (*Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151, 186 [204 Cal.Rptr.3 770, 375 P.3d 887].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1236–1244

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) Ch. 5

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, §§ 508.24, 508.25 (Matthew Bender)

4A Nichols on Eminent Domain, Ch. 14, *Damages for Partial Takings*, §§ 14.01–14.03 (Matthew Bender)

5 Nichols on Eminent Domain, Ch. 16, *Consequential Damages as a Result of Proposed Use*, §§ 16.01–16.05 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.140 (Matthew Bender)

3903D. Lost Earning Capacity (Economic Damage)

[*Insert number, e.g.,* "4."**] The loss of [***name of plaintiff***]'s ability to earn money.**

To recover damages for the loss of the ability to earn money as a result of the injury, [*name of plaintiff***] must prove:**

1. **That it is reasonably certain that the injury that [***name of plaintiff***] sustained will cause [him/her] to earn less money in the future than [he/she] otherwise could have earned; and**

2. ~~**t**~~**The reasonable value of that loss to [him/her].** ~~**It is not necessary that [he/she] have a work history.**~~

In determining the reasonable value of the loss, compare what it is reasonably probable that [*name of plaintiff***] could have earned without the injury to what [he/she] can still earn with the injury. [Consider the career choices that [***name of plaintiff***] would have had a reasonable probability of achieving.] It is not necessary that [he/she] have a work history.**

New September 2003; Revised April 2004, April 2008, May 2017

Directions for Use

This instruction is not intended for use in employment cases.

If lost profits are asserted as an element of damages, see CACI No. 3903N, *Lost Profits (Economic Damage)*.

If there is a claim for both lost future earnings and lost earning capacity, give also CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage)*. The verdict form should ensure that the same loss is not computed under both standards.

In the last paragraph, include the bracketed sentence if the plaintiff is of sufficient age that reasonable probabilities can be projected about career opportunities.

Sources and Authority

- ~~"Damages may be awarded for lost earning capacity without any proof of actual loss of earnings." (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 348, fn. 6 [100 Cal.Rptr.2d 854], internal citations omitted.)~~Before [lost earning capacity] damages may be awarded, a jury must (1) find the injury that the plaintiff sustained will result in a loss of earning capacity, and (2) assign a value to that loss by comparing what the plaintiff could have earned without the injury to what she can still earn with the injury." (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 887 [-- Cal.Rptr.3d --].

- "Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money." (*Connolly v. Pre-Mixed Concrete Co.* (1957) 49 Cal.2d 483, 489 [319 P.2d 343].)

- "Because these damages turn on the plaintiff's earning capacity, the focus is 'not [on] what the plaintiff would have earned in the future[,] but [on] what she could have earned.' Consequently, proof of the plaintiff's prior earnings, while relevant to demonstrate earning capacity, is not a prerequisite to the award of these damages, nor a cap on the amount of those damages. Indeed, proof that the plaintiff had any prior earnings is not required because the 'vicissitudes of life might call upon [the plaintiff] to make avail of her capacity to work,' even if she had not done so previously." (*Licudine, supra*, 3 Cal.App.5th at pp. 893−894, internal citations omitted.)

- ~~The test [for lost earning capacity] is not what the plaintiff would have earned in the future but what she could have earned. …~~ Such damages are '. . . awarded for the purpose of *compensating* the plaintiff for injury suffered, i.e., restoring . . . [her] as nearly as possible to . . . [her] former position, or giving . . . [her] some pecuniary equivalent.' Impairment of the capacity or power to work is an injury separate from the actual loss of earnings." (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412 [196 Cal.Rptr. 117], original italics, internal citations omitted.)

- "[T]he jury must fix a plaintiff's future earning capacity based on what it is 'reasonably probable' she could have earned." (*Licudine, supra*, 3 Cal.App.5th at p. 887.)

- "A plaintiff's earning capacity without her injury is a function of two variables—the career(s) the plaintiff could have pursued and the salaries attendant to such career(s)." (*Licudine, supra*, 3 Cal.App.5th at p. 894.)

- "How [is the jury to assess what career(s) are available to the plaintiff? Is the sky the limit? In other words, can a plaintiff urge the jury to peg her earning capacity to the salary of a world-class athlete, neuroscientist, or best-selling author just by testifying that is what she wanted to do? Or must the jury instead determine a plaintiff's earning capacity by reference to the career choices the plaintiff stood a realistic chance of accomplishing? We conclude some modicum of scrutiny by the trier of fact is warranted, and hold that the jury must look to the earning capacity of the career choices that the plaintiff had a reasonable probability of achieving." (*Licudine, supra*, 3 Cal.App.5th at p. 894.)

- "Once the jury has determined which career options are reasonably probable for the plaintiff to achieve, how is the jury to value the earning capacity of those careers? Precedent suggests three methods: (1) by the testimony of an expert witness; (2) by the testimony of lay witnesses, including the plaintiff; or (3) by proof of the plaintiff's prior earnings in that same career. As these options suggest, expert testimony is not always required." (*Licudine, supra*, 3 Cal.App.5th at p. 897.)

- ~~"[I]t is not necessary for a party to produce expert testimony on future earning ability although some plaintiff's attorneys may choose as a matter of trial tactics to present such evidence." (*Gargir v. B'Nei Akiva* (1998) 66 Cal.App.4th 1269, 1282 [78 Cal.Rptr.2d 557], internal citations omitted.)~~

- ~~The Supreme Court has stated:~~ " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 175 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1666, 1667

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.42

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.10–52.11 (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

1 California Civil Practice: Torts, § 5:15 (Thomson Reuters)

Table 3. Life table for females: United States, 2012

Spreadsheet version available from: ftp://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/NVSR/65_08/Table03.xlsx.

Age (years)	Probability of dying between ages x and $x+1$ q_x	Number surviving to age x l_x	Number dying between ages x and $x+1$ d_x	Person-years lived between ages x and $x+1$ L_x	Total number of person-years lived above age x T_x	Expectation of life at age x e_x
0–1	0.005432	100,000	543	99,523	8,116,947	81.2
1–2	0.000374	99,457	37	99,438	8,017,424	80.6
2–3	0.000234	99,420	23	99,408	7,917,985	79.6
3–4	0.000182	99,396	18	99,387	7,818,577	78.7
4–5	0.000140	99,378	14	99,371	7,719,190	77.7
5–6	0.000127	99,364	13	99,358	7,619,819	76.7
6–7	0.000110	99,352	11	99,346	7,520,461	75.7
7–8	0.000097	99,341	10	99,336	7,421,115	74.7
8–9	0.000089	99,331	9	99,327	7,321,779	73.7
9–10	0.000084	99,322	8	99,318	7,222,452	72.7
10–11	0.000083	99,314	8	99,310	7,123,134	71.7
11–12	0.000089	99,306	9	99,301	7,023,824	70.7
12–13	0.000104	99,297	10	99,292	6,924,523	69.7
13–14	0.000129	99,286	13	99,280	6,825,231	68.7
14–15	0.000162	99,274	16	99,266	6,725,951	67.8
15–16	0.000199	99,258	20	99,248	6,626,686	66.8
16–17	0.000236	99,238	23	99,226	6,527,438	65.8
17–18	0.000274	99,214	27	99,201	6,428,212	64.8
18–19	0.000311	99,187	31	99,172	6,329,011	63.8
19–20	0.000346	99,156	34	99,139	6,229,840	62.8
20–21	0.000381	99,122	38	99,103	6,130,701	61.9
21–22	0.000416	99,084	41	99,064	6,031,597	60.9
22–23	0.000446	99,043	44	99,021	5,932,534	59.9
23–24	0.000471	98,999	47	98,975	5,833,513	58.9
24–25	0.000494	98,952	49	98,928	5,734,538	58.0
25–26	0.000517	98,903	51	98,878	5,635,610	57.0
26–27	0.000543	98,852	54	98,825	5,536,732	56.0
27–28	0.000571	98,798	56	98,770	5,437,907	55.0
28–29	0.000601	98,742	59	98,712	5,339,137	54.1
29–30	0.000632	98,683	62	98,652	5,240,424	53.1
30–31	0.000668	98,620	66	98,587	5,141,773	52.1
31–32	0.000707	98,554	70	98,520	5,043,185	51.2
32–33	0.000745	98,485	73	98,448	4,944,666	50.2
33–34	0.000784	98,411	77	98,373	4,846,218	49.2
34–35	0.000826	98,334	81	98,294	4,747,845	48.3
35–36	0.000878	98,253	86	98,210	4,649,551	47.3
36–37	0.000942	98,167	92	98,121	4,551,341	46.4
37–38	0.001015	98,074	100	98,025	4,453,221	45.4
38–39	0.001096	97,975	107	97,921	4,355,196	44.5
39–40	0.001183	97,867	116	97,809	4,257,275	43.5
40–41	0.001276	97,752	125	97,689	4,159,465	42.6
41–42	0.001381	97,627	135	97,559	4,061,776	41.6
42–43	0.001506	97,492	147	97,419	3,964,217	40.7
43–44	0.001657	97,345	161	97,265	3,866,798	39.7
44–45	0.001834	97,184	178	97,095	3,769,534	38.8
45–46	0.002022	97,006	196	96,908	3,672,439	37.9
46–47	0.002222	96,810	215	96,702	3,575,531	36.9
47–48	0.002444	96,594	236	96,476	3,478,829	36.0
48–49	0.002687	96,358	259	96,229	3,382,353	35.1
49–50	0.002942	96,099	283	95,958	3,286,124	34.2
50–51	0.003205	95,817	307	95,663	3,190,166	33.3
51–52	0.003470	95,510	331	95,344	3,094,503	32.4
52–53	0.003738	95,178	356	95,000	2,999,159	31.5
53–54	0.004014	94,822	381	94,632	2,904,159	30.6
54–55	0.004306	94,442	407	94,238	2,809,527	29.7
55–56	0.004622	94,035	435	93,818	2,715,288	28.9
56–57	0.004961	93,600	464	93,368	2,621,471	28.0
57–58	0.005324	93,136	496	92,888	2,528,102	27.1
58–59	0.005712	92,640	529	92,376	2,435,214	26.3
59–60	0.006129	92,111	565	91,829	2,342,838	25.4
60–61	0.006579	91,546	602	91,245	2,251,010	24.6

See footnote at end of table.

Table 3. Life table for females: United States, 2012—Con.

Spreadsheet version available from: ftp://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/NVSR/65_08/Table03.xlsx.

Age (years)	Probability of dying between ages x and $x+1$ q_x	Number surviving to age x l_x	Number dying between ages x and $x+1$ d_x	Person-years lived between ages x and $x+1$ L_x	Total number of person-years lived above age x T_x	Expectation of life at age x e_x
61–62	0.007075	90,944	643	90,622	2,159,764	23.7
62–63	0.007634	90,301	689	89,956	2,069,142	22.9
63–64	0.008274	89,611	741	89,241	1,979,186	22.1
64–65	0.008998	88,870	800	88,470	1,889,945	21.3
65–66	0.009826	88,070	865	87,638	1,801,475	20.5
66–67	0.010745	87,205	937	86,736	1,713,837	19.7
67–68	0.011748	86,268	1,013	85,761	1,627,101	18.9
68–69	0.012811	85,254	1,092	84,708	1,541,340	18.1
69–70	0.013960	84,162	1,175	83,575	1,456,632	17.3
70–71	0.015317	82,987	1,271	82,352	1,373,057	16.5
71–72	0.016935	81,716	1,384	81,024	1,290,705	15.8
72–73	0.018674	80,332	1,500	79,582	1,209,681	15.1
73–74	0.020539	78,832	1,619	78,023	1,130,099	14.3
74–75	0.022642	77,213	1,748	76,339	1,052,076	13.6
75–76	0.025028	75,465	1,889	74,520	975,737	12.9
76–77	0.027826	73,576	2,047	72,552	901,217	12.2
77–78	0.030908	71,529	2,211	70,423	828,664	11.6
78–79	0.034321	69,318	2,379	68,128	758,241	10.9
79–80	0.038452	66,939	2,574	65,652	690,113	10.3
80–81	0.042724	64,365	2,750	62,990	624,461	9.7
81–82	0.047387	61,615	2,920	60,155	561,471	9.1
82–83	0.052600	58,695	3,087	57,152	501,315	8.5
83–84	0.058859	55,608	3,273	53,971	444,164	8.0
84–85	0.066132	52,335	3,461	50,604	390,192	7.5
85–86	0.074693	48,874	3,651	47,049	339,588	6.9
86–87	0.083936	45,223	3,796	43,325	292,539	6.5
87–88	0.094140	41,428	3,900	39,478	249,214	6.0
88–89	0.105361	37,528	3,954	35,551	209,736	5.6
89–90	0.117645	33,574	3,950	31,599	174,186	5.2
90–91	0.131027	29,624	3,882	27,683	142,587	4.8
91–92	0.145527	25,742	3,746	23,869	114,904	4.5
92–93	0.161149	21,996	3,545	20,224	91,035	4.1
93–94	0.177876	18,451	3,282	16,810	70,811	3.8
94–95	0.195666	15,169	2,968	13,685	54,001	3.6
95–96	0.214456	12,201	2,617	10,893	40,315	3.3
96–97	0.234153	9,585	2,244	8,462	29,422	3.1
97–98	0.254640	7,340	1,869	6,406	20,960	2.9
98–99	0.275777	5,471	1,509	4,717	14,554	2.7
99–100	0.297402	3,962	1,178	3,373	9,837	2.5
100 and over	1.000000	2,784	2,784	6,464	6,464	2.3

SOURCE: NCHS, National Vital Statistics System, Mortality.

Table 2. Life table for males: United States, 2012

Spreadsheet version available from: ftp://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/NVSR/65_08/Table02.xlsx.

Age (years)	Probability of dying between ages x and $x+1$ q_x	Number surviving to age x l_x	Number dying between ages x and $x+1$ d_x	Person-years lived between ages x and $x+1$ L_x	Total number of person-years lived above age x T_x	Expectation of life at age x e_x
0–1	0.006499	100,000	650	99,427	7,641,761	76.4
1–2	0.000443	99,350	44	99,328	7,542,334	75.9
2–3	0.000303	99,306	30	99,291	7,443,006	75.0
3–4	0.000224	99,276	22	99,265	7,343,715	74.0
4–5	0.000200	99,254	20	99,244	7,244,451	73.0
5–6	0.000165	99,234	16	99,226	7,145,207	72.0
6–7	0.000144	99,217	14	99,210	7,045,981	71.0
7–8	0.000125	99,203	12	99,197	6,946,771	70.0
8–9	0.000107	99,191	11	99,185	6,847,574	69.0
9–10	0.000090	99,180	9	99,176	6,748,389	68.0
10–11	0.000081	99,171	8	99,167	6,649,213	67.0
11–12	0.000090	99,163	9	99,159	6,550,046	66.1
12–13	0.000128	99,154	13	99,148	6,450,887	65.1
13–14	0.000204	99,141	20	99,131	6,351,739	64.1
14–15	0.000307	99,121	30	99,106	6,252,608	63.1
15–16	0.000415	99,091	41	99,070	6,153,502	62.1
16–17	0.000524	99,050	52	99,024	6,054,432	61.1
17–18	0.000646	98,998	64	98,966	5,955,408	60.2
18–19	0.000779	98,934	77	98,895	5,856,442	59.2
19–20	0.000914	98,857	90	98,812	5,757,547	58.2
20–21	0.001053	98,766	104	98,714	5,658,735	57.3
21–22	0.001178	98,662	116	98,604	5,560,021	56.4
22–23	0.001270	98,546	125	98,484	5,461,417	55.4
23–24	0.001319	98,421	130	98,356	5,362,933	54.5
24–25	0.001337	98,291	131	98,225	5,264,577	53.6
25–26	0.001346	98,160	132	98,094	5,166,351	52.6
26–27	0.001359	98,028	133	97,961	5,068,258	51.7
27–28	0.001373	97,894	134	97,827	4,970,297	50.8
28–29	0.001394	97,760	136	97,692	4,872,469	49.8
29–30	0.001420	97,624	139	97,554	4,774,778	48.9
30–31	0.001448	97,485	141	97,415	4,677,223	48.0
31–32	0.001477	97,344	144	97,272	4,579,809	47.0
32–33	0.001506	97,200	146	97,127	4,482,536	46.1
33–34	0.001537	97,054	149	96,979	4,385,409	45.2
34–35	0.001574	96,905	153	96,828	4,288,430	44.3
35–36	0.001625	96,752	157	96,673	4,191,602	43.3
36–37	0.001694	96,595	164	96,513	4,094,928	42.4
37–38	0.001775	96,431	171	96,346	3,998,415	41.5
38–39	0.001867	96,260	180	96,170	3,902,069	40.5
39–40	0.001970	96,080	189	95,986	3,805,899	39.6
40–41	0.002087	95,891	200	95,791	3,709,914	38.7
41–42	0.002227	95,691	213	95,584	3,614,123	37.8
42–43	0.002398	95,478	229	95,363	3,518,538	36.9
43–44	0.002609	95,249	248	95,125	3,423,175	35.9
44–45	0.002862	95,000	272	94,864	3,328,050	35.0
45–46	0.003136	94,728	297	94,580	3,233,186	34.1
46–47	0.003438	94,431	325	94,269	3,138,606	33.2
47–48	0.003793	94,107	357	93,928	3,044,337	32.3
48–49	0.004205	93,750	394	93,553	2,950,408	31.5
49–50	0.004654	93,356	434	93,138	2,856,856	30.6
50–51	0.005115	92,921	475	92,683	2,763,717	29.7
51–52	0.005581	92,446	516	92,188	2,671,034	28.9
52–53	0.006072	91,930	558	91,651	2,578,846	28.1
53–54	0.006600	91,372	603	91,070	2,487,196	27.2
54–55	0.007173	90,769	651	90,443	2,396,125	26.4
55–56	0.007791	90,117	702	89,766	2,305,682	25.6
56–57	0.008438	89,415	754	89,038	2,215,916	24.8
57–58	0.009100	88,661	807	88,257	2,126,878	24.0
58–59	0.009765	87,854	858	87,425	2,038,620	23.2
59–60	0.010439	86,996	908	86,542	1,951,195	22.4
60–61	0.011156	86,088	960	85,608	1,864,653	21.7

See footnote at end of table.

Table 2. Life table for males: United States, 2012—Con.

Spreadsheet version available from: ftp://ftp.cdc.gov/pub/Health_Statistics/NCHS/Publications/NVSR/65_08/Table02.xlsx.

Age (years)	Probability of dying between ages x and $x+1$ q_x	Number surviving to age x l_x	Number dying between ages x and $x+1$ d_x	Person-years lived between ages x and $x+1$ L_x	Total number of person-years lived above age x T_x	Expectation of life at age x e_x
61–62	0.011929	85,128	1,016	84,620	1,779,045	20.9
62–63	0.012740	84,112	1,072	83,576	1,694,426	20.1
63–64	0.013593	83,040	1,129	82,476	1,610,849	19.4
64–65	0.014505	81,912	1,188	81,318	1,528,373	18.7
65–66	0.015501	80,724	1,251	80,098	1,447,056	17.9
66–67	0.016614	79,472	1,320	78,812	1,366,958	17.2
67–68	0.017888	78,152	1,398	77,453	1,288,146	16.5
68–69	0.019327	76,754	1,483	76,012	1,210,693	15.8
69–70	0.020930	75,270	1,575	74,483	1,134,681	15.1
70–71	0.022834	73,695	1,683	72,854	1,060,198	14.4
71–72	0.025025	72,012	1,802	71,111	987,344	13.7
72–73	0.027449	70,210	1,927	69,247	916,233	13.0
73–74	0.030017	68,283	2,050	67,258	846,986	12.4
74–75	0.032687	66,233	2,165	65,151	779,728	11.8
75–76	0.035636	64,068	2,283	62,927	714,577	11.2
76–77	0.039103	61,785	2,416	60,577	651,650	10.5
77–78	0.043133	59,369	2,561	58,089	591,073	10.0
78–79	0.047638	56,808	2,706	55,455	532,984	9.4
79–80	0.052915	54,102	2,863	52,671	477,529	8.8
80–81	0.058450	51,239	2,995	49,742	424,858	8.3
81–82	0.064422	48,245	3,108	46,691	375,116	7.8
82–83	0.071408	45,137	3,223	43,525	328,426	7.3
83–84	0.079491	41,913	3,332	40,248	284,901	6.8
84–85	0.088144	38,582	3,401	36,881	244,653	6.3
85–86	0.097713	35,181	3,438	33,462	207,772	5.9
86–87	0.109044	31,743	3,461	30,013	174,310	5.5
87–88	0.121408	28,282	3,434	26,565	144,297	5.1
88–89	0.134836	24,848	3,350	23,173	117,732	4.7
89–90	0.149341	21,498	3,211	19,893	94,559	4.4
90–91	0.164923	18,287	3,016	16,779	74,667	4.1
91–92	0.181561	15,271	2,773	13,885	57,888	3.8
92–93	0.199210	12,499	2,490	11,254	44,003	3.5
93–94	0.217805	10,009	2,180	8,919	32,749	3.3
94–95	0.237254	7,829	1,857	6,900	23,830	3.0
95–96	0.257445	5,971	1,537	5,203	16,930	2.8
96–97	0.278240	4,434	1,234	3,817	11,727	2.6
97–98	0.299485	3,200	958	2,721	7,910	2.5
98–99	0.321012	2,242	720	1,882	5,189	2.3
99–100	0.342642	1,522	522	1,261	3,307	2.2
100 and over	1.000000	1,001	1,001	2,046	2,046	2.0

SOURCE: NCHS, National Vital Statistics System, Mortality.

4012. Concluding Instruction

To find that [*name of respondent***] is gravely disabled, all 12 jurors must agree on the verdict. To find that [***name of respondent***] is not gravely disabled, only 9 jurors must agree on the verdict.**

As soon as you have agreed on a verdict, the presiding juror must date and sign the form and notify the [clerk/bailiff].

New June 2005; Revised May 2017

Directions for Use

Read this instruction immediately after CACI No. 5009, *Predeliberation Instructions*.

There are many votes that are possible other than a unanimous 12-0 vote for gravely disabled or a 9-3 or better vote for not gravely disabled. A vote other than one of these will result in a mistrial and the option to retry the proceeding.

Sources and Authority

- "The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act." (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1].)

- "The LPS Act is silent as to whether the jury must unanimously agree on the issue of grave disability. '[H]owever, the Act incorporates by reference Probate Code procedures for conservatorships. The Probate Code provides for factual determinations by a three-fourths majority . . . . Thus, the Legislature has provided for less than unanimous jury verdicts in grave disability cases.' " (*Conservatorship of Rodney M.* (1996) 50 Cal.App.4th 1266, 1269 [58 Cal.Rptr.2d 513].)

- "The Legislature's determination that a three-fourths majority vote applies in LPS conservatorship proceedings is eminently sound in the context of finding a proposed conservatee is not gravely disabled." (*Conservatorship of Rodney M.*, *supra*, ~~(1996)~~ 50 Cal.App.4th at pp.~~1266,~~ 1271–1272 ~~[58 Cal.Rptr.2d 513]~~.)

- "Permitting a finding of no grave disability to be based on a three-fourths majority coincides with *Roulet's* goal of minimizing the risk of unjustified and needless conservatorships. It also avoids unnecessary confinement of the proposed conservatee while renewal proceedings are completed." (*Conservatorship of Rodney M.*, *supra*, 50 Cal.App.4th at p. 1270.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 104

2 California Conservatorship Practice (Cont.Ed.Bar) § 23.89

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

VF-4000. Conservatorship—Verdict Form

Select one of the following two options:

____ **12 jurors find that [***name of respondent***] is presently gravely disabled due to [a mental disorder/impairment by chronic alcoholism].**

____ **9 or more jurors find that [***name of respondent***] is not presently gravely disabled due to [a mental disorder/impairment by chronic alcoholism].**

[If you have concluded that [*name of respondent***] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism] then answer the following:**

Do all 12 jurors find that [*name of respondent***] is disqualified from voting because [he/she] cannot communicate, with or without reasonable accommodations, a desire to participate in the voting process.~~not capable of completing an affidavit of voter registration~~?**
____ Yes ____ No]

Signed: _____
Presiding Juror

Dated: _____

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

New June 2005; Revised December 2010, May 2017

Directions for Use

The question regarding voter ~~registration~~ disqualification is bracketed. The judge must decide whether this question is appropriate in a given case. (See CACI No. 4013, *Disqualification From Voting.*

Instruction	Commentator	Comment	Committee Response
429, *Negligent Sexual Transmission of Disease*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The case on which this proposed new instruction is based, *John B. v. Superior Court* (2006) 38 Cal.4th 1177, involved a very specific fact pattern. We question the need for a standard instruction involving such specific facts. We believe the proposed instruction as written does not limit liability to the same factual scenario as in *John B.*, which involved a married couple, promises of monogamy, and unprotected sex. We believe the cautionary language in the Directions for Use is insufficient to avoid the potential misuse of this instruction.	The committee fully considered this point. The problem is that courts are giving a BAJI instruction on this subject because there is no CACI instruction. But in the committee's view, the BAJI instruction is seriously flawed. The committee decided that a CACI instruction, even if of limited applicability, is needed as a better alternative to the BAJI instruction.
		The instruction seems to assume that the defendant had unprotected sex with the plaintiff, when that could be a disputed issue and, in any event, should be expressly stated in the instruction. Also, we would state that the defendant "was negligent" rather than "may be negligent." We find the instruction flawed and would reject this proposed new instruction.	The committee does not find any such assumption in the language of the instruction. Because of the unusual and limited nature of *John B*, it is not possible to express its standards as absolutes. Everything is a "may be."
470, *Primary Assumption of Risk—Exception to Nonliability–Coparticipant in Sport or*	Association of Defense Counsel of Northern California and Nevada, by Don Willenburg, Attorney at Law	Instructions 470 and 471 should include a definition of recklessness.	The only proposed change to these instructions is to renumber them. Therefore, this comment is beyond the scope of the Invitation to

Instruction	Commentator	Comment	Committee Response
Other Recreational Activity 471, *Primary Assumption of Risk—Exception to Nonliability–Instructors, Trainers, or Coaches*			Comment. It will be considered in the next release cycle.
470, 471, 472, *Primary Assumption of Risk—Exception to Nonliability–Facilities Owners and Operators and Event Sponsors* 473, *Primary Assumption of Risk–Exception to Nonliability–Occupation Involving Inherent Risk*	Orange County Bar Association, by Michael L. Baroni, President	We recommend that the title of this instruction be changed to "*Secondary Assumption of Risk – Exception to Nonliability –…*" in order to properly emphasize that this exception is not based on any doctrine of primary assumption of risk, but rather is based on the doctrines of secondary assumption of the risk and comparative fault as set forth in the *Knight vs. Jewett* case.	Only CACI No. 473 is presented for substantive consideration for this release. Any changes to the other three instructions would have to be considered in the next release cycle. However, the committee believes that the comment is contrary to the law and does not intend to address it further. "In cases involving "secondary assumption of risk"--where the defendant does owe a duty of care to the

Instruction	Commentator	Comment	Committee Response
			plaintiff, but the plaintiff proceeds to encounter a known risk imposed by the defendant's breach of duty--the doctrine is merged into the comparative fault scheme, and the trier of fact, in apportioning the loss resulting from the injury, may consider the relative responsibility of the parties." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 315.).
		We recommend that the Sources and Authority specifically identify what former language was removed and what new language has been added and the reasons therefor in each instance.	The Sources and Authority are for presenting statutes and case excerpts that would be of interest to the user in researching the subject of the instruction. While identifying changes might also be of interest, trying to document them all would soon become unwieldy. Proposed changes can be seen in the files posted for public comment, which are archived.

Instruction	Commentator	Comment	Committee Response
470, *Primary Assumption of Risk— Exception to Nonliability– Coparticipant in Sport or Other Recreational Activity*	Orange County Bar Association, by Michael L. Baroni, President	We recommend that the following language be added to the end of element number 1: "… or that [*name of defendant*] unreasonably increased the risks to [*name of plaintiff*] over and above those inherent in (e.g. touch football);" This change is necessary to make this CACI consistent with No 471, 472, and 473.	The only proposed change to this instruction is to renumber it. Therefore, this comment is beyond the scope of the Invitation to Comment and would have to be addressed in the next release cycle. However, the committee believes that the comment is contrary to the law and does not intend to address it further. The standard for coparticipants is that the defendant either intentionally injured the plaintiff or acted so recklessly that his/her conduct was entirely outside the range of ordinary activity involved in the sport or activity. (*Knight, supra,* 3 Cal.4th at p. 320.) This is a much higher bar than simply increasing the risk.
473, *Primary Assumption of Risk–Exceptio*	Orange County Bar Association, by Michael L. Baroni, President	We recommend that the language be modified where indicated to state: "However, [*name of plaintiff*] may recover if he/she) proves one or more	The committee does not share this concern. The "or's" are there now between the options for

Instruction	Commentator	Comment	Committee Response
n to Nonliability–Occupation Involving Inherent Risk		of the following: (1. … (or) 1…. (or) 1….) **and also both** 2…. and 3….)." The reason is because as written it will be confusing for a jury trying to decide if all three of the alternative points number 1 are required or just one of them.	element 1. It is not necessary to add any language to tell the jury that both 2 and 3 must also be proved.
		We recommend that some Secondary Sources be added since all other instructions in this grouping cite to Secondary Sources, which are useful to the court and counsel.	Proposed Secondary Sources are submitted by the publishers later.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Unlike the other instructions on exceptions to nonliability, this proposed new instruction states when the defendant is not liable. ("[*Name of defendant*] is not liable if [*name of plaintiff*]'s injury arose from a risk inherent in the occupation of [*e.g., firefighter*])," but without stating which party has the burden of proof on that issue. We believe this language is unnecessary and may confuse the jury. The instruction states that the plaintiff must prove certain facts to establish liability, and this seems sufficient. We would delete the sentence quoted above. This will require a fuller explanation of the "inherent risk" in the third alternative element 1, which we would modify as follows:	The committee believes that the sentence that the commentators would delete is important. It sets up the firefighter rule as a potential bar to liability; and then sets up the exceptions as the plaintiff's burden to prove.

Instruction	Commentator	Comment	Committee Response
		[1. That the cause of [*name of plaintiff*]'s injury was not related to the risks inherent risk in [*e.g., firefighting*];]	
		The Directions for Use of the other instructions on exceptions to nonliability include a paragraph stating, "While duty is question of law, courts have held that whether the defendant has unreasonably increased the risk is a question of fact for the jury. . . ." We find this useful and would include the same language in the Directions for Use of this instruction.	The committee agreed and has made this addition.
1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*	Defense Counsel of Northern California and Nevada, by Don Willenburg, Attorney at Law and Allen Glaessner, Attorney at Law San Francisco (both submitting essentially the same letter)	The jury instruction as presently worded omits any reference to the owner/hirer "affirmatively contributing" to the plaintiff's injury. This is a serious shortcoming of the instruction and should be remedied. The Association proposes that a new element 5 be added (present element 5 becoming element 6): 5. That [*name of defendant*]'s negligent exercise of [his/her/its] retained control over safety conditions affirmatively contributed to causing [*name of plaintiff*]'s harm.	The committee extensively considered this point some years ago and concluded, as stated in the current Directions for Use, that "affirmatively contributed" is not a separate element apart from causation. The court in *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594−595 expressly agreed with the committee's conclusion.
		The proposed revised use note cites footnote three in *Hooker* for the proposition that an "affirmative contribution" may "be in the form of an	The complete footnote already appears in the Sources and Authority. Adding this language to

Instruction	Commentator	Comment	Committee Response
		omission to act." That is correct, but incomplete. The next sentence provides as the example an owner-hirer who promises a particular safety measure, but fails to keep that promise, that should result in liability. But a promise is itself more than a failure to act – it is a type of act that misleads others. Rather than using just a potentially misleading snippet, the use note should include the entire short (3-sentence) footnote.	the Directions for Use would extend them beyond the purpose, which is to make it clear to users that an omission can be an "affirmative contribution."
		The proposed revised use note cites *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582 (which in turn cites the existing use note) for the proposition that "Affirmative contribution simply means that there must be causation between the hirer's retained control and the plaintiff's injury." The quotation is accurate (*id.* at 594) but the statement is wrong, because it confuses the nature of the conduct with the results of the conduct. It is flatly inconsistent with *Hooker,* where causation was present but affirmative contribution was not.	The commentator disagrees with the court in *Regalado*, but the committee must follow the law as interpreted in that case.
		Because CACI 1009B (as presently worded) contains no indication that there should be an "affirmative contribution" by the owner/hirer in order to find that defendant liable, the use note should also advise that it may	CACI 401 states the general principles of negligence, one of which is that negligence can be by act or omission. That general principle applies

Instruction	Commentator	Comment	Committee Response
		be appropriate to modify the CACI 401 general negligence instructions to omit reference to an "omission to act" depending on the facts of the case. As in the *Hooker* footnote example, if the owner/hirer promised to be responsible for some aspect of the project safety, inclusion of the "omission" instruction in CACI 401 would be appropriate, because following the promise, there was a failure to act to honor the promise. Conversely, if the owner/hirer made no such promise, then under *Hooker* the owner/hirer's "omission" (not requiring the subcontractor to undertake safety precautions) would not be a basis for liability. (*Hooker, supra,* 27 Cal.4th at 215-216.)	in a 1009B case. The committee sees no problems if the court gives both 401 and 1009B without modifying 401 as proposed in the comment.
	Orange County Bar Association, by Michael L. Baroni, President	1.The last two sentences in the 3rd paragraph in the Directions for Use should be re written as follows for clarity: "Affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act. The "substantial factor" element, as noted in Element 5, adequately expresses the "affirmative contribution" requirement. (See *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594–595 [207	The committee changed "in the form of an omission" to "a failure." The committee did not find the other suggested revisions to be improvements.

Instruction	Commentator	Comment	Committee Response
		Cal.Rptr.3d 712] [agreeing with committee's position that "affirmatively contributed" need not be specifically stated in instruction].)	
1010. *Affirmative Defense—Recreation Immunity—Exceptions*	Orange County Bar Association, by Michael L. Baroni, President	We question the removal of the word "use" and replacing it with the word "enter" in the first and last sentences of the instruction. These changes do not appear to be based on case law or Civil Code § 846. Case law and Civil Code § 846 actually refer to "entry on or use" of property.	The statutory immunity protects the property owner from liability for "entry or use by others for any recreational purpose." The committee agrees that "or use" should be restored to the opening paragraph. However, the statutory language regarding the express invitation exception (last sentence) applies to "any persons who are expressly invited rather than merely permitted to *come upon* the premises by the landowner." "Come upon" requires entry; "or use" should not be included here.
VF-1001. *Premises Liability—Affirmative Defense—Recreation*	Hon. Justice Elizabeth A. Baron (Ret.)	In light of the proposed revisions to CACI 1010, I think VF-1001 needs to be revised in conformity to the changes in the instruction.	The commentator is correct; VF-1001 is added to the release.

Instruction	Commentator	Comment	Committee Response
Immunity—Exceptions			
1249. *Affirmative Defense—Reliance on Intermediary*	Orange County Bar Association, by Michael L. Baroni, President	We recommend changing name of instruction to "Affirmative Defense – Reliance on Knowledgeable Intermediary" for clarity. [See *Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 189.]	The committee agreed and has changed the title as suggested.
		We recommend adding the word "knowledgeable" in front of the term "intermediary purchaser" in the instruction in keeping with case law.	The committee believes that this point is adequately made in the second option to element 2 without the need to add "knowledgeable" to the instruction itself.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with this proposed new instruction, except we would add a fourth factor in element 3(c) based on the California Supreme Court authority quoted in the eighth bullet point in the Sources and Authority, stating: "(4) Whether [name of intermediary] had a legal duty to warn end users about the particular risk."	The committee debated this issue extensively. It decided not to include the intermediary's independent duty as a reliance factor in the instruction itself because if the intermediary had a legal duty to give warnings, then reliance would seem to be justified as a matter of law; it would not be a jury issue. Additionally, the committee finds that the

Instruction	Commentator	Comment	Committee Response
			paragraph in *Webb* that addresses this issue (*Webb, supra,* 63 Cal.4th at p. 191) leaves many unresolved questions as to just how and when the intermediary's independent duty to warn affects the supplier's potential liability. The committee has opted to include the entire paragraph in the Directions for Use without any attempt to analyze the language.
	Union Carbide Corporation, by David K. Schultz, Attorney at Law	Proposes replacing proposed 1249 with the following: "Affirmative Defense—Sophisticated Intermediary [*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 it sold [*specify product, e.g., asbestos*] to an intermediary purchaser [*name of intermediary*]. To succeed on this defense, [*name of defendant*] must prove:	The commentator's proposed instruction differs from the committee's proposed instruction in several ways, but the only difference that is developed in the comment is that the factors to determine reasonable reliance should not be included. The committee, therefore, will not respond to the other differences.

Instruction	Commentator	Comment	Committee Response
		(1) That [*name of defendant*] conveyed adequate warnings of the potential risks of [*specify product, e.g. asbestos*] to [*name of intermediary*] or [*name of intermediary*] was aware of, or should have been aware of, the potential risks of [*e.g. asbestos*]; and (2) That [*name of defendant*] reasonably relied on [*name of intermediary*] to convey adequate warnings of the potential risks of [*e.g. asbestos*] to those, like [*name of plaintiff*], who may encounter it [as a component or ingredient in a finished product].	
		The factors set forth in the proposed instruction unduly emphasize issues and evidence. There is a significant concern that the "reasonable reliance" factors in the currently proposed CACI 1249 will place undue emphasis on evidence and argument that may be presented in connection with the sophisticated intermediary defense.	Factors do emphasize issues and evidence; that is their purpose. But the committee does not believe that the factors "unduly" emphasize issues and evidence. The reasonable-reliance factors are all presented by the court in *Webb.* The committee believes that including them in

Instruction	Commentator	Comment	Committee Response
			the instruction is helpful to jurors.
		Factor b is "[t]he feasibility of [*name of defendant*]'s directly warning those who might encounter [*e.g., asbestos*] in a finished product;". "Circumstances may make it extremely difficult, or impossible, for a raw material supplier to provide warnings directly to the consumers of finished products." (*Webb,* 63 Cal.4th at 185.) "These suppliers likely have no way to identify ultimate product users and no ready means to communicate with them." (*Id.* at 191.) "[A] raw material supplier can often do little more than furnish the manufacturer with appropriate warnings and rely on the manufacturer to pass them along." (*Id.* at 192.) Thus, the *Webb* Court cautioned that a "raw material supplier's ability to warn end users" may "differ significantly from that of a product manufacturer or distributor that sells packaged commodities or deals directly with consumers." (All of page 5 of the comment is on this point.)	The committee believes that it will often be beneficial to the defense to instruct the jury on feasibility. If the defense can show that its giving warnings would be burdensome, it favors relying on the intermediary.
		The factors currently listed in proposed CACI 1249 omit that *Webb* instructed that "[i]t is also significant, if, under the circumstances giving rise to the	See response to this same comment made by the State Bar committee above.

Instruction	Commentator	Comment	Committee Response
		plaintiff's claim, the intermediary itself had a legal duty to warn end users about the particular hazard in question." (*Webb,* 63 Cal.4th at p. 191, citing *Persons*, 217 Cal.App.3d at p. 178).	
		At the very least, if the current list of reasonable reliance factors is retained, it should be amended to include the following additional factors at the beginning, so that juries may also consider such in accordance with the principles discussed by the California Supreme Court in *Webb*: (a) It is "significant, if, under the circumstances giving rise to the plaintiff's claim, the intermediary itself had a legal duty to warn end users about the particular hazard in question." (*Webb, supra,* 63 Cal.4th at p. 191.) (b) "When a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning." (*Persons,* 217 Cal.App.3d at p. 178, cited favorably in *Webb, supra*, 63 Cal.4th at pp. 191-192.) and	The committee prefers to present the factors with the language from *Webb*. Proposed additional factor (a) is discussed above. Proposed additional factor (b) is current factor (b), but rephrased to favor the defense. Proposed additional factor (c) addresses *actual* reliance. The commentator's proposed replacement language omits actual reliance as an element.

Instruction	Commentator	Comment	Committee Response
		(c) Because "direct proof of actual reliance may be difficult to obtain when, as in the case of latent disease, the material was supplied to an intermediary long ago," reliance on the intermediary is an inference that may be "draw[n] from circumstantial evidence about the parties' dealings." (*Webb, supra,* 63 Cal.4th at p. 193.)	
		Alternatively, in lieu of listing any particular factors in CACI No. 1249, after the elements for the sophisticated intermediary defense are provided, the following concise sentence is preferable: "Reasonable reliance depends on all circumstances in this case." This would not unduly emphasize any particular factor and would allow the parties wide berth to present arguments based on the evidence admitted in the case.	The proposed language does not provide adequate guidance to the jury.
		The term "particular risk" in CACI 1249 should be changed to "potential risk," as in CACI 1205. The alleged risk is a disputed issue in product liability cases, so using the word "potential" is more appropriate. The California Supreme Court has also used the phrase "potential risk" when discussing claims for an alleged failure to warn.	The court in *Webb* uses "particular hazard," (*Webb, supra,* 63 Cal.4th at p. 188.), which is not the same thing as a "potential risk[BG1]."[MS2]

Instruction	Commentator	Comment	Committee Response
		(*Anderson,* 53 Cal.3d at p. 991; *O'Neil,* 53 Cal.4th at p. 363; *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1110–1111.)	
1722. *Retraction: News Publication or Broadcast*	Orange County Bar Association, by Michael L. Baroni, President	In order to more accurately reflect the provisions of the relevant statute, the addition of "[daily/weekly]" to the language of the Instruction is proposed, to describe the news publication involved. As proposed, the bracketed language appears as follows: "… [daily/weekly] [news publication/broadcaster], …." This seems to suggest that to complete the Instruction, one item is to be chosen from each bracketed pair. To avoid confusion, it is suggested that the bracketed language be set forth as follows: "… [daily news publication/ weekly news publication] [broadcaster], …."	The commentator is misreading the brackets. It is actually: [[daily/weekly] news publication/broadcaster] , which is correct. There's a choice (red brackets and /) between a news publication and a broadcaster. Then if the choice is news publication, there is a choice (blue brackets and /) between daily and weekly. The bracket before news publication (green bracket in comment) has actually been deleted; it is just hard to see the strike through. The suggested change is not bracketed quite right. There should be a slash between "weekly news publication" and

Instruction	Commentator	Comment	Committee Response
			"broadcaster," not a bracket.
		In the second line of the proposed new paragraph to the Directions for Use, it appears that the citation for the relevant statute is inaccurate. Reference is made to, "Civ. Code, §48a(1)," however, it is suggested that the accurate citation is "Civ. Code, §48a(a)." There is no subdivision (1), though [1] apparently appears in certain published versions of the code, but only to aid in determining the location of the first of many deletions made to the statute in 2016.	The comment is correct; this change has been made.
VF-1900. *Intentional Misrepresentation* VF-1903. *Negligent Misrepresentation*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the revision to the instruction. We believe, however, that in a case in which reasonable reliance is disputed and CACI No. 1908, *Reasonable Reliance,* is given, this verdict form should explicitly require a "material fact." We suggest inserting "[material]" as optional language in question No. 1 immediately before the word "fact" and stating in the Directions for Use to include that optional language if reasonable reliance is disputed and CACI No. 1908 is given.	The committee concluded several years ago that materiality is an element of reasonable reliance, not a separate element of the claim. It is true that the verdict forms only incorporate materiality indirectly, by requiring reasonable reliance. But to accept this comment would be to make it an element of the claim, which would imply that the instructions are not correct.

Instruction	Commentator	Comment	Committee Response
2021. *Private Nuisance—Essential Factual Elements*	Civil Justice Association, by John Doherty, President and Chief Executive Officer	The Revisions to the Sources and Authority include the following cite and summary of the *Varjabedian* case: "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ... 'A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.' " " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.) It is not clear how the included summary relates to the proposed revisions to these jury instructions, nor how their inclusion would help judge or jury interpret them as a whole. We would suggest it be removed or clarified to better describe the relevant holding in *Varjabedian*.	This excerpt is not new; it is only being moved from the second position because, like the commentator, the committee doesn't see it as very relevant or helpful. The Sources and Authority excerpts are direct quotes from cases that allow the user to go to Lexis or Westlaw to read the case. There is no analysis nor clarification included.

Instruction	Commentator	Comment	Committee Response
	Orange County Bar Association, by Michael L. Baroni, President	The quote from the added *Mendez* case is missing ellipses ("…") before the last sentence beginning with "In other words." The ellipses should be added to reflect that some language was omitted from the quote.	The omitted material is an internal citation, which is noted as omitted.
		The modified bullet point striking the citation to the *Koll Irvine* case and adding a cite to the *Mendez* case, should be changed by striking the citation to the *Mendez* case and replacing it with a citation to *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 302. The *Mendez* case is quoting from the *Monks* case, and, as such, the citation for the quote should be to the case where the quote was first made.	If a later case is citing an earlier case, the excerpt is taken from the later case. The courts' system of internal quotation marks and the addition of "internal citations omitted" indicate that the court is quoting an earlier case.
		A new bullet point should be added to the Sources and Authority immediately after the second point referenced above, and should read as follows: "The requirements of *substantial damage* and *unreasonableness* are not inconsequential" (*Mendez, supra,* 3 Cal.App.5th at 263, original italics.) This quote would appear to be a more significant new holding than the prior quotations that were added to the instructions from the *Mendez* decision. It also fits in to the case quotes that follow.	The committee has added the entire paragraph that includes the suggested sentence because it explains in policy terms just why the requirements "are not inconsequential."

Instruction	Commentator	Comment	Committee Response
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The word "substantial" or "substantially," although prevalent in published opinions on nuisance, provides little or no meaningful guidance to the jury as to the degree of interference, or harm, required. Moreover, the word "substantial" in the context of harm seems to have a different meaning from "substantial" as used in "substantial factor." If the jury is not instructed on the meaning of "substantial" with respect to harm, the jury may refer to the definition of "substantial factor" in CACI No. 430, *Causation: Substantial Factor,* which may be misleading as to the meaning of "substantial" in this different context.	The committee believes that "substantial" has a commonly understood meaning to average jurors and does not need a special legal definition. What is substantial is a consummate jury question: is there enough of it?. CACI No. 430, *Causation: Substantial Factor*, is different because it is a very specialized legal doctrine.
		The Directions for Use state that this instruction must be given with CACI No. 2022, *Private Nuisance—Balancing Test Factors—Seriousness of Harm and Public Benefit*. *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 163, stated that the balancing test encompasses the requirement that the harm was substantial, and if a jury properly instructed on the balancing test finds the defendant liable the jury necessarily must have found that the harm was substantial. As in *Wilson,* we believe that these two instructions given together adequately cover the	The committee believes that adding the word "substantial" to element 3 of the instruction is a far simpler and cleaner approach than inferring substantiality of the interference (not of the harm) from the rather complex balancing test in CACI No. 2022.

Instruction	Commentator	Comment	Committee Response
		substantial harm requirement. The insertion of "substantially" in element 3 of CACI No. 2021 is unnecessary and could confuse the jury, so we would strike the word.	
		In renumbered element 4, we believe that "reasonably have been annoyed or disturbed" conveys the intended meaning more clearly than "have been reasonably annoyed or disturbed." Accordingly, we would modify proposed element 4 as follows: "Would an ordinary person <u>reasonably</u> have been ~~reasonably~~ annoyed or disturbed by [name of defendant]'s conduct?"	The committee agreed with the comment and has made the change.
VF-2006. *Private Nuisance*	Orange County Bar Association, by Michael L. Baroni, President	Question 2 suggests that a nuisance can only exist if the tortious action was "harmful to health." According to the verdict form then, checking "No" to this Question 2 would mean no "nuisance" claim has been established and thus that plaintiff is unable to recover any damages if there has been no evidence of the actions being "harmful to health". However, the statute and the cases all provide that a plaintiff may recover damages based on the tort of "nuisance," if the offending action resulted in a "substantial and unreasonable interference with the comfortable enjoyment of life or	For verdict forms, not all element options from the instruction are presented as questions. One option is presented, and then the Directions for Use say, e.g., "Depending on the facts of the case, question 2 can be modified, as in element 2 of CACI No. 2021." But this sentence could perhaps be phrased better; the question needs to be replaced, not

Instruction	Commentator	Comment	Committee Response
		property," regardless of whether or not it was "harmful to health." Accordingly, it is recommended that Question 2 be revised to read as follows: "Did [*name of defendant*], by acting or failing to act, create a condition or permit a condition to exist that substantially and unreasonably interfered with the comfortable enjoyment of life of property [*name of plaintiff*]?"	modified. The committee has reworded the sentence to better guide the user.
		If Question 2 is modified as suggested above, it would replace Question 3 in its entirety, and thus Question 3 should be deleted.	See the response above
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We would strike "substantially" in question No. 3 for the reasons stated above.	See response above rejecting this comment.
		We would modify question No. 4 as follows for the reason stated above: "Would an ordinary person <u>reasonably</u> have been ~~reasonably~~ annoyed or disturbed by [name of defendant]'s conduct?"	Proposed change adopted as explained above.
2100. *Conversion—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree that the words "intentionally and" are misplaced in the current instruction and should be stricken because the defendant need not have intended to wrongfully interfere. However, as stated in the third bullet point in the Sources and Authority, the act constituting conversion must be	The committee agreed with this comment, though not with the proposed solution. *Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119, 1124 says that conversion

Instruction	Commentator	Comment	Committee Response
		done knowingly and intentionally to create liability. We would add a sentence at the end of element 2 to convey this requirement while distinguishing it from knowingly acting wrongfully: "[*Name of defendant*] need not have known that this act was wrongful, but must have knowingly done the act."	"must be knowingly or intentionally done.'' As noted in the comment, it is not the interference that must be intended, but only the act that creates the interference. Those acts are the options for element 2. The committee has inserted "knowingly or intentionally" into element 2 before presenting the options.
		We suggest that the Advisory Committee consider adding to the Sources and Authority a quotation from *Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 124-125, discussing the conversion of intangible property if the property right is not reflected in a document: "We recognize that the common law of conversion, which developed initially as a remedy for the dispossession or other loss of chattel [citation], may be inappropriate for some modern intangible personal property, the unauthorized use of which can take many forms. In some circumstances, newer economic torts have developed that may better take into account the	The committee agreed to add a shorter version of the proposed excerpt, omitting the second paragraph on net operating loss.

Instruction	Commentator	Comment	Committee Response
		nature and uses of intangible property, the interests at stake, and the appropriate measure of damages. On the other hand, if the law of conversion can be adapted to particular types of intangible property and will not displace other, more suitable law, it may be appropriate to do so. [Citation.] The appropriate scope of a conversion action as applied to intangible personal property has been the subject of scholarly and informative discussion. [Citations.] [¶] A net operating loss is a definite amount [citation] that can be recorded in tax and accounting records. The significance of this, in our view, is not that the intangible right is somehow merged or reflected in a document, but that both the property and the owner's rights of possession and exclusive use are sufficiently definite and certain."	
VF-2100. *Conversion*	Civil Justice Association, by John Doherty, President and Chief Executive Officer	We would propose inserting the following language, from the Sources and Authority section of CACI No. 2100, to the Directions of Use section for VF-2100: "With respect to plaintiffs' causes of action for conversion, '[o]ne is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the	The committee will consider the issue of privilege in the next release cycle. Substantive issues are seldom addressed in the Directions for Use to a verdict form unless the issue somehow affects choices that will need to

Instruction	Commentator	Comment	Committee Response
		possession of another, for the purpose of defending himself or a third person against the other, under the same conditions which would afford a privilege to inflict a harmful or offensive contact upon the other for the same purpose.' 'For the purpose of defending his own person, an actor is privileged to make intentional invasions of another's interests or personality when the actor reasonably believes that such other person intends to cause a confinement or a harmful or offensive contact to the actor, of that such invasion of his interests is reasonably probable, and the actor reasonably believes that the apprehended harm can be safely prevented only by the infliction of such harm upon the other. A similar privilege is afforded an actor for the protection of certain third persons.' " (*Church of Scientology, supra,* 232 Cal.App.3d at p. 1072, internal citations omitted.) This case provides clear and useful guidance regarding limitations on what acts are or are not considered conversion related to protection and defense.	be made in completing the form.
2547. *Disability-*	Orange County Bar Association,	The proposed addition is to address a discrete circumstance such as that	Neither proposed addition to this

Instruction	Commentator	Comment	Committee Response
Based Associational Discriminatio n—Essential Factual Elements	by Michael L. Baroni, President	found in *Castro-Ramirez* (namely the employee was a relative of the disabled person and the employee sought an accommodation in association with the disability). This concept should be addressed in a separate instruction rather than added to the general instruction on associational disability discrimination in order to avoid confusing the trier of fact.	instruction is related to the points at issue in *Castro-Ramirez,* though it was this case that brought them to the committee's attention. The question of associational disability based on a relative's need is not resolved in *Castro-Ramirez,* as is pointed out in the Directions for Use. Should the issue ever be resolved, it might possibly be a new instruction.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We suggest adding the appropriate code citation to the title "(Gov. Code, § 12926(o)" consistent with other instructions in this series.	It is already there; the last (fifth) statute bulleted excerpt.
		The penultimate bracket in the last line of element 4 appears to be misplaced, so we would delete it: "[*Specify other basis for associational discrimination*~~]~~;]	There is a bracketing error here, but one more bracket, not one less, is needed. The whole sentence is one of the options for element 4, so it needs brackets before and at the end. Then the italicized language also needs brackets around it. This error has been fixed.

Instruction	Commentator	Comment	Committee Response
		We can find no authority in the Sources and Authority supporting element 5 in an associational discrimination case. The statement in *Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1042, 1038-1039, is dictum. We suggest including element 5 only if authority for the element is provided, and otherwise would delete that element.	*Green v. State of California* (2007) 42 Cal.4th 254, 262 holds that an element of a disability discrimination case is that the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation. The committee believes that this element is required in an associational disability case. The court in *Castro-Ramirez* includes it in setting forth the elements. (*Castro-Ramirez, supra,* 2 Cal.App.5th at pp. 1038−1039.) Whether or not it is dictum in *Castro-Ramirez,* the committee believes that *Green* supports element 5.
2548. *Disability Discrimination–Refusal to Make Reasonable Accommodation in* Housing	Deborah Thrope, National Housing Law Project Deborah Gettleman, Disability Rights California	The Council should revise the jury instructions to include a definition of "reasonable accommodation." Reasonable accommodation is defined as: A change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a	This definition is not in the statute. If it is a regulation, the commentators did not cite it. Commentators are advised to provide authority for any proposed changes.

Instruction	Commentator	Comment	Committee Response
	Joel Marrero, Legal Aid Foundation of Los Angeles Michelle Uzeta, Law Office of Michelle Uzeta Madeline Howard, Western Center on Law and Poverty	disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces.	
		The Council should include examples to illustrate reasonable accommodation such as: a. Exception to "no pets" policy to accommodate an assistance animal. b. Adjustment of rent due date to accommodate date of receipt of public benefit payments. c. Provision of designated parking space for individual with physical disability. d. Providing other similar accommodations for an individual with a disability.	Again, no authority has been provided to support the view that these are examples of reasonable accommodations.
		Element #6 correctly instructs the jury to consider the reasonableness of the request for an accommodation. "Reasonable" should be further explained in the jury instructions. An accommodation is "reasonable" if it is "ordinarily or in the run of cases" or a plaintiff can "show that special circumstances warrant a finding that ... the requested 'accommodation' is 'reasonable' on the particular facts."	The commentators cite only federal cases construing federal law for the meaning of "reasonable." For language to appear in a CACI instruction on a claim created by California law, there must be California authority.

Instruction	Commentator	Comment	Committee Response
		Reasonableness can also be established if the plaintiff produces evidence showing that the requested accommodation is merely "possible" (*Giebeler v. M&B Associates* (9th Cir. 2003) 343 F.3d 1143, 1156 (citing *Vinson v. Thomas* (9th Cir.2002) 288 F.3d 1145, 1154 n. 7.(A reasonable accommodation is also one that does not pose an undue financial and administrative burden or require a fundamental alteration of the program. (*Southeastern Cmty. College v. Davis* (1979) 442 U.S. 397, 410, 412; *Giebeler, supra,* 343 F.3d at p. 1157.)	
		Element 5 of the instruction requires that the accommodation be necessary. "Necessary" should be defined in the instructions. To show that a requested accommodation is necessary, there must be an identifiable relationship, or nexus, between the requested accommodation and the individual's disability. The plaintiff must show that "but for" the accommodation, the plaintiff will be denied an equal opportunity to use and enjoy a dwelling. (*Giebeler, supra,* 343 F.3d at p. 1155.) Necessity can be shown, at a minimum, if "the desired	Again, only federal authority provided.

Instruction	Commentator	Comment	Committee Response
		accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." (*Bronk v. Ineichen* (7th Cir. 1995), 54 F.3d 425, 429.)	
		4. The jury instructions should include the obligation to engage in the interactive process. A housing provider is obligated to engage in a discussion with the tenant before denying an accommodation request. This dialogue is known as the interactive process. The failure or refusal to engage in the interactive process with a person with a disability is discrimination based on disability. (federal cases cited.) The housing provider must discuss alternative accommodations with the tenant rather than denying the accommodation outright. If an alternative accommodation would effectively meet the requester's disability-related needs and is reasonable, the provider must grant it. (Joint Statement cited) Even a delay in the process can be considered a failure to accommodate an individual with a disability. The Council should therefore amend the jury instruction to read:	The committee believes that requiring an interactive process is not an element of the claim, but a separate requirement, as it is under the employment branch of the FEHA. (See CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*.) An excerpt on the interactive process has been included in the Sources and Authority.

Instruction	Commentator	Comment	Committee Response
		7. That [name of defendant] refused to make this accommodation or engage in the interactive process. We also suggest that the Council include the definition of interactive process above.	
		The Directions for Use should include a discussion regarding the burden of proof in reasonable accommodation cases. Specifically, we propose inclusion of the following: The initial burden is on the plaintiff to show that the accommodation sought is reasonable. This requirement is minimal. Reasonableness can be established if the Plaintiff produces evidence showing that the requested accommodation is "ordinarily or in the run of cases." (*Griebeler* cited.) If the plaintiff cannot make the initial showing that the requested accommodation is reasonable in the run of cases, he "nonetheless remains free to show that special circumstances warrant a finding that ... the requested 'accommodation' is 'reasonable' on the particular facts." (*Griebeler* cited.) Reasonableness can also be established if the Plaintiff produces evidence showing that the requested	Again, only federal authority cited. Also, the proposed discussion is beyond the function of the Directions for Use. Substantive issues are presented in the Directions for Use only when there is an issue that affects some aspect of the instruction.

Instruction	Commentator	Comment	Committee Response
		accommodation is merely "possible." (*Griebeler* cited.) Once the plaintiff shows that the requested accommodation is reasonable, the defendant must make the accommodation unless it can show that the requested accommodation is not reasonable because it poses an undue financial or administrative burden, or fundamental alteration in the basic operation of program or provision of housing services. (*Griebeler* and Joint Statement cited.)	
	Orange County Bar Association, by Michael L. Baroni, President	Element 5 should be amended to read: "That [*specify accommodation required*] was necessary to afford [*name of plaintiff*] an equal opportunity to use and enjoy the [e.g., apartment]." to correct grammatical errors.	Element 5 says: "That in order to afford [*name of plaintiff*] an equal opportunity to use and enjoy the [*e.g., apartment*], it was necessary to [*specify accommodation required*];" The committee does not see any grammatical errors and declines to make this change.
	State Bar of California, Litigation Section, Jury Instructions Committee, by	We note that the first the citation under Secondary Sources in the Sources and Authority appears to include a second date that does not belong (March 3, 2008), which should be stricken.	The comment is correct. The March 2008 publication is a different one on modifications. The March date has been removed.

Instruction	Commentator	Comment	Committee Response
	Reuben A. Ginsberg, Chair	We also suggest including a link to the Joint Statement, which may be difficult for users to find: "available at https://www.hud.gov/offices/fheo/library/huddojstatement.pdf .	The committee has added the link.
2549. *Disability Discrimination–Refusal to Permit Reasonable Modification to Housing Unit*	Deborah Thrope, National Housing Law Project Deborah Gettleman, Disability Rights California Joel Marrero, Legal Aid Foundation of Los Angeles Michelle Uzeta, Law Office of Michelle Uzeta Madeline Howard, Western Center on Law and Poverty	Element 7 is inaccurate in some cases because it requires that the plaintiff agree to pay for the modification. If the tenant is protected under Section 504 of the Rehabilitation Act of 1973 or Title II of the Americans With Disabilities Act, then there is no obligation to pay for the modification. The Council should include this information in the Directions for Use to make it clear that element 7 only applies in the case of private housing not covered by Section 504 or the ADA or other sources of law that might shift the payment burden. Section 504 provides another source of protection for people with disabilities in need of a modification. Section 504 applies to federally subsidized housing. Unlike private landlords that must comply solely with the FHA, Section 504 obligates subsidized landlords to pay for a modification when it is necessary and reasonable. Title II of the Americans with Disabilities Act (ADA) also shifts the responsibility of payment to entities covered under the Act.	The Directions for Use have been revised to advise that element 7 does not apply if either of the federal laws apply.

Instruction	Commentator	Comment	Committee Response
	Orange County Bar Association, by Michael L. Baroni, President	Element 5 should be amended to read: "That [*specify accommodation required*] was necessary to afford [*name of plaintiff*] an equal opportunity to use and enjoy the [*e.g., apartment*]." to correct grammatical errors.	Element 5 of this instruction is the same as element 5 of 2548; addressed above. The committee sees no grammatical errors.
		Element 8 should be amended to read: "That [*name of plaintiff*] agreed to restore the [interior/exterior] of the unit to the condition that existed before the modification by the end of the tenancy at [*name of plaintiff's*] own expense, other than for reasonable wear and tear." The proposed instruction says "at" the end of the tenancy which is not the same as "by" the end. The proposed revisions 1) make it clear that the plaintiff must have completed the changes back to the original configuration before, or in any event no later than, the end of the tenancy, not that the changes would be done at the end, 2) the plaintiff agreed to pay for converting the unit back to the original 3) the changes to the exterior that were made to accommodate plaintiff are also included, not simply the interior changes.	The statute says: "In the case of a rental, the landlord may, where it is reasonable to do SO[BG3],[MS4] condition permission for a modification on the renter's agreeing to restore the interior of the premises to the condition that existed before the modification (other than for reasonable wear and tear)." There is no mention of when the restoration should be done, neither *at* the end nor *by* the end. The committee has removed ", at the end of the tenancy," as the timing is not addressed. Although who pays for the restoration is also not

Instruction	Commentator	Comment	Committee Response
		Note that element 7 addresses that plaintiff agreed to pay for the initial changes but not reconverting the unit back to the original condition, which is what is being addressed in element 8.	explicit in the statute, the committee believes that it is implied that the tenant pays ("the renter's agreeing to restore"). Because it is not expressed in the statute, the committee does not believe that it should be addressed in the instruction. There is also no statutory requirement to restore the exterior.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the instruction.	No response is necessary.
		The last sentence in the Directions for Use suggests that the defendant would have the burden of proof on the issue of whether restoration is reasonable, but cites no case authority. It is unclear whether this statement refers to an element in the instruction and whether the instruction should be modified in some manner if the issue is disputed, and if so how it should be modified. We find the statement unhelpful and would strike this sentence.	The committee believes that giving the defendant the burden to prove that no restoration is reasonable is justified under Evidence Code section 500 ("party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting).
		The Joint Statement cited under Secondary Sources in the Sources and Authority appears to be the same Joint Statement cited in CACI No. 2548 and	This is not the same joint statement as the one for CACI No. 2548. This is

Instruction	Commentator	Comment	Committee Response
		should have the same date (May, 17, 2004) shown in the document online and a link, as stated above.	the March 2008 publication.
3040. *Violation of Prisoner's Federal Civil Rights—Eighth Amendment —Substantial Risk of Serious Harm*	Orange County Bar Association, by Michael L. Baroni, President	*Castro v. Cnty of L.A.* (2016) 833 F.3d 1060 held that Eighth Amendment violations under § 1983 may be based upon an affirmative action or an omission by a prison official. The elements of the instruction have been slightly rewritten and renumbered to accurately accommodate whether the action is based upon "conduct" or a "failure to act" thus adding clarity for the jury. Additionally, use notes and Sources and Authority sections have been updated to reflect and recent accurate statements of decisional law. For clarification, the following modifications are recommended: 5. That there was no reasonable justification for the conduct/**failure to act**: 6. That [*name of defendant*] was acting or purporting to act or **failed to act** in the performance of [his/her] official duties;	The committee agreed with the comment and has revised the elements to include failure to act.

Instruction	Commentator	Comment	Committee Response
		8. That [*name of defendant*]'s conduct/**failure to act** was a substantial factor in causing [*name of plaintiff*]'s harm.	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Proposed new element 4 seems unnecessary if the defendant knowingly exposed the plaintiff to a substantial risk of serious harm. If the defendant knowingly created the risk through the defendant's conduct or failure to act (as required in elements 2 & 3), it should not be necessary to prove that the defendant failed to take reasonable measures to protect against the risk the defendant knowingly created. The source of the proposed new language, *Castro v. County of Los Angeles* (9th Cir. 2016) 833 F.3d 1060, 1067, quoted in the Sources and Authority, refers to "failing to take reasonable measures to abate [a substantial risk of serious harm]" in the context of a failure to act, as distinguished from affirmative conduct. A defendant who, in the language of proposed new element 4, fails to take reasonable measures to protect against a risk of serious harm creates a risk of serious harm by failure to act, as stated in one of the alternatives of element 2. Thus, proposed new element 4 appears	A failure to act could be merely negligence, which is not a 1983 violation. There must be a failure to act that creates a risk (element 2); then an awareness of the risk (element 3); and then standing by and doing nothing (new element 4).

Instruction	Commentator	Comment	Committee Response
		to be duplicative of element 2 if the defendant failed to act, and should be unnecessary. So we would strike proposed new element 4.	
3052. *Use of Fabricated Evidence—Essential Factual Elements*	Shawn McMillan, Attorney at Law, San Diego	The jury instruction as presently framed does not address omission of exculpatory evidence, perjury, or the myriad other ways that evidence is typically presented to the courts in a deceptive manner. The Due Process Clause of the Fourteenth Amendment includes the right to be free from deception in the presentation of evidence by government agents during judicial proceedings, i.e., use of perjured testimony and/or the suppression of known exculpatory evidence. (*Beltran v. Santa Clara County* (9th Cir. 2008) 514 F.3d 906, 908; *Greene, supra,* 588 F.3d at 1034-1035; see also, *Hardwick v. Cnty. of Orange* (9th Cir. 2017) 844 F.3d 1112, 1118.)) The following changes to the proposed jury instruction should be made: [*Name of plaintiff*] claims that [name of defendant] [fabricated evidence, suppressed exculpatory evidence, committed perjury, made false statements] against [him/her], and that	The committee finds authority only for a narrowly focused instruction at this time limited to the knowing use of fabricated evidence. Authority for expansion into any of the "myriad other ways" that evidence might be used against someone is not clear. The committee may consider further work in this area in the next release cycle.

Instruction	Commentator	Comment	Committee Response
		as a result, [he/she] was deprived of [his/her] [*specify constitutional or legal right, privilege, or immunity, e.g, liberty*] without due process of law. In order to establish this claim, [*name of plaintiff*] must prove all of the following: 1. That [*name of defendant*] [<u>fabricated evidence, suppressed exculpatory evidence, committed perjury, made false statements – specify,</u> e.g., informed the district attorney that plaintiff's DNA was found at the scene of the crime];	
		A constitutional violation occurs if the affiant "intentionally or recklessly omitted facts required to prevent technically true statements in the affidavit from being misleading." (*Liston v. County. of Riverside* (9th Cir. 1997) 120 F.3d 965, 973.).) To support a § 1983 claim of judicial deception, a plaintiff must show that the defendant deliberately or recklessly made false statements or omissions that were material to underlying courts orders and findings. (*KRL v. Moore* (9th Cir. 2004) 384 F.3d 1105, 1117; see, also, *Franks v. Delaware* (1978) 438 U.S. 154, 171-172.)	This instruction is based on the California case of *Kerkeles v. City of San Jose* (2011) 199 Cal.App.4th 1001. The court in *Kerkeles* says that "the Due Process Clause is violated by the *knowing* use of perjured testimony or the *deliberate* suppression of evidence favorable to the accused." (199 Cal.App.4th at p. 1008, emphasis added.) The word "reckless" does not appear in the opinion.

Instruction	Commentator	Comment	Committee Response
		The following change should be made: 3. That [*name of defendant*] knew [or in the exercise or reasonable care should have known] that the [*e.g., statement*] was not true;	The commentator cites two 9th Circuit cases involving search warrants in support of "reckless." The committee does not write instructions if the only authority is from the 9th Circuit. The commentator does cite *Franks v. Delaware*, which is a United States Supreme Court case also involving a search warrant. *Franks* does include "reckless disregard for the truth." (438 U.S. at p. 165.) The committee will consider in the next release cycle whether to expand the instruction to include reckless disregard outside of the search warrant situation. It appears that the commentator wants to morph "recklessly" into "should have known." But "recklessly," is not the same thing as "in the exercise of reasonable

Instruction	Commentator	Comment	Committee Response
			care should have known." There is no support for this objective standard, which sounds like negligence, in *Kerkeles* or *Lewis*. (See response to comment of Orange County Bar Association below.)
		Add loss of custody to the final paragraph: [Deprivation of liberty does not require that [*name of plaintiff*] have been put in jail [or] [lost custody of their child]. Nor is it necessary that [he/she] prove that [he/she] was wrongly convicted of a crime.]	This paragraph is limited to fabricated evidence used in an underlying criminal cases.
	Orange County Bar Association, by Michael L. Baroni, President	This is a new instruction for use in § 1983 actions where the use of fabricated evidence has resulted in the deprivation of a constitutional right etc. The instruction format and elements overall appear legally correct and follow the template of other § 1983 claim instructions. The cases cited in both the Directions for Use and the Sources and Authority sections are appropriate and relevant. However, for legal accuracy's sake, based upon the cited decisional law and in particular, *Devereaux v. Abbey*	As noted above, this instruction is based on *Kerkeles*, not *Devereaux.* Even if the committee were inclined to treat *Devereaux* as controlling authority, it is not clear in *Deveraux* that what the officer should have known is that the questionable information was not true.

Instruction	Commentator	Comment	Committee Response
		(9th Cir. 2001) 263 F.3d 1070, 1074–1075, the phrase "or should have known" should be inserted after the word "knew" in element 3 so that the instruction would now read as follows: "3. That [*name of defendant*] knew or should have known that the [e.g., statement] was not true; and;".	
	Office of the City Attorney of San Francisco, Sean F. Connolly, Deputy City Attorney	A. The opening paragraph contains redundant language and is confusing. Section 1983 creates a cause of action for violations of the Constitution or federal statute. The proposed instruction arises from the Ninth Circuit's decision in *Devereaux v. Abbey* (9th Cir. 2001) 263 F.3d 1070, a case that recognized a Due Process right under the Fourteenth Amendment not to be subjected to criminal charges on the basis of fabricated evidence. Every case interpreting *Devereaux* has interpreted it in the context of whether certain deliberate conduct by a government official deprived a person of due process. The claim is based on substantive Due Process rights, and the plaintiff must show that the claim involves a constitutionally recognized right to "life, liberty, or property" that has been deprived by the defendant's actions. (*Costanich v. Dept. of Social*	There are three proposed changes to the opening paragraph: 1. Add "deliberately." The committee agrees given the current formulation of the instruction and has made this addition. 2. Add "as a result of that evidence being used against [him/her]".The committee agrees with this change also as the proposed language is more legally precise. 3. Revise the italicized direction as to the right involved and drop "without due process of law." The committee

Item number: 07(b)

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Approve**

RUPRO Meeting: April 19, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Approve Publication of Minor Revisions (Action Required)

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

Staff contact (name, phone and e-mail): Bruce Greenlee, Attorney, Legal Services 415-865-7698 bruce.greenlee@jud.ca.gov

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

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 30 is the first CACI release for 2017. Release 29 was approved on December 13, 2016.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
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, the advisory committee also requests that RUPRO approve and submit to the Judicial Council new and revised 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
April 11, 2017

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 May 19, 2017

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 only changes to the Directions for Use or additions to the Sources and Authority.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that RUPRO, effective May 19, 2017, approve for publication 64 revised civil jury instructions, prepared by the advisory committee, that contain changes that do not require Judicial Council approval. On RUPRO's approval, these instructions will be officially published in the midyear supplement to the 2017 edition of the *Judicial Council of California Civil Jury Instructions*.

The 64 instructions presented for final RUPRO approval are attached at pages 5–273. The committee in a separate report requests that RUPRO recommend to the Judicial Council for adoption 22 new and revised instructions and verdict forms.

Previous Council Action

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

> Review and approve nonsubstantive technical changes and corrections and minor substantive changes unlikely to create controversy to Judicial Council of California Civil Jury Instructions (CACI) and Criminal Jury Instructions (CALCRIM).[1]

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 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:

---

[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* (Sept. 12, 2006), p. 1.

[2] In light of the committee's 2014 decision 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.

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

- 54 have revisions under category (a) above only (additional cases and statutes added to Sources and Authority);
- 3 have revisions under category (c) above only (revisions to the Directions for Use); and
- 7 fall under both categories (a) and (c) (additions to Sources and Authority and additions or changes to the Directions for Use).

Standards for adding case excerpts to Sources and Authority

The standards approved by the advisory committee for adding case excerpts to the Sources and Authority are as follows:

1. *CACI* Sources and Authority are in the nature of a digest. Entries should be direct quotes from cases. However, all cases that may be relevant to the subject area of an instruction need not be included, particularly if they do not involve a jury matter.
2. Each legal component of the instruction should be supported by authority—either statutory or case law.
3. Authority addressing the burden of proof should be included.
4. Authority addressing the respective roles of judge and jury (questions of law and questions of fact) should be included.
5. Only one case excerpt should be included for each legal point.
6. California Supreme Court authority should always be included, if available.
7. If no Supreme Court authority is available, the most recent California appellate court authority for a point should be included.
8. A U.S. Supreme Court case should be included on any point for which it is the controlling authority.
9. A Ninth Circuit Court of Appeals case may be included if the case construes California law or federal law that is the subject of the *CACI* instruction.
10. Other cases may be included if deemed particularly useful to the users.
11. The fact that the committee chooses to include a case excerpt in the Sources and Authority does not mean that the committee necessarily believes that the language is binding precedent. The standard is simply whether the language would be useful or of interest to users.

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 proposed to be added to CACI in this release are final. No citations are incomplete.

Sources and Authority format cleanup

CACI format requires that case excerpts in the Sources and Authority be of directly quoted material from the case. In some of the series, this format was not uniformly observed initially, and some excerpts are in the form of a legal statement with a citation rather than a direct quotation. Where found in instructions otherwise included, these out-of-format excerpts have been converted to direct quotations.

CACI format also orders statutes, rules, and regulations first; then case excerpts; and then any other authorities, such as a Restatement excerpt. 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*; and to submit its recommendations to the council for approval. The proposed revisions and additions meet this responsibility. There are no alternatives to be considered and no policy implications.

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 midyear supplement to the 2017 edition and pay royalties to the council. The official publisher will also make the new supplement 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, at pages 5–273

CIVIL JURY INSTRUCTIONS
TABLE OF CONTENTS

CALIFORNIA FAMILY RIGHTS ACT SERIES

WORKERS' COMPENSATION SERIES

CIVIL RIGHTS SERIES

ELDER ABUSE AND DEPENDENT ADULT CIVIL PROTECTION ACT SERIES

CARTWRIGHT ACT SERIES

303. Breach of Contract—Essential Factual Elements

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

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

[2. That [*name of plaintiff***] did all, or substantially all, of the significant things that the contract required [him/her/it] to do;]**

[or]

[2. That [*name of plaintiff***] was excused from having to [***specify things that plaintiff did not do, e.g., obtain a guarantor on the contract***];]**

[3. That [*specify occurrence of all conditions required by the contract for [name of defendant]'s performance, e.g., the property was rezoned for residential use***];]**

[or]

[3. That [*specify condition(s) that did not occur***] [was/were] [waived/excused];]**

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

[*or***]**

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

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

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

New September 2003; Revised April 2004, June 2006, December 2010, June 2011, June 2013, June 2015, December 2016

Directions for Use

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

Optional elements 2 and 3 both involve conditions precedent. A "condition precedent" is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues

or the contractual duty arises. (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1147 [180 Cal.Rptr.3d 683].) Element 2 involves the first kind of condition precedent; an act that must be performed by one party before the other is required to perform. Include the second option if the plaintiff alleges that he or she was excused from having to perform some or all of the contractual conditions.

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 involves the second kind of condition precedent; an uncertain event that must happen before contractual duties are triggered. Include the second option if the plaintiff alleges that the defendant agreed to perform even though a condition did not occur. 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*.

Element 6 states the test for causation in a breach of contract action: whether the breach was a substantial factor in causing the damages. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 909 [28 Cal.Rptr.3d 894].) In the context of breach of contract, it has been said that the term "substantial factor" has no precise definition, but is something that is more than a slight, trivial, negligible, or theoretical factor in producing a particular result. (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 871−872 [63 Cal.Rptr.3d 514]; see CACI No. 430, *Causation—Substantial Factor*, applicable to negligence actions.)

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.

- "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].)

- "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.)

- “b. *Excuse*. The non-occurrence of a condition of a duty is said to be ‘excused’ when the condition need no longer occur in order for performance of the duty to become due. The non-occurrence of a condition may be excused on a variety of grounds. It may be excused by a subsequent promise, even without consideration, to perform the duty in spite of the non-occurrence of the condition. See the treatment of ’waiver’ in § 84, and the treatment of discharge in §§ 273-85. It may be excused by acceptance of performance in spite of the non-occurrence of the condition, or by rejection following its non-occurrence accompanied by an inadequate statement of reasons. See §§ 246-48. It may be excused by a repudiation of the conditional duty or by a manifestation of an inability to perform it. See § 255; §§ 250-51. It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing (§ 205). See § 239. And it may be excused by impracticability. See § 271. These and other grounds for excuse are dealt with in other chapters of this Restatement. This Chapter deals only with one general ground, excuse to avoid forfeiture. See § 229.” (Rest.2d of Contracts, § 225.)

- “ ‘ “Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.” [Citation.]’ ” (*Stephens & Stephens XII, LLC, supra*, 231 Cal. App. 4th at p. 1144.)

- “ ‘Causation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the defendant's breach, and that their causal occurrence be at least reasonably certain.’ A proximate cause of loss or damage is something that is a substantial factor in bringing about that loss or damage.” (*U.S. Ecology, Inc., supra,* 129 Cal.App.4th at p. 909, internal citations omitted.)

- “An essential element of [breach of contract] claims is that a defendant's alleged misconduct was the cause in fact of the plaintiff's damage. [¶] The causation analysis involves two elements. ‘ “One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event.” [Citation.]’ The second element is proximate cause. ‘ “[P]roximate cause ‘is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.’ ” ’ ” (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102−1103 [192 Cal.Rptr.3d 354], footnote and internal citation omitted.)

- “Determining whether a defendant's misconduct was the cause in fact of a plaintiff's injury involves essentially the same inquiry in both contract and tort cases." (*Tribeca Companies, LLC, supra,* 239 Cal.App.4th at p. 1103.)

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

351. Special Damages

[*Name of plaintiff***] [also] claims damages for [***identify special damages***].**

To recover for this harm, [*name of plaintiff***] must prove that when the parties made the contract, [***name of defendant***] knew or reasonably should have known of the special circumstances leading to the harm.**

New September 2003

Directions for Use

Before giving this instruction, the judge should determine whether a particular item of damage qualifies as "special."

Sources and Authority

- Measure of Contract Damages. Civil Code section 3300.

- " 'Unlike general damages, special damages are those losses that do not arise directly and inevitably from any similar breach of any similar agreement. Instead, they are secondary or derivative losses arising from circumstances that are particular to the contract or to the parties. Special damages are recoverable if the special or particular circumstances from which they arise were actually communicated to or known by the breaching party (a subjective test) or were matters of which the breaching party should have been aware at the time of contracting (an objective test). [Citations.] Special damages "will not be presumed from the mere breach" but represent loss that 'occurred by reason of injuries following from' the breach.' " (*Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 1010 [207 Cal.Rptr.3d 82]~~The detriment that is 'likely to result therefrom' is that which is foreseeable to the breaching party at the time the contract is entered into." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted~~.)

- "Special damages must fall within the rule of *Hadley v. Baxendale*, ... that is, they must reasonably be supposed to have been contemplated or foreseeable by the parties when making the contract as the probable result of a breach." (*Sabraw v. Kaplan* (1962) 211 Cal.App.2d 224, 227 [27 Cal.Rptr. 81], internal citations omitted.)

- "Parties may voluntarily assume the risk of liability for unusual losses, but to do so they must be told, at the time the contract is made, of any special harm likely to result from a breach [citations]. Alternatively, the nature of the contract or the circumstances in which it is made may compel the inference that the defendant should have contemplated the fact that such a loss would be 'the probable result' of the defendant's breach. [Citation.] Not recoverable as special damages are those 'beyond the expectations of the parties.' [Citation.] Special damages for breach of contract are limited to losses that were either actually foreseen [citation] or were 'reasonably foreseeable' when the contract was formed." (*Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1269−1270 [168

Cal.Rptr.3d 499].)

- "When reference is made to the terms of the contract alone, there is ordinarily little difficulty in determining what damages arise from its breach in the usual course of things, and the parties will be presumed to have contemplated such damages only. But where it is claimed the circumstances show that a special purpose was intended to be accomplished by one of the parties (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily follow from a breach by the other party), and such purpose was known to the other party, the facts showing the special purpose and the knowledge of the other party must be averred. This rule has frequently been applied to the breach of a contract for the sale of goods to be delivered at a certain time. In such cases the general rule of damages is fixed by reference to the market value of the goods at the time they were to have been delivered, because in the usual course of events the purchaser could have supplied himself with like commodities at the market price. And if special circumstances existed entitling the purchaser to greater damages for the defeat of a special purpose known to the contracting parties (as, for example, if the purchaser had already contracted to furnish the goods at a profit, and they could not be obtained in the market), such circumstances must be stated in the declaration with the facts which, under the circumstances, enhanced the injury." (*Mitchell v. Clarke* (1886) 71 Cal. 163, 164-165 [11 P. 882], internal citation omitted.)

- "[I]f special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract. The requirement of knowledge or notice as a prerequisite to the recovery of special damages is based on the theory that a party does not and cannot assume limitless responsibility for all consequences of a breach, and that at the time of contracting he must be advised of the facts concerning special harm which might result therefrom, in order that he may determine whether or not to accept the risk of contracting." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)

- "Contract damages must be clearly ascertainable in both nature and origin. A contracting party cannot be required to assume limitless responsibility for all consequences of a breach and must be advised of any special harm that might result in order to determine whether or not to accept the risk of contracting." (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 560 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)

- " '[F]oreseeability is to be determined as of the time of the making of the contract'; 'what must be foreseeable is only that the loss would result if the breach occurred'; 'it is foreseeability only by the party in breach that is determinative'; 'foreseeability has an objective character'; and 'the loss need only have been foreseeable as a probable, as opposed to a necessary or certain, result of the breach.' " (*Ash, supra*, 223 Cal.App.4th at p. 1270.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 871

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.13 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.61 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[6], 7.08[3]

356. Buyer's Damages for Breach of Contract for Sale of Real Property (Civ. Code, § 3306)

To recover damages for the breach of a contract to sell real property, [*name of plaintiff***] must prove:**

1. **The difference between the fair market value of the property on the date of the breach and the contract price;**

2. **The amount of any payment made by [***name of plaintiff***] toward the purchase;**

3. **The amount of any reasonable expenses for examining title and preparing documents for the sale;**

4. **The amount of any reasonable expenses in preparing to occupy the property; and**

5. **[***Insert item(s) of claimed consequential damages***].**

New September 2003

Directions for Use

Read this instruction in conjunction with CACI No. 350, *Introduction to Contract Damages.* If the appropriate rate of interest is in dispute, the jury should be instructed to determine the rate. Otherwise, the judge should calculate the interest and add the appropriate amount of interest to the verdict.

For a definition of "fair market value," see CACI No. 3501, *"Fair Market Value" Explained*.

Sources and Authority

- Damages for Breach of Contract to Convey Real Property. Civil Code section 3306.
- Interest on Contract Damages. Civil Code section 3289
- " 'The rules of damages for a breach of a contract to sell or buy real property are special and unique. To the extent that the measure of compensatory damages available to a buyer or seller of real property for a breach of a contract are different from the general measure of compensatory damages for a breach of contract, the special provisions for damages for a breach of a real property sales contract prevail.' " (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 751 [118 Cal.Rptr.3d 531].)
- "A simple reading of the statute discloses that by its explicit terms it is adaptable only to a failure to convey, and not to a delay in conveying." (*Christensen v. Slawter* (1959) 173 Cal.App.2d 325, 330 [343 P.2d 341].)
- "This court itself has recently described section 3306 as providing for 'loss-of-bargain damages'

measured by the difference between the contract price and the fair market value on the date of the breach." (*Reese v. Wong* (2001) 93 Cal.App.4th 51, 56 [112 Cal.Rptr.2d 669], internal citation omitted.)

- "It is settled that when a seller of real property fails or refuses to convey, a buyer who has made advance payments toward the purchase price may recover interest on those payments as damages for breach of contract. This rule is not limited to sales of real property; it applies to sales in general." (*Al-Husry v. Nilsen Farms Mini-Market, Inc.* (1994) 25 Cal.App.4th 641, 648 [31 Cal.Rptr.2d 28], internal citations omitted.)

- Section 3306 does not ordinarily apply to breach of an unexercised option to buy property. (*Schmidt v. Beckelman* (1960) 187 Cal.App.2d 462, 470-471 [9 Cal.Rptr. 736].)

- " 'Generally, [consequential] damages are those which, in view of all facts known by the parties at the time of the making of the contract, may reasonably be supposed to have been considered as a likely consequence of a breach in the ordinary course of events. This provision would conform the measure of damages in real property conveyance breaches to the general contract measure of damages which is specified in Civil Code 3300: "... all the detriment proximately caused (by the breach), or which, in the ordinary course of things, would be likely to result therefrom." ' " (*Stevens Group Fund IV v. Sobrato Development Co.* (1991) 1 Cal.App.4th 886, 892 [2 Cal.Rptr.2d 460], quoting the Assembly Committee on Judiciary.)

- "Moreover, in none of the foregoing cases does it appear that the buyer demonstrated the existence of the other requisites for an award of consequential or special damages, i.e., that the seller knew of the buyer's purpose in purchasing the property and that the anticipated profits were proved with reasonable certainty as to their occurrence and amount." (*Greenwich S.F., LLC , supra,* 190 Cal.App.4th at p. 757.)

- "The plain language of section 3306, adding consequential damages to the general damages and other specified damages recoverable for breach of a contract to convey real property, the legislative history of the 1983 amendment acknowledging that the addition of consequential damages would conform the measure of damages to the general contract measure of damages, and the generally accepted inclusion of lost profits as a component of consequential or special damages in other breach of contract contexts and by other states in the context of breach of contracts to convey real property, taken together, persuade us that lost profits may be awarded as part of consequential damages under section 3306 upon a proper showing." (*Greenwich S.F., LLC , supra,* 190 Cal.App.4th at p. 758, internal citations omitted.)

- "Rents received from the lease of the property in this case are not properly an item of consequential damages. Here, plaintiff introduced evidence as to the fair market value of the property which included these profits. To allow these as consequential damages under these circumstances would have permitted a double recovery for plaintiff." (*Stevens Group Fund IV, supra,* 1 Cal.App.4th at p. 892.)

- "[T]he phrase 'to enter upon the land' refers to the taking of possession rather than the use of the property~~to things done to put the land to general use~~." (*Schellinger Brothers v. Cotter* (2016) 2

Cal.App.5th 984, 1011 [207 Cal.Rptr.3d 82~~*Crag Lumber Co. v. Crofoot* (1956) 144 Cal.App.2d 755, 779 [301 P.2d 952~~].)

- "We think the phrase 'and interest' should continue to be read as referring to the generally applicable provisions of [Civil Code] section 3287 regarding prejudgment interest. As amended in 1967, subdivision (a) of section 3287 establishes a right to recover prejudgment interest on damages 'capable of being made certain by calculation' and subdivision (b) gives the court general discretionary authority to award prejudgment interest where damages are 'based upon a cause of action in contract ....' The discretionary authority conferred by subdivision (b) will ordinarily apply to loss-of-bargain damages measured by the contract price/market value differential." (*Rifkin v. Achermann* (1996) 43 Cal.App.4th 391, 397 [50 Cal.Rptr.2d 661].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 898–900

California Real Property Remedies Practice (Cont.Ed.Bar 1980; 1999 supp.) Breach of Seller-Buyer Agreements, §§ 4.11–4.14

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 11-D, *Buyer's Remedies Upon Seller's Breach—Damages And Specific Performance*, ¶ 11:184 (The Rutter Group)

50 California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser*, § 569.22 (Matthew Bender)

9 California Legal Forms, Ch. 23, *Real Property Sales Agreements*, § 23.12 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04[7][f]

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.37, 8.58

361. Reliance Damages

If you decide that [*name of defendant***] breached the contract, [***name of plaintiff***] may recover the reasonable amount of money that [he/she/it] spent in preparing for contract performance. These amounts are called "reliance damages." [***Name of plaintiff***] must prove the amount that [he/she/it] was induced to spend in reliance on the contract.**

If [*name of plaintiff***] proves reliance damages, [***name of defendant***] may avoid paying [some/ [or] all] of those damages by proving [***include one or both of the following***]:**

[1. That [some/ [or] all] of the money that [*name of plaintiff***] spent in reliance was unnecessary;]**

[or]

[2. That [*name of plaintiff***] would have suffered a loss even if [***name of defendant***] had fully performed [his/her/its] obligations under the contract].**

New December 2015

Sources and Authority

- "One proper 'measure of damages for breach of contract is the amount expended [by the nonbreaching party] on the faith of the contract.' " (*Agam v. Gavra* (2015) 236 Cal.App.4th 91, 105 [186 Cal.Rptr.3d 295].)

- "Where, without fault on his part, one party to a contract who is willing to perform it is prevented from doing so by the other party, the primary measure of damages is the amount of his loss, which may consist of his reasonable outlay or expenditure toward performance, and the anticipated profits which he would have derived from performance." (*Buxbom v. Smith* (1944) 23 Cal.2d 535, 541 [145 P.2d 305].)

- "This measure of damages often is referred to as 'reliance damages.' It has been held to apply where, as here, 'one party to an established business association fails and refuses to carry out the terms of the agreement, and thereby deprives the other party of the opportunity to make good in the business … .' " (*Agam, supra,* 236 Cal.App.4th at p. 105, internal citations omitted.)

- "The lost earnings found by the jury constituted harm flowing not from the *breach* of any contract but from plaintiff's *entry into* the contract in the expectation of receiving the promised options. Such 'reliance' damages may sometimes be recovered on a contract claim '[a]s an alternative' to expectation damages." (*Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 788 [211 Cal.Rptr.3d 743], original italics.)

- "[I]n the context of reliance damages, the plaintiff bears the burden to establish the amount he or she expended in reliance on the contract. The burden then shifts to the defendant to show (1) the

amount of plaintiff's expenses that were unnecessary and/or (2) how much the plaintiff would have lost had the defendant fully performed (i.e., absent the breach). The plaintiff's recovery must be reduced by those amounts." (*Agam, supra*, 236 Cal.App.4th at p. 107, internal citation omitted.)

- "Concerning reliance damages, Restatement [Second of Contracts] section 349 provides as follows: 'As an alternative to the measure of damages stated in [Restatement section] 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, *less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed*.' " (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 907 [28 Cal.Rptr.3d 894], original italics.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2010) Contracts, § 869 et seq.

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.79 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.21 et seq. (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.15

425. "Gross Negligence" Explained

Gross negligence is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others.

A person can be grossly negligent by acting or by failing to act.

New April 2008; Revised December 2015

Directions for Use

Give this instruction if a particular statute that is at issue in the case creates a distinction based on a standard of gross negligence. (See, e.g., Gov. Code, § 831.7(c)(1)(E) [immunity for public entity or employee to liability to participant in or spectator to hazardous recreational activity does not apply if act of gross negligence is proximate cause of injury].) Courts generally resort to this definition if gross negligence is at issue under a statute. (See, e.g., *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 971 [4 Cal.Rptr.3d 340].)

Give this instruction with CACI No. 400, *Negligence—Essential Factual Elements,* but modify that instruction to refer to gross negligence.

This instruction may also be given if case law has created a distinction between gross and ordinary negligence. For example, under the doctrine of express assumption of risk, a signed waiver of liability may release liability for ordinary negligence only, not for gross negligence. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095]; see also CACI No. 451, *Affirmative Defense—Contractual Assumption of Risk.*) Once the defendant establishes the validity and applicability of the release, the plaintiff must prove gross negligence by a preponderance of the evidence. (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 732, 734 [183 Cal.Rptr.3d 234].) A lack of gross negligence can be found as a matter of law if the plaintiff's showing is insufficient to suggest a triable issue of fact. (See *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 638−639 [184 Cal.Rptr.3d 155]; cf. *Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 555 [188 Cal.Rptr.3d 228] [whether conduct constitutes gross negligence is generally a question of fact, depending on the nature of the act and the surrounding circumstances shown by the evidence].)

Sources and Authority

- " 'Gross negligence' long has been defined in California and other jurisdictions as either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' " (*City of Santa Barbara, supra,* 41 Cal.4th at p. 754, internal citations omitted.)

- "By contrast, 'wanton' or 'reckless' misconduct (or ' "willful and wanton negligence" ') describes conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result." (*City of Santa Barbara, supra,* 41 Cal.4th at p. 754, fn. 4, internal citations omitted.)

- "California does not recognize a distinct cause of action for 'gross negligence' independent of a statutory basis." (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856 [120 Cal.Rptr.3d 90].)

- "Gross negligence is pleaded by alleging the traditional elements of negligence: duty, breach, causation, and damages. However, to set forth a claim for 'gross negligence' the plaintiff must allege extreme conduct on the part of the defendant." (*Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1082 [122 Cal.Rptr.3d 22], internal citation omitted.)

- "The theory that there are degrees of negligence has been generally criticized by legal writers, but a distinction has been made in this state between ordinary and gross negligence. Gross negligence has been said to mean the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Constr. Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644], internal citation omitted.)

- "Numerous California cases have discussed the doctrine of gross negligence. Invariably these cases have turned upon an interpretation of a statute which has used the words 'gross negligence' in the text." (*Cont'l Ins. Co. v. Am. Prot. Indus.* (1987) 197 Cal.App.3d 322, 329 [242 Cal.Rptr. 784].)

- "[I]n cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement. Evidence of conduct that evinces an extreme departure from manufacturer's safety directions or an industry standard also could demonstrate gross negligence. Conversely, conduct demonstrating the failure to guard against, or warn of, a dangerous condition typically does not rise to the level of gross negligence." (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 881 [208 Cal.Rptr.3d 792], internal citations omitted.)

- "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara, supra,* 41 Cal.4th at p. 777, original italics.)

- " 'Prosser on Torts (1941) page 260, also cited by the *Van Meter* court for its definition of gross negligence, reads as follows: "Gross Negligence. This is very great negligence, or the want of even scant care. It has been described as a failure to exercise even that care which a careless person would use. Many courts, dissatisfied with a term so devoid of all real content, have interpreted it as requiring wilful misconduct, or recklessness, or such utter lack of all care as will be evidence of either -- sometimes on the ground that this must have been the purpose of the legislature. But most courts have considered that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind. *So far as it has any accepted meaning, it is merely an extreme departure from the ordinary standard of care.*" ' " (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358 [257

Cal.Rptr. 356], original italics, internal citations omitted.)

- "Generally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence [citation] but not always." (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640 [189 Cal.Rptr.3d 449].)

- "The Legislature has enacted numerous statutes … which provide immunity to persons providing emergency assistance except when there is gross negligence. (See Bus. & Prof. Code, § 2727.5 [immunity for licensed nurse who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of nurse's employment unless the nurse is grossly negligent]; Bus. & Prof. Code, § 2395.5 [immunity for a licensed physician who serves on-call in a hospital emergency room who in good faith renders emergency obstetrical services unless the physician was grossly negligent, reckless, or committed willful misconduct]; Bus. & Prof. Code, § 2398 [immunity for licensed physician who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a community college or high school athletic event for an injury suffered in the course of that event unless the physician was grossly negligent]; Bus. & Prof. Code, § 3706 [immunity for certified respiratory therapist who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of employment unless the respiratory therapist was grossly negligent]; Bus. & Prof. Code, § 4840.6 [immunity for a registered animal health technician who in good faith renders emergency animal health care at the scene of an emergency unless the animal health technician was grossly negligent]; Civ. Code, § 1714.2 [immunity to a person who has completed a basic cardiopulmonary resuscitation course for cardiopulmonary resuscitation and emergency cardiac care who in good faith renders emergency cardiopulmonary resuscitation at the scene of an emergency unless the individual was grossly negligent]; Health & Saf. Code, § 1799.105 [immunity for poison control center personnel who in good faith provide emergency information and advice unless they are grossly negligent]; Health & Saf. Code, § 1799.106 [immunity for a firefighter, police officer or other law enforcement officer who in good faith renders emergency medical services at the scene of an emergency unless the officer was grossly negligent]; Health & Saf. Code, § 1799.107 [immunity for public entity and emergency rescue personnel acting in good faith within the scope of their employment unless they were grossly negligent].)" (*Decker, supra,* 209 Cal.App.3d at pp. 356–357.)

- "The jury here was instructed: 'It is the duty of one who undertakes to perform the services of a police officer or paramedic to have the knowledge and skills ordinarily possessed and to exercise the care and skill ordinarily used in like cases by police officers or paramedics in the same or similar locality and under similar circumstances. A failure to perform such duty is negligence. [para.] The standard to be applied in this case is gross negligence. The term gross negligence means the failure to provide even scant care or an extreme departure from the ordinary standard of conduct.' " (*Wright v. City of L.A.* (1990) 219 Cal.App.3d 318, 343 [268 Cal.Rptr. 309] [construing "gross negligence" under Health & Saf. Code, § 1799.106, which provides that a police officer or paramedic who renders emergency medical services at the scene of an emergency shall only be liable in civil damages for acts or omissions performed in a grossly negligent manner or not performed in good faith].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 278

Advising and Defending Corporate Directors and Officers (Cont.Ed.Bar) § 3.13

1 Levy et al., California Torts, Ch. 1, *General Principles of Liability,* § 1.01 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, §§ 380.10, 380.171 (Matthew Bender)

432. Affirmative Defense—Causation: Third-Party Conduct as Superseding Cause

[*Name of defendant***] claims that [he/she/it] is not responsible for [***name of plaintiff***]'s harm because of the later misconduct of [***insert name of third party***]. To avoid legal responsibility for the harm, [***name of defendant***] must prove all of the following:**

1. **That [***name of third party***]'s conduct occurred after the conduct of [***name of defendant***];**

2. **That a reasonable person would consider [***name of third party***]'s conduct a highly unusual or an extraordinary response to the situation;**

3. **That [***name of defendant***] did not know and had no reason to expect that [***name of third party***] would act in a [negligent/wrongful] manner; and**

4. **That the kind of harm resulting from [***name of third party***]'s conduct was different from the kind of harm that could have been reasonably expected from [***name of defendant***]'s conduct.**

New September 2003; Revised June 2011, December 2011

Directions for Use

A superseding cause instruction should be given if the issue is raised by the evidence. (See *Paverud v. Niagara Machine and Tool Works* (1987) 189 Cal.App.3d 858, 863 [234 Cal.Rptr. 585]; disapproved in *Soule v. General Motors Corp.* (1994) 8 Cal. 4th 548, 574, 580 [34 Cal.Rptr.2d 607, 882 P.2d. 298] [there is no rule of automatic reversal or inherent prejudice applicable to any category of civil instructional error].) The issue of superseding cause should be addressed directly in a specific instruction. (See *Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 10 [116 Cal.Rptr. 575]; disapproved in *Soule, supra,* 8 Cal. 4th at p. 580.)

Superseding cause is an affirmative defense that must be proved by the defendant. (*Maupin v. Widling* (1987) 192 Cal.App.3d 568, 578 [237 Cal.Rptr. 521].) Therefore, the elements of this instruction are phrased in the affirmative and require the defendant to prove that they are all present in order to establish superseding cause. (See *Martinez v. Vintage Petroleum* (1998) 68 Cal.App.4th 695, 702 [80 Cal.Rptr.2d 449].)

If, as a matter of law, a party is liable for subsequent negligence, as in subsequent medical negligence, this instruction should not be given.

Sources and Authority

" 'It is well established … that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct)

of a third person.' In determining whether one has a duty to prevent injury that is the result of third party conduct, the touchstone of the analysis is the foreseeability of that intervening conduct." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1148 [210 Cal.Rptr.3d 283, 384 P.3d 283], internal citation omitted.)

- "This issue is concerned with whether or not, assuming that a defendant was negligent and that his negligence was an actual cause of the plaintiff's injury, the defendant should be held responsible for the plaintiff's injury where the injury was brought about by a later cause of independent origin. This question, in turn, revolves around a determination of whether the later cause of independent origin, commonly referred to as an intervening cause, was foreseeable by the defendant or, if not foreseeable, whether it caused injury of a type which was foreseeable. If either of these questions is answered in the affirmative, then the defendant is not relieved from liability towards the plaintiff; if, however, it is determined that the intervening cause was not foreseeable and that the results which it caused were not foreseeable, then the intervening cause becomes a supervening cause and the defendant is relieved from liability for the plaintiff's injuries." (*Akins v. County of Sonoma* (1967) 67 Cal.2d 185, 199 [60 Cal.Rptr. 499, 430 P.2d 57].)

- " 'A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.' If the cause is superseding, it relieves the actor from liability whether or not that person's negligence was a substantial factor in bringing about the harm." (*Brewer v. Teano* (1995) 40 Cal.App.4th 1024, 1031 [47 Cal.Rptr.2d 348], internal citation omitted; see Restatement 2d of Torts, § 440.)

- "The rules set forth in sections 442–453 of the Restatement of Torts for determining whether an intervening act of a third person constitutes a superseding cause which prevents antecedent negligence of the defendant from being a proximate cause of the harm complained of have been accepted in California. Under these rules the fact that an intervening act of a third person is done in a negligent manner does not make it a superseding cause if a reasonable man knowing the situation existing when the act of the third person is done would not regard it as highly extraordinary that the third person so acted or the act is a normal response to a situation created by the defendant's conduct and the manner in which the intervening act is done is not extraordinarily negligent." (*Stewart v. Cox* (1961) 55 Cal.2d 857, 864 [13 Cal.Rptr. 521, 362 P.2d 345], internal citations omitted.)

- "This test is but another way of saying that foreseeable intervening ordinary negligence will not supersede but such negligence, if 'highly extraordinary,' will supersede. [¶] '[T]he fact that an intervening act of a third person is done in a negligent manner does not make it a superseding cause if . . . the act is a normal response to a situation created by the defendant's conduct and the manner in which the intervening act is done is not extraordinarily negligent. … ' This test is but another way of saying a normal, but negligent, intervening response will not supersede but an extraordinarily negligent response will supersede." (*Martinez, supra*, 68 Cal.App.4th at p. 701 [holding that highly extraordinary negligence or extraordinarily negligent response obviates need to prove unforeseeable risk of harm].)

- "Intervening negligence cuts off liability, and becomes known as a superseding cause, if ' "it is determined that the intervening cause was not foreseeable *and* that the results which it caused were

not foreseeable … .” ’ ” (*Martinez, supra,* 68 Cal.App.4th at pp. 700–701, original italics.)

- “ ‘[T]he defense of “superseding cause[]” … absolves [the original] tortfeasor, even though his conduct *was a* substantial contributing factor, when an independent event [subsequently] intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible.’ … [¶] To determine whether an independent intervening act was reasonably foreseeable, we look to the act and the nature of the harm suffered. To qualify as a superseding cause so as to relieve the defendant from liability for the plaintiff's injuries, both the intervening act and the results of that act must not be foreseeable. Significantly, ‘what is required to be foreseeable is the general character of the event or harm … not its precise nature or manner of occurrence.’ ” (*Chanda v. Federal Home Loans Corp.* (2013) 215 Cal.App.4th 746, 755−756 [155 Cal.Rptr.3d 693], original italics, internal citations omitted.)

- “ ‘Third party negligence which is the immediate cause of an injury may be viewed as a superseding cause when it is so highly extraordinary as to be unforeseeable. … “The foreseeability required is of the risk of harm, not of the particular intervening act. In other words, the defendant may be liable if his conduct was ‘a substantial factor’ in bringing about the harm, though he neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred.” … It must appear that the intervening act has produced “harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible.” … [¶] … [F]oreseeability is a question for the jury unless undisputed facts leave no room for a reasonable difference of opinion. … Thus, the issue of superseding cause is generally one of fact. …’ ” (*Lawson v. Safeway Inc.* (2010) 191 Cal.App.4th 400, 417 [119 Cal.Rptr.3d 366].)

- “The intervening negligence (or even recklessness) of a third party will not be considered a superseding cause if it is a ‘normal response to a situation created by the defendant’s conduct’ and is therefore ‘ “… within the scope of the reasons [for] imposing the duty upon [the defendant] to refrain from negligent conduct” ’ in the first place.” (*Pedeferri v. Seidner Enterprises* (2013) 216 Cal.App.4th 359, 373 [163 Cal.Rptr.3d 55], internal citations omitted.)

- “Under the theory of supervening cause, the chain of causation that would otherwise flow from an initial negligent act is broken when an independent act intervenes and supersedes the initial act.” (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 26 [22 Cal.Rptr.2d 106].)

- “[T]he intervening and superseding act itself need not necessarily be a negligent or intentional tort. For example, the culpability of the third person committing the intervening or superseding act is just one factor in determining if an intervening force is a new and independent superseding cause.” (*Ash v. North American Title Co.* (2014) 223 Cal.App.4th 1258, 1277 [168 Cal.Rptr.3d 499] [unforeseeable bankruptcy can be superseding cause].)

- “Whether an intervening force is superseding or not generally presents a question of fact, but becomes a matter of law where only one reasonable conclusion may be reached.” (*Ash, supra,* 223 Cal.App.4th at p. 1274.)

- “[O]ne does not reach the issue of superseding cause until one is satisfied that the record supports a

finding of negligence on the part of the defendant and a further finding that but for such negligence the accident would not have occurred. This, at least, has been the approach of our Supreme Court. … [S]uch an approach may be analytically wrong, because a finding that plaintiff's harm was due to a superseding cause, is, in reality, a finding that the cause which injured the plaintiff was not a part of the risk created by the defendant." (*Ewart v. Southern California Gas Co.* (1965) 237 Cal.App.2d 163, 169 [46 Cal.Rptr. 631].)

- "The potential for error in the [instruction] lies in the ambiguity of the words 'extraordinary' and 'abnormal.' These terms could be interpreted as meaning either: A. Unforeseeable (unpredictable, statistically extremely improbable, etc.); *or* B. Outside the scope of that which would be done by ordinary man. The instruction was correct if interpreted in sense A, since defendant's conduct would not in fact give rise to liability if the criminal act were unforeseeable. However, the instruction was incorrect if interpreted in sense B. Such an interpretation would almost invariably preclude liability for failure to police against criminal conduct, since there are very few situations indeed to which ordinary men would respond by committing serious criminal offenses. Yet it is not the law that one has no duty to protect against foreseeable criminal acts." (*Campodonico v. State Auto Parks, Inc.* (1970) 10 Cal.App.3d 803, 807 [89 Cal.Rptr. 270], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1197, 1198

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, *Causation Issues*, ¶ 2:2444 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶ 2:1326 (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.17

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.11 (Matthew Bender)

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.74 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.301, 165.321 (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.)

- "Further, '[t]he mere "possibility" of exposure' is insufficient to establish causation. '[P]roof that raises mere speculation, suspicion, surmise, guess or conjecture is not enough to sustain [the plaintiff's] burden' of persuasion." (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 969 [180 Cal.Rptr.3d 382], 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.)

- " '[G]iven the long latency period of asbestos-related disease, and the occupational settings that commonly exposed the worker to multiple forms and brands of asbestos products with varying degrees of toxicity,' our Supreme Court has held that a plaintiff 'need *not* prove with medical exactitude that fibers from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy.' Rather, a '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.' " (*Izell, supra,* 231 Cal.App.4th at p. 975, original italics, internal citation 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].)

- "In this case, [defendant] argues the trial court's refusal to give its proposed instruction was error because the instruction set forth 'the requirement in *Rutherford* that causation be decided by taking into account "the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed." ' But *Rutherford* does not require the jury to take these factors into account when deciding whether a plaintiff's exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion." (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495 [199 Cal.Rptr.3d 583], internal citation 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.)

- "Nothing in *Rutherford* precludes a plaintiff from establishing legal causation through opinion testimony by a competent medical expert to the effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, *Rutherford* acknowledges the scientific debate between the 'every exposure' and 'insignificant exposure' camps, and recognizes that the conflict is one for the jury to resolve." (*Izell, supra,* 231 Cal.App.4th at p. 977.)

- "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.)

- "We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 [210 Cal.Rptr.3d 283, 384 P.3d 283].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 570

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, Theories of Recovery—Strict Liability For Defective Products, ¶ 2:1259 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, Theories of Recovery—Causation Issues, ¶ 2:2409 (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)

451. Affirmative Defense—Contractual Assumption of Risk

[*Name of defendant***] claims that [***name of plaintiff***] may not recover any damages because [he/she] agreed before the incident that [he/she] would not hold [***name of defendant***] responsible for any damages.**

If [*name of defendant***] proves that there was such an agreement and that it applies to [***name of plaintiff***]'s claim, then [***name of defendant***] is not responsible for [***name of plaintiff***]'s harm[, unless you find that [***name of defendant***] was grossly negligent or intentionally harmed [***name of plaintiff***]].**

[If you find that [*name of defendant***] was grossly negligent or intentionally harmed [***name of plaintiff***], then the agreement does not apply. You must then determine whether [he/she/it] is responsible for [***name of plaintiff***]'s harm based on the other instructions that I have given you.]**

New September 2003; Revised December 2011

Directions for Use

This instruction sets forth the affirmative defense of express or contractual assumption of risk. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856 [120 Cal.Rptr.3d 90].) It will be given in very limited circumstances. Both the interpretation of a waiver agreement and application of its legal effect are generally resolved by the judge before trial. The existence of a duty is a question of law for the court (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 719 [183 Cal.Rptr.3d 234]), as is the interpretation of a written instrument if the interpretation does not turn on the credibility of extrinsic evidence. (*Allabach v. Santa Clara County Fair Assn., Inc.* (1996) 46 Cal.App.4th 1007, 1011 [54 Cal.Rptr.2d 330].)

However, there may be contract law defenses (such as fraud, lack of consideration, duress, unconscionability) that could be asserted by the plaintiff to contest the validity of a waiver. If these defenses depend on disputed facts that must be considered by a jury, then this instruction should also be given.

Express assumption of risk does not relieve the defendant of liability if there was gross negligence or willful injury. (See Civ. Code, § 1668.) However, the doctrine of primary assumption of risk may then become relevant if an inherently dangerous sport or activity is involved. (See *Rosencrans v. Dover Images, Ltd*. (2011) 192 Cal.App.4th 1072, 1081 [122 Cal.Rptr.3d 22].)

If there are jury issues with regard to gross negligence, include the bracketed language on gross negligence. Also give CACI No. 425, *"Gross Negligence" Explained.* If the jury finds no gross negligence, then the action is barred by express assumption of risk unless there are issues of fact with regard to contract formation.

Sources and Authority

- Contract Releasing Party From Liability for Fraud or Willful Injury is Against Public Policy. Civil

Code section 1668.

- "[P]arties may contract for the release of liability for future ordinary negligence so long as such contracts do not violate public policy. 'A valid release precludes liability for risks of injury within the scope of the release.' " (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 877 [208 Cal.Rptr.3d 792], internal citations omitted.)

- "Express assumption occurs when the plaintiff, in advance, expressly consents ... to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. ... The result is that ... being under no duty, [the defendant] cannot be charged with negligence." (*Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 764 [276 Cal.Rptr. 672], internal citations omitted.)

- "While often referred to as a defense, a release of future liability is more appropriately characterized as an express assumption of the risk that negates the defendant's duty of care, an element of the plaintiff's case." (*Eriksson, supra,* 233 Cal.App.4th at p. 719.)

- "[C]ases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing risk. Thus in this respect express assumption of risk properly can be viewed as analogous to primary assumption of risk." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308-309, fn. 4 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

- " ' "It is only necessary that the act of negligence, which results in injury to the releaser, be reasonably related to the object or purpose for which the release is given." ' … 'An act of negligence is reasonably related to the object or purpose for which the release was given if it is included within the express scope of the release.' " (*Eriksson, supra,* 233 Cal.App.4th at p. 722.)

- "Although [decedent] could not release or waive her parents' subsequent wrongful death claims, it is well settled that a release of future liability or express assumption of the risk by the decedent may be asserted as a defense to such claims." (*Eriksson, supra,* 233 Cal.App.4th at p. 725.)

- "[E]xculpatory clause which affects the public interest cannot stand." (*Tunkl v. Regents of Univ. of California* (1963) 60 Cal.2d 92, 98 [32 Cal.Rptr. 33, 383 P.2d 441].)

- "The issue [of whether something is in the public interest] is tested *objectively*, by the activity's importance to the *general public*, not by its subjective importance to the particular plaintiff." (*Booth v. Santa Barbara Biplane Tours, LLC* (2008) 158 Cal.App.4th 1173, 1179–1180 [70 Cal.Rptr.3d 660], original italics.)

- "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095], original italics.)

- " ' "A written release may exculpate a tortfeasor from future negligence or misconduct. [Citation.] To be effective, such a release '*must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties*.' [Citation.] The release need not achieve perfection. [Citation.] Exculpatory agreements in the recreational sports context do not implicate the public interest and therefore are not void as against public policy. [Citations.]" ' ' "An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. [Citations.]" ' " (*Huverserian v. Catalina Scuba Luv, Inc.* (2010) 184 Cal.App.4th 1462, 1467 [110 Cal.Rptr.3d 112], original italics, internal citations omitted.)

- "Unlike claims for ordinary negligence, products liability claims cannot be waived." (*Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 640 [184 Cal.Rptr.3d 155].)

- "Since there is no disputed issue of material fact concerning gross negligence, the release also bars [plaintiff]'s cause of action for breach of warranty." (*Grebing, supra,* 234 Cal.App.4th at p. 640.)

- "Generally, a person who signs an instrument may not avoid the impact of its terms on the ground that she failed to read it before signing. However, a release is invalid when it is procured by misrepresentation, overreaching, deception, or fraud. 'It has often been held that if the releaser was under a misapprehension, not due to his own neglect, as to the nature or scope of the release, and if this misapprehension was induced by the misconduct of the releasee, then the release, regardless of how comprehensively worded, is binding only to the extent actually intended by the releaser.' 'In cases providing the opportunity for overreaching, the releasee has a duty to act in good faith and the releaser must have a full understanding of his legal rights. [Citations.] Furthermore, it is the province of the jury to determine whether the circumstances afforded the opportunity for overreaching, whether the releasee engaged in overreaching and whether the releaser was misled. [Citation.]' A 'strong showing of misconduct' by the plaintiff is not necessary to demonstrate the existence of a triable issue of fact here; only a 'slight showing' is required." (*Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 563−564 [188 Cal.Rptr.3d 228], internal citations omitted.)

- "Plaintiffs assert that Jerid did not 'freely and knowingly' enter into the Release because (1) the [defendant's] employee represented the Release was a sign-in sheet; (2) the metal clip of the clipboard obscured the title of the document; (3) the Release was written in a small font; (4) [defendant] did not inform Jerid he was releasing his rights by signing the Release; (5) Jerid did not know he was signing a release; (6) Jerid did not receive a copy of the Release; and (7) Jerid was not given adequate time to read or understand the Release. [¶] We do not find plaintiffs' argument persuasive because … there was nothing preventing Jerid from reading the Release. There is nothing indicating that Jerid was prevented from (1) reading the Release while he sat at the booth, or (2) taking the Release, moving his truck out of the line, and reading the Release. In sum, plaintiffs' arguments do not persuade us that Jerid was denied a reasonable opportunity to discover the true terms of the contract." (*Rosencrans, supra,* 192 Cal.App.4th at pp. 1080–1081.)

- "Whether a contract provision is clear and unambiguous is a question of law, not of fact." (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598 [250 Cal.Rptr. 299].)

- "By signing as [decedent]'s parent, [plaintiff] approved of the terms of the release and understood

that her signature made the release 'irrevocable and binding.' Under these circumstances, the release could not be disaffirmed. [¶] Although [plaintiff]'s signature prevented the agreement from being disaffirmed, it does not make her a party to the release." (*Erikkson, supra,* 233 Cal.App.4th at p. 721.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1282, 1292–1294

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.44

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

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.171 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.402 (Matthew Bender)

457. Statute of Limitations—Equitable Tolling—Other Prior Proceeding

[*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.

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

- Tolling for Equal Employment Opportunity Commission Investigation. Government Code section 12965(d)(1).

- "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.)

- "Tolling the FEHA limitation period while the employee awaits the outcome of an EEOC investigation furthers several policy objectives: (1) the defendant receives timely notice of the claim; (2) the plaintiff is relieved of the obligation of pursuing simultaneous actions on the same set of facts; and (3) the costs of duplicate proceedings often are avoided or reduced." (*Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1008 [205 Cal.Rptr.3d 261].)

- "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)

501. Standard of Care for Health Care Professionals

[A/An] [*insert type of medical practitioner***] is negligent if [he/she] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [***insert type of medical practitioners***] would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."**

[You must determine the level of skill, knowledge, and care that other reasonably careful [*insert type of medical practitioners***] would use in the same or similar circumstances, based only on the testimony of the expert witnesses [including [***name of defendant***]] who have testified in this case.]**

New September 2003; Revised October 2004, December 2005, December 2010

Directions for Use

This instruction is intended to apply to nonspecialist physicians, surgeons, and dentists. The standards of care for nurses, specialists, and hospitals are addressed in separate instructions. (See CACI No. 502, *Standard of Care for Medical Specialists*, CACI No. 504, *Standard of Care for Nurses*, and CACI No. 514, *Duty of Hospital*.)

The second paragraph should be used if the court determines that expert testimony is necessary to establish the standard of care, which is usually the case. (See *Scott v. Rayhrer* (2010) 185 Cal.App.4th 1535, 1542–1543 [111 Cal.Rptr.3d 36].)

If the standard of care is set by statute or regulation, refer to instructions on negligence per se (CACI Nos. 418–421). (See *Galvez v. Frields* (2001) 88 Cal.App.4th 1410 [107 Cal.Rptr.2d 50].)

See CACI Nos. 219-221 on evaluating the credibility of expert witnesses.

Sources and Authority

- "With unimportant variations in phrasing, we have consistently held that a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances." (*Landeros v. Flood* (1976) 17 Cal.3d 399, 408 [131 Cal.Rptr. 69, 551 P.2d 389].)

- "The courts require only that physicians and surgeons exercise in diagnosis and treatment that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36 [210 Cal.Rptr. 762, 694 P.2d 1134].)

- "[T]he law imposes on individuals a duty to have medical education, training and skill before practicing medicine and that practicing medicine without this education, training and skill is negligent. … [A] breach of that portion of the standard of care does not, in and of itself, establish

actionable malpractice (i.e., one cannot recover from a person merely for lacking medical knowledge unless that lack of medical knowledge caused injury to the plaintiff).” (*Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1119 [267 Cal.Rptr. 503], disapproved on other grounds in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1228 [23 Cal.Rptr.2d 397, 859 P.2d 96].)

- “[T]he standard of care for physicians is the reasonable degree of skill, knowledge and care ordinarily possessed and exercised by members of the medical profession *under similar circumstances*. The test for determining familiarity with the standard of care is knowledge of similar conditions. Geographical location may be a factor considered in making that determination, but, by itself, does not provide a practical basis for measuring similar circumstances. Over 30 years ago, our Supreme Court observed that ‘[t]he unmistakable general trend . . . has been toward liberalizing the rules relating to the testimonial qualifications of medical experts.’ ” (*Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470–471 [71 Cal.Rptr.3d 707], original italics, internal citations omitted.)

- “Today, ‘neither the Evidence Code nor Supreme Court precedent *requires* an expert witness to have practiced in a particular locality before he or she can render an opinion in an ordinary medical malpractice case.’ ” (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 310−311 [205 Cal.Rptr.3d 825], original italics.)
- “As a general rule, the testimony of an expert witness is required in every professional negligence case to establish the applicable standard of care, whether that standard was met or breached by the defendant, and whether any negligence by the defendant caused the plaintiff's damages. A narrow exception to this rule exists where ‘ “ ‘ … the conduct required by the particular circumstances is within the common knowledge of the layman.’ … [Citations.]” ’ This exception is, however, a limited one. It arises when a foreign object such as a sponge or surgical instrument, is left in a patient following surgery and applies only when the plaintiff can invoke the doctrine of res ipsa loquitur. ‘The “common knowledge” exception is generally limited to situations in which … a layperson “ … [can] say as a matter of common knowledge … that the consequences of professional treatment were not such as ordinarily would have followed if due care had been exercised.” …’ ” (*Scott, supra,* 185 Cal.App.4th at pp. 1542–1543, footnote and internal citations omitted.)

- “We have already held upon authority that the failure to remove a sponge from the abdomen of a patient is negligence of the ordinary type and that it does not involve knowledge of *materia medica* or surgery but that it belongs to that class of mental lapses which frequently occur in the usual routine of business and commerce, and in the multitude of commonplace affairs which come within the group of ordinary actionable negligence. The layman needs no scientific enlightenment to see at once that the omission can be accounted for on no other theory than that someone has committed actionable negligence.” (*Ales v. Ryan* (1936) 8 Cal.2d 82, 93 [64 P.2d 409].)

- The medical malpractice standard of care applies to veterinarians. (*Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1425 [89 Cal.Rptr.2d 868].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 933, 934, 971, 975

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.1

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals,* § 30.12, Ch. 31, *Liability of Physicians and Other Medical Practitioners,* § 31.11 (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 209, *Dentists,* § 209.42 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 295, *Hospitals,* §§ 295.13, 295.43, 295.45 (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: Medical Malpractice*, § 175.20 et seq. (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.
- Notice of Intent to Commence Action. Code of Civil Procedure section 364(a).
- 90-Day Extension of Limitation Period. Code of Civil Procedure section 364(d).
- "The one-year limitation period of section 340.5 is a codification of the discovery rule, under which a cause of action accrues when the plaintiff is aware, or reasonably should be aware, of 'injury,' a term of art which means 'both the negligent cause and the damaging effect of the alleged wrongful act.' " (*Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 290 [170 Cal.Rptr.3d 125].)
- "When a plaintiff has information which would put a reasonable person on inquiry, when a plaintiff's "reasonably founded suspicions [have been] aroused" and the plaintiff has "become alerted to the necessity for investigation and pursuit of her remedies," the one-year period commences. "Possession of 'presumptive' as well as 'actual' knowledge will commence the running of the statute." ' " (*Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 823 [16 Cal.Rptr.2d 714], internal citations omitted.)
- "[W]hen the plaintiff in a medical malpractice action alleges the defendant health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the misdiagnosis, which is when the plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one." (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184 [209 Cal.Rtpr.3d 332].)
- "The fact that [plaintiff] contemplated suing [defendants] is strong evidence that [plaintiff] suspected the doctors had not properly diagnosed or treated his headaches. Even with the presence of such suspicions, however, the one-year and three-year limitations periods did not begin to run until [plaintiff] discovered his injury—that is, became aware of additional, appreciable harm from his preexisting condition—and, with respect to the one-year limitations period, also had reason to believe that injury was caused by the wrongdoing of [defendants]." (*Drexler*, *supra*, 4 Cal.App.5th at p. 1190, internal citation omitted.)
- "We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language." (*Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [Code Civ. Proc., § 352.1, which tolls statutes of limitation for prisoners, applies to extend one-year period of Code Civ. Proc., § 340.5].)
- "The implications of *Belton's* analysis for our case here is inescapable. Like tolling the statute of limitations for confined prisoners under section 352.1, tolling under section 351 for a defendant's absence from California is of general applicability [and therefore extends the one-year period of Code

of Civil Procedure section 340.5]. (For other general tolling provisions, see § 352 [minors or insanity]; § 352.5 [restitution orders]; § 353.1 [court's assumption of attorney's practice]; § 354 [war]; § 356 [injunction].)" (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 643 [75 Cal.Rptr.3d 861].)

- "[A] plaintiff's minority as such does not toll the limitations period of section 340.5. When the Legislature added the separate statute of limitations for minors to section 340.5 in 1975, it clearly intended that the general provision for tolling of statutes of limitation during a person's minority (§ 352, subd. (a)(1)) should no longer apply to medical malpractice actions." (*Steketee v. Lintz* (1985) 38 Cal.3d 46, 53 [210 Cal.Rptr 781, 694 P.2d 1153], internal citations omitted.)

- "Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first 'discovers' the injury *and the negligent cause* of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not 'discover' the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury." (*Ashworth v. 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.)

- "[I]f the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under section 340.5. But section 340.5 does not extend to negligence in the maintenance of equipment and premises that are merely convenient for, or incidental to, the provision of medical care to a patient." (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 88 [201 Cal.Rptr.3d 449, 369 P.3d 229].)

- "[W]hile MICRA is not limited to suits by patients, it 'applies only to actions alleging injury suffered as a result of negligence in … the provision of medical care to patients.' Driving to an accident victim is not the same as providing medical care to the victim. A paramedic's exercise of due care while driving is not 'necessary or otherwise integrally related to the medical treatment and diagnosis of the patient", at least when the patient is not in the vehicle.' " (*Aldana v. Stillwagon* (2016) ~~205 Cal.Rptr.3d 719,~~ 2 Cal.App.5th 1, 8 [205 Cal.Rptr.3d 719], internal citations omitted.)

Secondary Sources

Haning, et al., California Practice Guide: Personal Injury, Ch. 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

McDonald, California Medical Malpractice: Law and Practice, §§ 7:1–7:7 (Thomson Reuters)

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.

- "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].)

- "[W]hen the plaintiff in a medical malpractice action alleges the defendant health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the misdiagnosis, which is when the plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one." (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184 [209 Cal.Rtpr.3d 332].)

- "The fact that [plaintiff] contemplated suing [defendants] is strong evidence that [plaintiff] suspected the doctors had not properly diagnosed or treated his headaches. Even with the presence of such suspicions, however, the one-year and three-year limitations periods did not begin to run until [plaintiff] discovered his injury—that is, became aware of additional, appreciable harm from his preexisting condition—and, with respect to the one-year limitations period, also had reason to believe that injury was caused by the wrongdoing of [defendants]." (*Drexler*, *supra*, 4 Cal.App.5th at p. 1190, internal citation omitted.)

- "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].)

- "[I]f the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under section 340.5. But section 340.5 does not extend to negligence in the maintenance of equipment and premises that are merely convenient for, or incidental to, the provision of medical care to a patient." (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 88 [201 Cal.Rptr.3d 449, 369 P.3d 229].)

- "[W]hile MICRA is not limited to suits by patients, it 'applies only to actions alleging injury suffered as a result of negligence in … the provision of medical care to patients.' Driving to an accident victim is not the same as providing medical care to the victim. A paramedic's exercise of due care while driving is not 'necessary or otherwise integrally related to the medical treatment and diagnosis of the patient", at least when the patient is not in the vehicle.…' " (*Aldana v. Stillwagon* (2016) ~~205 Cal.Rptr.3d 719,~~ 2 Cal.App.5th 1, 8 [205 Cal.Rptr.3d 719], internal citations omitted.)

Secondary Sources

Haning et al., California Practice Guide: Personal Injury, Ch. 1-B, *First Steps in Handling a Personal Injury Case—Initial Evaluation of Case: Decision to Accept or Reject Employment or Undertake Further Evaluation of Claim,* ¶ 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

McDonald, California Medical Malpractice: Law and Practice, §§ 7:1–7:7 (Thomson Reuters)

600. Standard of Care

[A/An] [*insert type of professional***] is negligent if [he/she] fails to use the skill and care that a reasonably careful [***insert type of professional***] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."**

[You must determine the level of skill and care that a reasonably careful [*insert type of professional***] would use in similar circumstances based only on the testimony of the expert witnesses[, including [***name of defendant***],] who have testified in this case.]**

New September 2003; Revised October 2004, December 2007

Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence, for which CACI No. 501, *Standard of Care for Health Care Professionals,* should be used. See CACI No. 400, *Negligence—Essential Factual Elements,* for an instruction on the plaintiff's burden of proof. The word "legal" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. (See *Sources and Authority* following CACI No. 500, *Medical Negligence—Essential Factual Elements*.)

Read the second paragraph if the standard of care must be established by expert testimony.

See CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

If the defendant is a specialist in his or her field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810 [121 Cal.Rptr. 194].) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id*. at pp. 810–811.)

Whether an attorney-client relationship exists is a question of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756].) If the evidence bearing upon this decision is in conflict, preliminary factual determinations are necessary. (*Ibid*.) Special instructions may need to be crafted for that purpose.

Sources and Authority

- "The elements of a cause of action in tort for professional negligence are (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433].)

- "Plaintiffs' argument that CACI No. 600 altered their burden of proof is misguided in that it assumes that a 'professional' standard of care is inherently different than the standard in ordinary negligence cases. It is not. '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.' '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.' " (*LAOSD Asbestos Cases* (2016) 5 Cal.App.5th 1022, 1050 [211 Cal.Rptr.3d 261], internal citation omitted.)

- " 'In addressing breach of duty, "the crucial inquiry is whether [the attorney's] advice was so legally deficient when it was given that he [or she] may be found to have failed to use 'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' …" … ' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710].)

- "[I]f the allegedly negligent conduct does not cause damage, it generates no cause of action in tort." (*Moua v. Pittullo, Howington, Barker, Abernathy, LLP* (2014) 228 Cal.App.4th 107, 112−113 [174 Cal.Rptr.3d 662].)

- "[T]he issue of negligence in a legal malpractice case is ordinarily an issue of fact." (*Blanks, supra,* 171 Cal.App.4th at p. 376.)

- "Plaintiffs argue that 'laying pipe is not a "profession." ' However, case law, statutes, and secondary sources suggest that the scope of those held to a 'professional' standard of care—a standard of care similar to others in their profession, as opposed to that of a 'reasonable person'—is broad enough to encompass a wide range of specialized skills. As a general matter, '[t]hose undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances, and failure to do so subjects them to liability for negligence.' " (*LAOSD Asbestos Cases, supra*, 5 Cal.App.5th at p. 1050.)

- "It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313, 705 P.2d 886].)

- "[A] lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra,* 47 Cal.App.3d at p. 810.)

- "To establish a [professional] malpractice claim, a plaintiff is required to present expert testimony establishing the appropriate standard of care in the relevant community. 'Standard of care " 'is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations] … .' " [Citation.]' " (*Quigley v. McClellan* (2013) 214 Cal.App.4th 1276, 1283 [154 Cal.Rptr.3d 719], internal citations omitted.)

- " ' … "[W]here the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony, then expert testimony is not required." In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary.' " (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093 [41 Cal.Rptr.2d 768], internal citations omitted.)

- "Where … the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met." (*Wright, supra*, 47 Cal.App.3d at pp. 810−811, footnote and internal citations omitted.)

- "The standard is that of members of the profession 'in the same or a similar locality under similar circumstances' … . The duty encompasses both a knowledge of law and an obligation of diligent research and informed judgment." (*Wright, supra*, 47 Cal.App.3d at p. 809, internal citations omitted; but see *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470–471 [71 Cal.Rptr.3d 707] [geographical location may be a factor to be considered, but by itself, does not provide a practical basis for measuring similar circumstances].)

- Failing to Act Competently. Rules of Professional Conduct, rule 3-110.

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, §§ 290–293

4 Witkin, California Procedure (5th ed. 2008) Pleadings, § 593

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 990, 991, 994–997

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 1-A, *Sources Of Regulation Of Practice Of Law In California-Overview*, ¶ 1:39 (The Rutter Group)

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶¶ 6:230–6:234 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.31 (Matthew Bender)

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, §§ 30.12, 30.13, Ch. 32, *Liability of Attorneys*, § 32.13 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.50, 76.51 (Matthew Bender)

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

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.20 et seq.

(Matthew Bender)

610. Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit (Code Civ. Proc., § 340.6)

[*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***] knew, or with reasonable diligence should have discovered, the facts of [***name of defendant***]'s alleged wrongful act or omission.**

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

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

[that [he/she/it] did not sustain actual injury until on or after [*insert date one year before date of filing***][,/; or]]**

[that on or after [*insert date one year before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

[that on or after [*insert date one year before date of filing***] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[,/;]]**

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] continued to represent [name of plaintiff]***].]**

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit,* if the four-year limitation provision is at issue.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of 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 "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.

Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.

- Persons Under Disabilities. Code of Civil Procedure section 352.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)

- " '[S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.' '[T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff's recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.' On the other hand, 'the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence' because the plaintiff cannot allege actual injury resulted from an attorney's malpractice." (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)

- "[A]ctual injury exists even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by his attorney's negligence'; even if the client will encounter 'difficulty in proving damages'; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, 'actual injury' does not include 'speculative and contingent injuries … that do not yet exist … .' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)

- "[B]ecause 'determining actual injury is predominately a factual inquiry' to the extent a question remains on this point, the matter is properly resolved by the trier of fact … ." (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)

- "[W]here, as here, the 'material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at pp. 1037−1038.)

- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period,

and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 589, fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)

- "[D]efendant, if he is to avail himself of the statute's one-year-from-discovery limitation defense, has the burden of proving, under the 'traditional allocation of the burden of proof' that plaintiff discovered or should have discovered the facts alleged to constitute defendant's wrongdoing more than one year prior to filing this action." (*Samuels, supra,* 22 Cal.4th at pp. 8–9, internal citations omitted.)

- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- "We hold that a cause of action for legal malpractice does not accrue until the client discovers, or should discover, the facts establishing the elements of his cause of action." (*Neel, supra,* 6 Cal.3d at p. 194.)

- " '[W]here there is a professional relationship, the degree of diligence in ferreting out the negligence for the purpose of the statute of limitations is diminished. [Citation.]' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 315 [166 Cal.Rptr.3d 116].)

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)

- "A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same 'specific subject matter.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at p. 1038.)

- "The continuous representation tolling provision in section 340.6, subdivision (a)(2) 'was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." ' " (*Kelly v. Orr* (2016) 243 Cal.App.4th 940, 950 [196 Cal.Rptr.3d 901].)

- "The mere existence of an attorney-client relationship does not trigger the continuous representation rule: 'Instead, the statute's tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, "[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated.*" ' Tolling does not apply where there is a continuing relationship between the attorney and client 'involving only unrelated matters.' " (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)

- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- " '[W]hen an attorney leaves a firm and takes a client with him or her, … the tolling in ongoing matters [does not] continue for claims against the former firm and partners.' " (*Stueve Bros. Farms, LLC, supra*, 222 Cal.App.4th at p. 314.)

- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

- "[T]he continuous representation tolling provision in section 340.6, subdivision (a)(2), applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee." (*Kelly, supra*, 243 Cal.App.4th at p. 951.)

- "[A]bsent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of … section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services. …* That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent*

actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services*, however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client's perspective … .*" (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- "Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship." (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [208 Cal.Rptr.3d 428], original italics.)

- "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 v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [applying rule to one-year limitation period]; cf. *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [substantially similar language in Code Civ. Proc., § 340.5, applicable to medical malpractice, construed to apply only to three-year limitation period].)

- "[T]he fourth tolling provision of section 340.6, subdivision (a)—that is, the provision applicable to legal and physical disabilities—encompasses the circumstances set forth in section 351 [exception, where defendant is out of the state]." (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 569 [107 Cal.Rptr.3d 539].)

- "In light of the Legislature's intent that section 340.6(a) cover more than claims for legal malpractice, the term 'professional services' is best understood to include nonlegal services governed by an attorney's professional obligations." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

- "For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." (*Lee, supra*, 61 Cal.4th at p. 1238.)

- "*Lee* held that 'section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a "professional obligation" is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.' " (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 292 [211 Cal.Rptr.3d 372].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 573, 626–655

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

611. Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit (Code Civ. Proc., § 340.6)

[*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 [his/her/its] alleged wrongful act or omission occurred before [***insert date four years before date of filing***].**

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

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

[that [he/she/it] did not sustain actual injury until on or after [*insert date four years before date of filing***]][,/; or]]**

[that on or after [*insert date four years before date of filing***] [***name of defendant***] continued to represent [***name of plaintiff***] regarding the specific subject matter in which the wrongful act or omission occurred[,/; or]]**

[that on or after [*insert date four years before date of filing***] [***name of defendant***] knowingly concealed the facts constituting the wrongful act or omission[,/; or]]**

[that on or after [*insert date four years before date of filing***] [he/she/it] was under a legal or physical disability that restricted [his/her/its] ability to file a lawsuit[,/;]]**

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] knowingly concealed the facts***].]**

New April 2007; Revised April 2009

Directions for Use

Use CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, if the one-year limitation provision is at issue.

If no tolling provision from Code of Civil Procedure section 340.6 is at issue, read only through the end of 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 wrongful act or omission 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 on which the alleged wrongful act or omission occurred and determine whether the action is timely.

The court may need to define the term "actual injury" depending on the facts and circumstances of the particular case.

Sources and Authority

- Statute of Limitation for Attorney Malpractice. Code of Civil Procedure section 340.6.

- Persons Under Disabilities. Code of Civil Procedure section 352.

- "Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence." (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751 [76 Cal.Rptr.2d 749, 958 P.2d 1062].)

- "Actual injury refers only to the legally cognizable damage necessary to assert the cause of action. There is no requirement that an adjudication or settlement must first confirm a causal nexus between the attorney's error and the asserted injury. The determination of actual injury requires only a factual analysis of the claimed error and its consequences. The inquiry necessarily is more qualitative than quantitative because the fact of damage, rather than the amount, is the critical factor." (*Truong v. Glasser* (2009) 181 Cal.App.4th 102, 113 [103 Cal.Rptr.3d 811].)

- " '[S]ection 340.6, subdivision (a)(1), will not toll the limitations period once the client can plead damages that could establish a cause of action for legal malpractice.' '[T]he limitations period is not tolled after the plaintiff sustains actual injury [even] if the injury is, in some sense, remediable. [Citation.] Furthermore, the statutory scheme does not depend on the plaintiff's recognizing actual injury. Actual injury must be noticeable, but the language of the tolling provision does not require that it be noticed.' On the other hand, 'the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence' because the plaintiff cannot allege actual injury resulted from an attorney's malpractice." (*Croucier v. Chavos* (2012) 207 Cal.App.4th 1138, 1148 [144 Cal.Rptr.3d 180], internal citations omitted.)

- "[A]ctual injury exists even if the client has yet to 'sustain[] all, or even the greater part, of the damages occasioned by his attorney's negligence'; even if the client will encounter 'difficulty in proving damages'; and even if that damage might be mitigated or entirely eliminated in the future. [¶] However, 'actual injury' does not include 'speculative and contingent injuries … that do not yet exist … .' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd. v. Keehn & Associates, APC* (2015) 238 Cal.App.4th 1031, 1036 [190 Cal.Rptr.3d 90], internal citations omitted.)

- "[B]ecause 'determining actual injury is predominately a factual inquiry' to the extent a question remains on this point, the matter is properly resolved by the trier of fact … ." (*Callahan v. Gibson, Dunn & Crutcher LLP* (2011) 194 Cal.App.4th 557, 576 [125 Cal.Rptr.3d 120].)

- "[W]here, as here, the 'material facts are undisputed, the trial court can resolve the matter [of actual injury] as a question of law in conformity with summary judgment principles.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at pp. 1037−1038.)

- "[P]rior to the enactment of section 340.6 the running of the statute of limitations coincided with accrual of the plaintiff's malpractice cause of action, including damages. By contrast, under the provisions of section 340.6, discovery of the negligent act or omission initiates the statutory period, and the absence of injury or damages serves as a tolling factor." (*Adams v. Paul* (1995) 11 Cal.4th 583, 598 fn. 2 [46 Cal.Rptr.2d 594, 904 P.2d 1205], internal citations omitted.)

- "[A] defendant must prove the facts necessary to enjoy the benefit of a statute of limitations." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10 [91 Cal.Rptr.2d 273, 989 P.2d 701], internal citations omitted.)

- "In ordinary tort and contract actions, the statute of limitations, it is true, begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute. In cases of professional malpractice, however, postponement of the period of limitations until discovery finds justification in the special nature of the relationship between the professional man and his client." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187–188 [98 Cal.Rptr. 837, 491 P.2d 421], footnote omitted.)

- "If the allegedly negligent conduct does not cause damage, it generates no cause of action in tort. The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. Hence, until the client suffers appreciable harm as a consequence of his attorney's negligence, the client cannot establish a cause of action for malpractice." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433], internal citations omitted.)

- "A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same 'specific subject matter.' " (*Shaoxing City Maolong Wuzhong Down Products, Ltd., supra,* 238 Cal.App.4th at p. 1038.)

- "The continuous representation tolling provision in section 340.6, subdivision (a)(2) 'was adopted in order to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired." ' " (*Kelly v. Orr* (2016) 243 Cal.App.4th 940, 950 [196 Cal.Rptr.3d 901].)

- "The mere existence of an attorney-client relationship does not trigger the continuous representation rule: 'Instead, the statute's tolling language addresses a particular phase of such a relationship-representation regarding a *specific subject matter*. Moreover, the limitations period is not tolled when an attorney's subsequent role is only tangentially related to the legal representation the attorney provided to the plaintiff. Therefore, "[t]he *inquiry is not whether an attorney-client relationship still exists but when the representation of the specific matter terminated*." ' Tolling does not apply where there is a continuing relationship between the attorney and client 'involving only unrelated matters.' " (*Lockton v. O'Rourke* (2010) 184 Cal.App.4th 1051, 1064 [109 Cal.Rptr.3d 392], original italics, internal citations omitted.)

- "[W]here a client hires a law firm to represent it, the provisions of section 340.6 apply to that firm; the term 'attorney' in section 340.6 may embrace the entire partnership, law corporation, or other legal entity the client retains. [¶] That either an attorney or a firm may be the subject of an action does not support a reading under which representation by one attorney or firm might toll the limitations period as to another no longer affiliated attorney or firm. Rather, the text implies an action against a law firm is tolled so long as *that firm* continues representation, just as an action against an attorney is tolled so long as *that attorney* continues representation, but representation by one attorney or firm does not toll claims that may exist against a different, unaffiliated attorney or firm." (*Beal Bank, SSB v. Arter & Hadden, LLP* (2007) 42 Cal.4th 503, 509 [66 Cal.Rptr.3d 52, 167 P.3d 666], original italics.)

- " '[W]hen an attorney leaves a firm and takes a client with him or her, … the tolling in ongoing matters [does not] continue for claims against the former firm and partners.' " (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 314 [166 Cal.Rptr.3d 116].)

- " 'Ordinarily, an attorney's representation is not completed until the agreed tasks or events have occurred, the client consents to termination or a court grants an application by counsel for withdrawal.' 'The rule is that, for purposes of the statute of limitations, the attorney's representation is concluded when the parties so agree, and that result does not depend upon formal termination, such as withdrawing as counsel of record.' 'Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing mutual relationship and of activities in furtherance of the relationship.' " (*Nielsen v. Beck* (2007) 157 Cal.App.4th 1041, 1049 [69 Cal.Rptr.3d 435], internal citations omitted.)

- "[T]he continuous representation tolling provision in section 340.6, subdivision (a)(2), applies to toll legal malpractice claims brought by successor trustees against attorneys who represented the predecessor trustee." (*Kelly, supra*, 243 Cal.App.4th at p. 951.)

- "[A]bsent a statutory standard to determine when an attorney's representation of a client regarding a specific subject matter ends, and consistent with the purposes of the continuing representation rule, we conclude that for purposes of … section 340.6, subdivision (a)(2), in the event of an attorney's unilateral withdrawal or abandonment of the client, the representation ends *when the client actually has or reasonably should have no expectation that the attorney will provide further legal services.* … That may occur upon the attorney's express notification to the client that the attorney will perform no further services, or, if the attorney remains silent, may be inferred from the circumstances. *Absent actual notice to the client that the attorney will perform no further legal services or circumstances that reasonably should cause the client to so conclude*, a client should be entitled to rely on an attorney to perform the agreed services and should not be required to interrupt the attorney-client relationship by filing a malpractice complaint. *After a client has no reasonable expectation that the attorney will provide further legal services*, however, the client is no longer hindered by a potential disruption of the attorney-client relationship and no longer relies on the attorney's continuing representation, so the tolling should end. To this extent and for these reasons, *we conclude that continuous representation should be viewed objectively from the client's perspective … .*" (*Laclette v. Galindo* (2010) 184 Cal.App.4th 919, 928 [109 Cal.Rptr.3d 660], original italics.)

- "Continuity of representation ultimately depends, not on the client's subjective beliefs, but rather on evidence of an ongoing *mutual* relationship and of activities in furtherance of the relationship." (*GoTek Energy, Inc. v. SoCal IP Law Group, LLP* (2016) 3 Cal.App.5th 1240, 1248 [208 Cal.Rptr.3d 428], original italics.)

- "In light of the Legislature's intent that section 340.6(a) cover more than claims for legal malpractice, the term 'professional services' is best understood to include nonlegal services governed by an attorney's professional obligations." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1237 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

- "For purposes of section 340.6(a), the question is not simply whether a claim alleges misconduct that entails the violation of a professional obligation. Rather, the question is whether the claim, in order to succeed, necessarily depends on proof that an attorney violated a professional obligation as opposed to some generally applicable nonprofessional obligation." (*Lee*, *supra*, 61 Cal.4th at p. 1238.)

- "*Lee* held that 'section 340.6(a)'s time bar applies to claims whose merits necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. In this context, a "professional obligation" is an obligation that an attorney has by virtue of being an attorney, such as fiduciary obligations, the obligation to perform competently, the obligation to perform the services contemplated in a legal services contract into which an attorney has entered, and the obligations embodied in the State Bar Rules of Professional Conduct.' " (*Foxen v. Carpenter* (2016) 6 Cal.App.5th 284, 292 [211 Cal.Rptr.3d 372].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 573, 626–655

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.170, 76.430 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

901. Status of Common Carrier Disputed

To prove that [*name of defendant***] was a common carrier, [***name of plaintiff***] must prove that it was in the business of transporting [the property of] the general public.**

In deciding this issue, you may consider whether any of the following factors apply. These factors suggest that a carrier is a common carrier:

(a) The carrier maintains a regular place of business for the purpose of transporting passengers [or property].

(b) The carrier advertises its services to the general public.

(c) The carrier charges standard fees for its services.

(d) [*Insert other applicable factor(s)***.]**

A carrier can be a common carrier even if it does not have a regular schedule of departures, a fixed route, or a transportation license.

If you find that [*name of defendant***] was not a common carrier, then [***name of defendant***] did not have the duty of a common carrier, only a duty of ordinary care.**

New September 2003

Directions for Use

The court should give the ordinary negligence instructions in conjunction with this one. Ordinary negligence is the standard applicable to private carriers.

Sources and Authority

- "Common Carrier" Defined. Civil Code section 2168.
- Contract of Carriage. Civil Code section 2085.
- "[A] common carrier within the meaning of Civil Code section 2168 is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit." (*Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1508 [3 Cal.Rptr.2d 897], internal citations omitted.)
- "Whether a party is a common carrier for reward may be decided as a matter of law when the material facts are not in dispute. When the material facts are disputed, it is a question of fact for the jury." (*Huang v. The Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 339 [208 Cal.Rptr.3d 591 [citing this

instruction]~~Whether a party is a common carrier within the meaning of Civil Code section 2168 is a matter of law where … the material facts are not in dispute." (*Squaw Valley Ski Corp., supra,* 2 Cal.App.4th at p. 1506~~.)

- "Factors bearing on a party's common carrier status include (1) whether the party maintained an established place of business for the purpose of transporting passengers; (2) whether the party engaged in transportation as a regular business and not as a casual or occasional undertaking; (3) whether the party advertised its transportation services to the general public; and (4) whether the party charged standard rates for its service. The party need not have a regular schedule or a fixed route to be a common carrier, nor need the party have a transportation license. [¶] Not all these factors need be present for the party to be a common carrier subject to the heightened duty of care." (*Huang, supra*, 4 Cal.App.5th at p. 339, internal citations omitted; see also *Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038, 1047–1048 [205 Cal.Rptr. 211] [approving jury instruction].)

- "A private carrier ... is bound only to accept carriage pursuant to special agreement." (*Webster v. Ebright* (1992) 3 Cal.App.4th 784, 787 [4 Cal.Rptr.2d 714].) Private carriers " 'make no public profession that they will carry for all who apply, but ... occasionally or upon the particular occasion undertake for compensation to carry the goods of others upon such terms as may be agreed upon.' " (*Id*. at p. 788, internal citations omitted.)

- " '[T]he law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.' " (*Samuelson v. Public Utilities Com.* (1951) 36 Cal.2d 722, 730 [227 P.2d 256], internal citation omitted.)

- "To be a common carrier, the entity merely must be of the character that members of the general public may, if they choose, avail themselves of it." (*Squaw Valley Ski Corp., supra,* 2 Cal.App.4th at pp. 1509-1510, internal citation omitted.)

- ~~In *Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038 [205 Cal.Rptr. 211], the court approved of an instruction stating that the plaintiff had the burden of proving that the defendant "undertook either expressly or by course of conduct generally and for all persons indifferently to carry and deliver them for hire, so long as it had room." (*Id*. at pp. 1047-1048.) The court also approved of giving the jury the factors of regular place of business, advertising, and standard charges. (*Id*. at p. 1048.) Note that these factors may not be applicable in all cases.~~

- "Given the fact [defendant] indiscriminately offers its Shirley Lake chair lift to the public to carry skiers at a fixed rate from the bottom to the top of the Shirley Lake run, it logically comes within the Civil Code section 2168 definition of a common carrier." (*Squaw Valley Ski Corp., supra,* 2 Cal.App.4th at p. 1508.)

- "[T]he 'reward' contemplated by the statutory scheme need not be a fee charged for the transportation service. The reward may be the profit generated indirectly by easing customers' way through the carriers' premises." (*Huang, supra*, 4 Cal.App.5th at p. 339, internal citation omitted.)

- " '[T]he "public" does not mean everyone all of the time; naturally, passengers are restricted by the type of transportation the carrier affords. [Citations.] "One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population." … To be a common carrier, the entity merely must be of the character that members of the general public may, if they choose, avail themselves of it.' " (*Huang, supra*, 4 Cal.App.5th at p. 339, internal citation omitted.)

- "Plaintiff also argues the public policy of protecting passengers of a common carrier for reward, as expressed in Civil Code section 2100, precludes limiting defendant's duty to riders on [bumper cars]. In *Gomez v. Superior Court* [(2005) 35 Cal.4th 1125, 1136, fn. 5 [29 Cal. Rptr. 3d 352, 113 P.3d 41]], we held that an operator of a 'roller coaster or similar amusement park ride can be a carrier of persons for reward' for purposes of Civil Code section 2100. At the same time, however, we expressed no opinion 'whether other, dissimilar, amusement rides or attractions can be carriers of persons for reward.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1160 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [bumper car ride is not common carrier].)

- "In the situation at bar, [defendant]'s motor cars were customarily and daily cruising the streets for patronage or awaiting calls of the public. It was a common carrier in transporting such patrons. But when it agreed to act as carrier of handicapped school children under agreement for its operators to escort the pupils to and from their schools and homes to the cab and to render such service exclusively for them at designated hours, the company ceased to be a common carrier while transporting the specified children during such hours." (*Hopkins v. Yellow Cab Co.* (1952) 114 Cal.App.2d 394, 398 [250 P.2d 330].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 924

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers*, § 109.14 (Matthew Bender)

3 California Points and Authorities, Ch. 33, *Carriers*, § 33.29 (Matthew Bender)

2 California Civil Practice: Torts §§ 28:1–28:2 (Thomson Reuters)

906. Duty of Passenger for Own Safety

While a common carrier must use the highest care for its passengers' safety, passengers need only use reasonable care for their own safety.

New September 2003; Revised June 2017

Directions for Use

This instruction is intended to clarify that passengers and common carriers have different standards of care.

Sources and Authority

- ~~This instruction is intended to clarify that passengers and common carriers have different standards of care. Courts have addressed the potential for confusion in this area when contributory negligence of the passenger is at issue:~~ "As applied to the standard of care imposed upon the common carrier as compared to the standard imposed on the passenger it is both erroneous and misleading to tell the jury, as was done here, that there are no degrees of negligence or contributory negligence in California, since the common carrier is in fact held to a higher degree of care than is the passenger. To follow this erroneous and misleading statement with the instruction, in the identical language used in another instruction concerning the defendant carrier's duty of care, that 'any negligence, however slight,' of the decedent proximately contributing to her death would bar a recovery, was to inform the jury that in determining negligence and contributory negligence they must apply the same standard of care." (*Wilson v. City and County of San Francisco* (1959) 174 Cal.App.2d 273, 276 [344 P.2d 828].)

- 'Whether unidentified passengers might be primarily or partially responsible for [plaintiff]'s injury, or whether she bears some responsibility for it herself, are questions for the trier of fact in considering causation." (*Huang v. The Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 346 [208 Cal.Rptr.3d 591].)

Secondary Sources

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.07[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2 California Civil Practice: Torts ~~(Thomson West)~~ § 28:32 (Thomson Reuters)

1000. Premises Liability—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed because of the way [***name of defendant***] managed [his/her/its] property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [owned/leased/occupied/controlled] the property;**
2. **That [***name of defendant***] was negligent in the use or maintenance of the property;**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s negligence was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised June 2005, December 2011

Directions for Use

For cases involving public entity defendants, see instructions on dangerous conditions of public property (CACI No. 1100 et seq.).

Sources and Authority

- General Duty to Exercise Due Care. Civil Code section 1714(a).
- "The elements of a negligence claim and a premises liability claim are the same: a legal duty of care, breach of that duty, and proximate cause resulting in injury. Premises liability ' "is grounded in the possession of the premises and the attendant right to control and manage the premises" '; accordingly, ' "mere possession with its attendant right to control conditions on the premises is a sufficient basis for the imposition of an affirmative duty to act." ' But the duty arising from possession and control of property is adherence to the same standard of care that applies in negligence cases. In determining whether a premises owner owes a duty to persons on its property, we apply the *Rowland* [*Rowland v. Christian* (1968) 69 Cal.2d 108 [70 Cal.Rptr. 97, 443 P.2d 561]] factors. Indeed, *Rowland* itself involved premises liability.' " (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1159 [210 Cal.Rptr.3d 283, 384 P.3d 283], internal citations omitted.)
- ~~"Since, the liability of landowners for injuries to people on their property has been governed by general negligence principles." (*Pineda v. Ennabe* (1998) 61 Cal.App.4th 1403, 1407 [72 Cal.Rptr.2d 206].)~~
- "~~Premises liability is a form of negligence based on the holding in *Rowland v. Christian*, *supra*, 69 Cal.2d 108, and is described as follows:~~ The owner of premises is under a duty to exercise ordinary care in the management of such premises in order to avoid exposing persons to an unreasonable risk of harm. A failure to fulfill this duty is negligence." (*Brooks v. Eugene Burger Management Corp.*

(1989) 215 Cal.App.3d 1611, 1619 [264 Cal.Rptr. 756].)

- ~~"[T]he duty to take affirmative action for the protection of individuals coming upon the land is grounded in the possession of the premises and the attendant right to control and manage the premises." (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 368 [178 Cal.Rptr. 783, 636 P.2d 1121].)~~

- " '[P]roperty owners are liable for injuries on land they own, possess, or control.' But … the phrase 'own, possess, *or* control' is stated in the alternative. A defendant need not own, possess and control property in order to be held liable; control alone is sufficient." (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162 [60 Cal.Rptr.2d 448, 929 P.2d 1239], original italics, internal citations omitted.)

- " ' "[A] landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner." ' 'Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite.' " (*Kesner, supra*, 5 Cal.5th at p. 1159, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1082–1086

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.01 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, §§ 170.01, 170.20 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.01 (Matthew Bender)

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

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

1 California Civil Practice: Torts §§ 16:1–16:3 (Thomson Reuters)

1005. Business Proprietor's Liability for the Negligent/Intentional/Criminal Conduct of Others

[An owner of a business that is open to the public/A landlord] must use reasonable care to protect [patrons/guests/tenants] from another person's harmful conduct on [his/her/its] property if the [owner/landlord] can reasonably anticipate such conduct.

New September 2003

Sources and Authority

- "[T]he property holder only 'has a duty to protect against types of crimes of which he has notice and which are likely to recur if the common areas are not secure.' The court's focus in determining duty ' " 'is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.' [Citation.]" ' " (*Janice H. v. 696 North Robertson, LLC* (2016) 1 Cal.App.5th 586, 594 [205 Cal.Rptr.3d 103], internal citation omitted.)

"[O]nly when 'heightened' foreseeability of third party criminal activity on the premises exists-shown by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location-does the scope of a business proprietor's special-relationship-based duty *include an obligation to provide guards* to protect the safety of patrons." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 240 [30 Cal.Rptr.3d 145, 113 P.3d 1159], internal citations and footnote omitted, original italics.)

- "Here [defendant] argues it has no duty unless and until it experiences a similar criminal incident. We disagree. While a property holder generally has a duty to protect against types of crimes of which he is on notice, the absence of previous occurrences does not end the duty inquiry. We look to all of the factual circumstances to assess foreseeability." (*Janice H., supra*, 1 Cal.App.5th at p. 595, internal citation omitted.)

- "Even when proprietors ... have no duty ... to provide a security guard or undertake other similarly burdensome preventative measures, the proprietor is not necessarily insulated from liability under the special relationship doctrine. A proprietor that has no duty ... to hire a security guard or to undertake other similarly burdensome preventative measures still owes a duty of due care to a patron or invitee by virtue of the special relationship, and there are circumstances (apart from the failure to provide a security guard or undertake other similarly burdensome preventative measures) that may give rise to liability based upon the proprietor's special relationship." (*Delgado, supra,* 36 Cal.4th at pp. 240-241.)

- A business proprietor is not an insurer of the safety of his invitees, "but he is required to exercise reasonable care for their safety and is liable for injuries resulting from a breach of this duty. The general duty includes not only the duty to inspect the premises in order to uncover dangerous conditions, but, as well, the duty to take affirmative action to control the wrongful acts of third

persons which threaten invitees where the occupant has reasonable cause to anticipate such acts and the probability of injury resulting therefrom." (*Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114, 121 [52 Cal.Rptr. 561, 416 P.2d 793], internal citations omitted.)

- "Once a court finds that the defendant was under a duty to protect the plaintiff, it is for the factfinder to decide whether the security measures were reasonable under the circumstances. The jury must decide whether the security was adequate." (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 131 [211 Cal.Rptr. 356, 695 P.2d 653], internal citation omitted.)

- "[A]s frequently recognized, a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676 [25 Cal.Rptr.2d 137, 863 P.2d 207], internal citations omitted.)

- "In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M., supra,* 6 Cal.4th at p. 674, internal citation omitted; *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 499-501 [229 Cal.Rptr. 456, 723 P.2d 573].)

- "[Restatement Second of Torts], Section 314A identifies 'special relations' which give rise to a duty to protect another. Section 344 of the Restatement Second of Torts expands on that duty as it applies to business operators." (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 823 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)section 344, provides:

  > A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure to the possessor to exercise reasonable care to
  >
  > (a) discover that such acts are being done or are likely to be done, or
  >
  > (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

- Section 344 has been followed by California courts. (See *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 807 [205 Cal.Rptr. 842, 685 P.2d 1193]; *Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 823 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)

- Comment (f) to section 344 further explains the section's intent: "Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual. If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of

~~third persons, either generally or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford a reasonable protection."~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1129–1149

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.06 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities,* § 170.05 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.21 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.12, 334.23, 334.57 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.30 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.60 et seq. (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ § 16:5 (Thomson Reuters)

1246. Affirmative Defense—Design Defect—Government Contractor

[*Name of defendant***] may not be held liable for design defects in the [***product***] if it proves all of the following:**

1. **That [***name of defendant***] contracted with the United States government to provide the [***product***] for military use;**

2. **That the United States approved reasonably precise specifications for the [***product***];**

3. **That the [***product***] conformed to those specifications; and**

4. **That [***name of defendant***] warned the United States about the dangers in the use of the [***product***] that were known to [***name of defendant***] but not to the United States.**

New June 2010; Revised December 2010

Directions for Use

This instruction is for use if the defendant's product whose design is challenged was provided to the United States government for military use. The essence of the defense is that the plaintiff should not be able to impose on a government contractor a duty under state law that is contrary to the duty imposed by the government contract. (See *Boyle v.United Technologies Corp.* (1988) 487 U.S. 500, 508–509 [108 S.Ct. 2510, 101 L.Ed.2d 442].)

It has been stated that the defense is not limited to military contracts (see *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 710 [99 Cal.Rptr.3d 418]), though no California court has expressly so held.

Different standards and elements apply in a failure-to-warn case. For an instruction for use in such a case, see CACI No. 1247, *Affirmative Defense—Failure to Warn—Government Contractor.*

Sources and Authority

- "The [United States] Supreme Court noted that in areas of ' "uniquely federal interests" ' state law may be preempted or displaced by federal law, and that civil liability arising from the performance of federal procurement contracts is such an area. The court further determined that preemption or displacement of state law occurs in an area of uniquely federal interests only where a ' "significant conflict" ' exists between an identifiable federal policy or interest and the operation of state law. The court concluded that 'state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.' " (*Oxford, supra,* 177 Cal.App.4th at p. 708, quoting *Boyle, supra*, 487 U.S. at pp. 500, 504, 507, 512.)

- "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to

those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision." (*Boyle, supra*, 487 U.S. at pp. 512–513.)

- "[T]he fact that a company supplies goods to the military does not, in and of itself, immunize it from liability for the injuries caused by those goods. Where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 811.)

- "[W]here a purchase does not involve 'reasonably precise specifications' bearing on the challenged design feature, the government necessarily has not made a considered evaluation of and affirmative judgment call about the design." (*Kase v. Metalclad Insulation Corp.* (2016) 6 Cal.App.5th 623, 628 [212 Cal.Rptr.3d 198].)

- "In our view, if a product is produced according to military specifications and used by the military because of particular qualities which serve a military purpose, and is incidentally sold commercially as well, that product may nonetheless still qualify as military equipment under the military contractor defense." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319 [273 Cal.Rptr. 214]; see also *Kase, supra*, 6 Cal.App.5th at p. 637 ["We continue to agree with *Jackson* and *Oxford* that a product's commercial availability does not necessarily foreclose the government contractor defense."].)

- "While courts such as the court in *Hawaii* have sought to confine the government contractor defense to products that are made exclusively for the military, we agree with the court in *Jackson* that this limitation is unduly confining. Though the court in *Boyle* discussed the parameters of the contractor defense in terms of 'military equipment,' use of that term appears to have followed from the facts of that case. Other courts considering this issue have concluded the defense is not limited to military contracts. … [*Boyle's*] application focuses instead on whether the issue or area is one involving 'uniquely federal interests' and, if so, whether the application of state law presents a 'significant conflict' with federal policy." (*Oxford, supra*, 177 Cal.App.4th at p. 710; the split on this issue in the federal and other state courts is noted in *Carley v. Wheeled Coach* (3d Cir. 1993) 991 F.2d 1117, 1119, fn. 1.)

- "[T]he Supreme Court in *Boyle* did not expressly limit its holding to products liability causes of action. Thus, the government contractor defense is applicable to related negligence claims." (*Oxford, supra*, 177 Cal.App.4th at p. 711.)

- "[I]n order to satisfy the first condition—government 'approval' … the government's

involvement must transcend rubber stamping." (*Oxford, supra,* 177 Cal.App.4th at p. 712.)

- "[A]pproval must result from a 'continuous exchange' and 'back and forth dialogue' between the contractor and the government. When the government engages in a thorough review of the allegedly defective design and takes an active role in testing and implementing that design, *Boyle's* first element is met." (*Getz v. Boeing Co.* (9th Cir. 2011) 654 F.3d 852, 861, internal citation omitted.)

- "[T]he operative test for conformity with reasonably precise specifications turns on whether 'the alleged defect … exist[ed] independently of the design itself.' 'To say that a product failed to conform to specifications is just another way of saying that it was defectively manufactured.' Therefore, absent some evidence of a latent manufacturing defect, a military contractor can establish conformity with reasonably precise specifications by showing '[e]xtensive government involvement in the design, review, development and testing of a product' and by demonstrating 'extensive acceptance and use of the product following production.' " (*Getz, supra,* 654 F.3d at p. 864, internal citations omitted.)

- "Although the source of the government contractor defense is the United States' sovereign immunity, we have explicitly stated that 'the government contractor defense does not confer sovereign immunity on contractors.' " (*Rodriguez v. Lockheed Martin Corp.* (9th Cir. 2010) 627 F.3d 1259, 1265.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1538

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1270, 2:1316, 2:1631 (The Rutter Group)

1 California Products Liability Actions, Ch. 8, *Defenses*, § 8.05 (Matthew Bender)

2 Levy et al., California Torts, Ch. 21, *Aviation Tort Law*, § 21.02[6] (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 16, *Airplanes and Airports*, § 16.10[5] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.104[23] (Matthew Bender)

1804A. Use of Name or Likeness (Civ. Code, § 3344)

[*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***] knowingly used [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [on merchandise/ [or] to advertise or sell [***describe what is being advertised or sold***]];**

2. **That the use did not occur in connection with a news, public affairs, or sports broadcast or account, or with a political campaign;**

3. **That [***name of defendant***] did not have [***name of plaintiff***]'s consent;**

4. **That [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] was directly connected to [***name of defendant***]'s commercial purpose;**

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

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

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

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

Different standards apply if the use is in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. (See Civ. Code, § 3344(d); *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421–426 [198 Cal.Rptr. 342].) The plaintiff bears the burden of proving the nonapplicability of these exceptions. (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416–417 [114 Cal.Rptr.2d 307].) Element 2 may be omitted if there is no question of fact with regard to this issue. See CACI No. 1804B, *Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*, for an instruction to use if one of the exceptions of Civil Code section 3344(d) applies.

If plaintiff alleges that the use was not covered by Civil Code section 3344(d) (e.g., not a "news"

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

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

Sources and Authority

- Liability for Use of Name or Likeness. Civil Code section 3344.

- "Civil Code section 3344 provides a statutory cause of action for commercial misappropriation that complements, rather than codifies, the common law misappropriation cause of action. ~~Civil Code section 3344 is "a commercial appropriation statute which complements the common law tort of appropriation.~~" (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 13 [206 Cal.Rptr.3d 884 ~~*KNB Enters. v. Matthews* (2000) 78 Cal.App.4th 362, 366–367 [92 Cal.Rptr.2d 713~~].)

- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enters v. Matthews* (2000) ~~*, supra,*~~ 78 Cal.App.4th 362, ~~at p.~~ 367 [92 Cal.Rptr.2d 713].)

- "There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. To prove the common law cause of action, the plaintiff must establish: ' "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." [Citation.]' To prove the statutory remedy, a plaintiff must present evidence of 'all the elements of the common law cause of action' and must also prove 'a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.' " (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200], internal citations omitted.)

- "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood, supra,* 149 Cal.App.3d at p. 417, fn. 6, internal citation omitted.)

- "[T]he single-publication rule as codified in [Civil Code] section 3425.3 applies, in general, to a cause of action for unauthorized commercial use of likeness." (*Christoff v. Nestle USA, Inc.* (2009) 47 Cal.4th 468, 476 [97 Cal.Rptr.3d 798, 213 P.3d 132].)

- "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. ... Throughout this litigation plaintiffs have borne the burden of establishing that their names and

likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d).” (*Gionfriddo, supra*, 94 Cal.App.4th at pp. 416–417, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 681–683

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

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

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

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

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

VF-1902. False Promise

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] make a promise to [***name of plaintiff***]?**
____ Yes ____ No

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

2. Did [*name of defendant***] intend to perform this promise when [he/she] made it?**
____ Yes ____ No

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

3. Did [*name of defendant***] intend that [***name of plaintiff***] rely on this promise?**
____ 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***] reasonably rely on this promise?**
____ Yes ____ No

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

5. Did [*name of defendant***] perform the promised act?**
____ Yes ____ No

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

6. Was [*name of plaintiff***]'s reliance on [***name of defendant***]'s promise a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

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

form.

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

[a. Past economic loss

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

Total Past Economic Damages: $ _____]

[b. Future economic loss

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

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, June 2014, December 2015, December 2016

Directions for Use

This verdict form is based on CACI No. 1902, *False Promise.*

The special verdict forms in this section are intended only as models. They may need to be modified

depending on the facts of the case.

If multiple promises are at issue, question 1 should be repeated to specify each one; for example: "1. Did [*name of defendant*] promise [*name of plaintiff*] that [*specify promise*]?" [See *Ryan v. Crown Castle NG Networks, Inc.* (2016) 6 Cal.App.5th 775, 794 [211 Cal.Rptr.3d 743].) The rest of the questions will need to be repeated for each promise.

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 (or from different promises), replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

2022. Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit

In determining whether the seriousness of the harm to [*name of plaintiff***] outweighs the public benefit of [***name of defendant***]'s conduct, you should consider a number of factors.**

To determine the seriousness of the harm [*name of plaintiff***] suffered, you should consider the following:**

a. **The extent of the harm, meaning how much the condition [***name of defendant***] caused interfered with [***name of plaintiff***]'s use or enjoyment of [his/her] property, and how long that interference lasted.**

b. **The character of the harm, that is, whether the harm involved a loss from the destruction or impairment of physical things that [***name of plaintiff***] was using, or personal discomfort or annoyance.**

c. **The value that society places on the type of use or enjoyment invaded. The greater the social value of the particular type of use or enjoyment of land that is invaded, the greater is the seriousness of the harm from the invasion.**

d. **The suitability of the type of use or enjoyment invaded to the nature of the locality. The nature of a locality is based on the primary kind of activity at that location, such as residential, industrial, or other activity.**

e. **The extent of the burden (such as expense and inconvenience) placed on [***name of plaintiff***] to avoid the harm.**

To determine the public benefit of [*name of defendant***]'s conduct, you should consider:**

a. **The value that society places on the primary purpose of the conduct that caused the interference. The primary purpose of the conduct means [***name of defendant***]'s main objective for engaging in the conduct. How much social value a particular purpose has depends on how much its achievement generally advances or protects the public good.**

b. **The suitability of the conduct that caused the interference to the nature of the locality. The suitability of the conduct depends upon its compatibility to the primary activities carried on in the locality.**

c. **The practicability or impracticality of preventing or avoiding the invasion.**

New December 2015

Directions for Use

This instruction must be given with CACI No. 2021, *Private Nuisance—Essential Factual Elements*. (See *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 160−165 [184 Cal.Rptr.3d 26].) CACI No. 2021 has been found to be inadequate to express the requirement that the plaintiff must suffer *serious* harm without this additional guidance to the jury on how to determine whether the seriousness of the plaintiff's harm outweighs the public benefit of the defendant's conduct (CACI No. 2021, element 8). (See *Id.* at pp. 162−163.)

Sources and Authority

- " 'The interference with the protected interest must not only be substantial, but it must also be unreasonable', i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' " (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938–939 [55 Cal.Rptr.2d 724, 920 P.2d 669], internal citations omitted.)

- "Had the jury been instructed on the proper factors to consider when weighing the gravity of the harm against the social utility of [defendant]'s conduct and found [defendant] liable, the statement of these elements would be sufficient because in finding in favor of [plaintiff] the jury necessarily would have concluded that the harm was substantial. Without such instruction, it is not." (*Wilson, supra,* 234 Cal.App.4th at p. 163.)

- Restatement Second of Torts, section 827 provides:
  In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
  (a) the extent of the harm involved;
  (b) the character of the harm involved;
  (c) the social value that the law attaches to the type of use or enjoyment invaded;
  (d) the suitability of the particular use or enjoyment invaded to the character of the locality; and
  (e) the burden on the person harmed of avoiding the harm.

- Restatement Second of Torts, section 828 provides:
  In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:
  (a) the social value that the law attaches to the primary purpose of the conduct;
  (b) the suitability of the conduct to the character of the locality; and
  (c) the impracticability of preventing or avoiding the invasion.

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2010) Equity, § 169 et seq.

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.05 (Matthew Bender)

9 California Real Estate Law and Practice, Ch. 320, *The Law of Nuisance*, § 320.15 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.20 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.47 (Matthew Bender)

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.)

- "Intentional interference with prospective economic advantage has five elements: (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action~~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.~~" (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512 [213 Cal.Rptr.3d 568, 388 P.3d ~~800]~~*Youst v. Longo* ~~(1987) 43 Cal.3d 64, 71, fn. 6 [233 Cal.Rptr. 294, 729 P.2d~~ 728].)

- "The tort's requirements 'presuppose the relationship existed at the time of the defendant's allegedly tortious acts lest liability be imposed for actually and intentionally disrupting a relationship which has yet to arise.' " (*Roy Allan Slurry Seal, Inc., supra*, 2 Cal.5th at p. 518.)

- "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 v. Longo* (1987) 43 Cal.3d 64, 71~~, fn. 6~~ [233 Cal.Rptr. 294, 729 P.2d 728~~*Youst, supra,* 43 Cal.3d at p. 71~~, internal citations omitted.)

- "Under [the competition] privilege, ' "a competitor is free to divert business to himself as long as he uses fair and reasonable means.' [Citation.]' " (*I-CA Enterprises, Inc. v. Palram Americas, Inc.* (2015) 235 Cal.App.4th 257, 292−293 [185 Cal.Rptr.3d 24].)

- "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 act or fail to act in a manner that deprives the insured of the benefits of the policy. To act unreasonably is not a mere failure to exercise reasonable care. It means that the insurer must act or fail to act without proper cause. 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, December 2015

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].)

- " '[P]erformance of an act specifically authorized by the policy cannot, as a matter of law, constitute bad faith.' [¶] [I]n the insurance context, … ' "courts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power." ' The possible exception would be ' "those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement." ' " (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 557−558 [204 Cal.Rptr.3d 433], internal citations omitted.)

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

---

[*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 [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.**

To act or fail to act "unreasonably" means that the insurer had no proper cause for its conduct. In determining whether [*name of defendant***] acted unreasonably, 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, December 2015

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.)

- "The standard of good faith and fairness examines the reasonableness of the insurer's conduct, and mere errors by an insurer in discharging its obligations to its insured ' "does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been *unreasonable*. [Citations.]" ' " (*Graciano v. Mercury General Corp*. (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717], original italics.)

- "Generally, the reasonableness of an insurer's conduct 'must be evaluated in light of the totality of the circumstances surrounding its actions.' " (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 654 [203 Cal.Rptr.3d 785].)

- "[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].)

- "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. Ch. 12C-C, *Bad Faith—Requirements for First Party Bad Faith Action,* ¶¶ 12:822–12:1016 (The Rutter Group)

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)

2403. Breach of Employment Contract—Unspecified Term—Implied-in-Fact Promise Not to Discharge Without Good Cause

---

An employer promises to [discharge/demote] an employee only for good cause if it is reasonable for an employee to conclude, from the employer's words or conduct, that [he/she] will be [discharged/demoted] only for good cause.

In deciding whether [*name of defendant***] promised to [discharge/demote] [***name of plaintiff***] only for good cause, you may consider, among other factors, the following:**

(a) [*Name of defendant***]'s personnel policies [and/or] practices;**

(b) [*Name of plaintiff***]'s length of service;**

(c) Any raises, commendations, positive evaluations, and promotions received by [*name of plaintiff***]; [and]**

(d) Whether [*name of defendant***] said or did anything to assure [***name of plaintiff***] of continued employment; [and]**

(e) [*Insert other relevant factor(s).***]**

Length of service, raises, and promotions by themselves are not enough to imply such a promise, although they are factors for you to consider.

New September 2003; Revised April 2009, June 2013

Directions for Use

This instruction should be read when an employee is basing his or her claim of wrongful discharge on an implied covenant not to terminate except for good cause. Only those factors that apply to the facts of the particular case should be read.

In certain cases, it may be necessary to instruct the jury that if it finds there is an at-will provision in an express written agreement, there may not be an implied agreement to the contrary. (See *Faigin v. Signature Group Holdings, Inc.* (2012) 211 Cal.App.4th 726, 739 [150 Cal.Rptr.3d 123] [there cannot be a valid express contract and an implied contract, each embracing the same subject, but requiring different results].)

Sources and Authority

- Express and Implied Contracts. Civil Code sections 1619-1621.
- "Labor Code section 2922 establishes a statutory presumption of at-will employment. However, an

employer and an employee are free to depart from the statutory presumption and specify that the employee will be terminated only for good cause, either by an express, or an implied, contractual agreement." (*Stillwell v. The Salvation Army* (2008) 167 Cal.App.4th 360, 380 [84 Cal.Rptr.3d 111], internal citations omitted.)

- "[M]ost cases applying California law … have held that an at-will provision in an *express written agreement*, signed by the employee, *cannot* be overcome by proof of an implied contrary understanding." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 340 fn. 10 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics.)

- "Where there is no express agreement, the issue is whether other evidence of the parties' conduct has a 'tendency in reason' to demonstrate the existence of an actual mutual understanding on particular terms and conditions of employment. If such evidence logically permits conflicting inferences, a question of fact is presented." (*Guz, supra*, 24 Cal.4th at p. 337, internal citations omitted.)

- "The question whether such an implied-in-fact agreement [to termination only for cause] exists is a factual question for the trier of fact unless the undisputed facts can support only one reasonable conclusion." (*Faigin, supra*, 211 Cal.App.4th at p. 739.)

- "In the employment context, factors apart from consideration and express terms may be used to ascertain the existence and content of an employment agreement, including 'the personnel policies or practices of the employer, the employee's longevity of service, actions or communications by the employer reflecting assurances of continued employment, and the practices of the industry in which the employee is engaged.' " (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 680 [254 Cal.Rptr. 211, 765 P.2d 373], internal citation omitted.)

- "[A]n employee's *mere* passage of time in the employer's service, even where marked with tangible indicia that the employer approves the employee's work, cannot *alone* form an implied-in-fact contract that the employee is no longer at will. Absent other evidence of the employer's intent, longevity, raises and promotions are their own rewards for the employee's continuing valued service; they do not, *in and of themselves*, additionally constitute a contractual guarantee of future employment security." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 341–342 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics.)

- "We agree that disclaimer language in an employee handbook or policy manual does not necessarily mean an employee is employed at will. But even if a handbook disclaimer is not controlling in every case, neither can such a provision be ignored in determining whether the parties' conduct was intended, and reasonably understood, to create binding limits on an employer's statutory right to terminate the relationship at will. Like any direct expression of employer intent, communicated to employees and intended to apply to them, such language must be taken into account, along with all other pertinent evidence, in ascertaining the terms on which a worker was employed." (*Guz, supra*, 24 Cal.4th at p. 340, internal citations omitted.)

- "Conceptually, there is no rational reason why an employer's policy that its employees will not be demoted except for good cause, like a policy restricting termination or providing for severance pay, cannot become an implied term of an employment contract. In each of these instances, an employer

promises to confer a significant benefit on the employee, and it is a question of fact whether that promise was reasonably understood by the employee to create a contractual obligation." (*Scott v. Pac. Gas & Elec. Co.* (1995) 11 Cal.4th 454, 464 [46 Cal.Rptr.2d 427, 904 P.2d 834].)

- "[Employer] retained the right to terminate [employee] for any lawful reason. Thus, … the fact that [employer] was obligated to pay compensation if it terminated [employee] for reasons other than his misconduct did not convert an otherwise at-will agreement into a for-cause agreement." (*Popescu v. Apple Inc.* (2016) 1 Cal.App.5th 39, 59 [204 Cal.Rptr.3d 302].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 233, 237, 238

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-B, *Agreements Limiting At–Will Termination*, ¶¶ 4:81, 4:105, 4:112 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.6–8.16

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.05[2][a]–[e] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.01, 249.13, 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.22, 100.25–100.27, 100.29, 100.34 (Matthew Bender)

California Civil Practice: Employment Litigation §§ 6:14–6:16 (Thomson Reuters)

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

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

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

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

   [**or**]

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

   [**or**]

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

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

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

5. **That [***name of defendant***]'s decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***] was a substantial factor in causing [him/her] harm.**

[[*Name of plaintiff***] does not have to prove [discrimination/harassment] in order to be protected from retaliation. If [he/she] [reasonably believed that [***name of defendant***]'s conduct was unlawful/requested a [disability/religious] accommodation], [he/she] may prevail on a retaliation claim even if [he/she] does not present, or prevail on, a separate claim for [discrimination/harassment/[***other***]].]**

New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010, June 2012, December 2012, June 2013, June 2014, June 2016, December 2016

Directions for Use

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

disability, regardless of whether the request was granted. (Gov. Code, § 12940(*l*)(4) [religious practice], (m)(2) [disability].)

Read the first option for element 2 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Give both the first and second options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select "conduct" in element 3 if the second option or both the first and second options are included for element 2.

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

Element 3 requires that the protected activity be a substantial motivating reason for the retaliatory acts. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

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

This instruction has been criticized in dictum because it is alleged that there is no element requiring retaliatory intent. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231 [136 Cal.Rptr.3d 472].) The court urged the Judicial Council to redraft the instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA.

The jury in the case was instructed per element 3 "that Richard Joaquin's reporting that he had been sexually harassed was a motivating reason for the City of Los Angeles' decision to terminate Richard Joaquin's employment or deny Richard Joaquin promotion to the rank of sergeant."The committee believes that the instruction as given is correct for the intent element in a retaliation case. (Cf. *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 127−132 [199 Cal.Rptr.3d 462] [for disability discrimination, "substantial motivating reason" is only language required to express intent].) However, in cases such as *Joaquin* that involve allegations of a prohibited motivating reason (based on a report of

sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified), the instruction may need to be modified to make it clear that plaintiff must prove that defendant acted based on the *prohibited* motivating reason and not the *permitted* motivating reason.

Sources and Authority

- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).

- Retaliation for Requesting Reasonable Accommodation for Religious Practice and Disability Prohibited. Government Code section 12940(*l*)(4), (m)(2).

- "Person" Defined Under Fair Employment and Housing Act. Government Code section 12925(d).

- Prohibited Retaliation. Title 2 California Code of Regulations section 11021.

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

- "Actions for retaliation are 'inherently fact-driven'; it is the jury, not the court, that is charged with determining the facts." (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 299 [156 Cal.Rptr.3d 851].)

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

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

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

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

- "Clearly, section 12940, subdivision (h) encompasses a broad range of protected activity. An employee need not use specific legal terms or buzzwords in opposing discrimination. Nor is it necessary for an employee to file a formal charge. The protected activity element may be established by evidence that the plaintiff threatened to file a discrimination charge, by a showing that the plaintiff mistakenly, but reasonably and sincerely believed he was opposing discrimination, or by evidence an employer believed the plaintiff was a potential witness in another employee's FEHA action." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 652 [163 Cal.Rptr.3d 392], internal citations and footnote omitted.)

- " 'Standing alone, an employee's unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee's opposition was based upon a reasonable belief that the employer was engaging in discrimination.' '[C]omplaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct.' [¶] But employees need not explicitly and directly inform their employer that they believe the employer's conduct was discriminatory or otherwise forbidden by FEHA." (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1046 [207 Cal.Rptr.3d 120], internal citation omitted.)

- "Notifying one's employer of one's medical status, even if such medical status constitutes a 'disability' under FEHA, does not fall within the protected activity identified in subdivision (h) of section 12940—i.e., it does not constitute engaging in opposition to any practices forbidden under FEHA or the filing of a complaint, testifying, or assisting in any proceeding under FEHA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 247 [206 Cal.Rptr.3d 841].)

- "[Plaintiff]'s advocacy for the disabled community and opposition to elimination of programs that might benefit that community do not fall within the definition of protected activity. [Plaintiff] has not shown the [defendant]'s actions amounted to discrimination against disabled citizens, but even if they could be so construed, discrimination by an employer against members of the general public is not a prohibited *employment* practice under the FEHA." (*Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 383 [209 Cal.Rptr.3d 809], original italics.)

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

internal citations omitted.)

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

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

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

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

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

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

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

- ~~"[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is~~

~~protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination." (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446,. 473–474 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)~~

- " 'The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints … .' Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result' that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer." (*Steele, supra,* 162 Cal.App.4th at p. 1255, internal citations omitted.)

- " 'The plaintiff's burden is to prove, by competent evidence, that the employer's proffered justification is mere pretext; i.e., that the presumptively valid reason for the employer's action was in fact a coverup. … In responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff cannot " 'simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee ' "must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them "unworthy of credence," … and hence infer "that the employer did not act for the [asserted] non-discriminatory reasons." ' " ' " (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1409 [194 Cal.Rptr.3d 689].)

- "Government Code section 12940, subdivision (h), does not shield an employee against termination or lesser discipline for either lying or withholding information during an employer's internal investigation of a discrimination claim. In other words, public policy does not protect deceptive activity during an internal investigation. Such conduct is a legitimate reason to terminate an at-will employee." (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1528 [152 Cal.Rptr.3d 154], footnotes omitted.)

- "Although appellant does not argue she was constructively discharged, such a claim is not necessary to find unlawful retaliation." (*McCoy, supra,* 216 Cal.App.4th at p. 301.)

- "The phrase 'because of' [in Gov. Code, § 12940(a)] is ambiguous as to the type or level of intent (i.e., motivation) and the connection between that motivation and the decision to treat the disabled person differently. This ambiguity is closely related to [defendant]'s argument that it is liable only if motivated by discriminatory animus. [¶] The statutory ambiguity in the phrase 'because of" was resolved by our Supreme Court about six months after the first jury trial [in *Harris, supra,* 56 Cal.4th at p. 203]." (*Wallace, supra,* 245 Cal.App.4th at p. 127.)

Secondary Sources

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

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

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

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

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

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

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] [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 [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];**

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.**

[*Name of plaintiff***] does not need to prove that [***name of defendant***] held any ill will or animosity toward [him/her] personally because [he/she] was [perceived to be] disabled. [On the other hand, if you find that [***name of defendant***] did hold ill will or animosity toward [***name of plaintiff***] because [he/she] was [perceived to be] disabled, you may consider this fact, along with all the other evidence, in determining whether [***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].]**

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013, December 2014, December 2016

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 if the claim of discrimination is based on 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).)

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 Gov. Code, § 12926(j)(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 … ."

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*.)

Give the optional sentence in the last paragraph if there is evidence that the defendant harbored personal animus against the plaintiff because of his or her disability.

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 Association 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.)
- "The distinction between cases involving *direct evidence* of the employer's motive for the adverse employment action and cases where there is only *circumstantial evidence* of the employer's

discriminatory motive is critical to the outcome of this appeal. There is a vast body of case law that addresses proving discriminatory intent in cases where there was no direct evidence that the adverse employment action taken by the employer was motivated by race, religion, national origin, age or sex. In such cases, proof of discriminatory motive is governed by the three-stage burden-shifting test established by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* [(1973) 411 U.S. 792 [93 S. Ct. 1817, 36 L. Ed. 2d 668]. (*Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 123 [199 Cal.Rptr.3d 462], original italics, footnote and internal citations omitted.)

- "The three-stage framework and the many principles adopted to guide its application do not apply in discrimination cases where, like here, the plaintiff presents direct evidence of the employer's motivation for the adverse employment action. In many types of discrimination cases, courts state that direct evidence of intentional discrimination is rare, but disability discrimination cases often involve direct evidence of the role of the employee's actual or perceived *disability* in the employer's decision to implement an adverse employment action. Instead of litigating the employer's reasons for the action, the parties' disputes in disability cases focus on whether the employee was able to perform essential job functions, whether there were reasonable accommodations that would have allowed the employee to perform those functions, and whether a reasonable accommodation would have imposed an undue hardship on the employer. To summarize, courts and practitioners should not automatically apply principles related to the *McDonnell Douglas* test to disability discrimination cases. Rather, they should examine the critical threshold issue and determine whether there is direct evidence that the motive for the employer's conduct was related to the employee's physical or mental condition." (*Wallace, supra*, 245 Cal.App.4th at p. 123, original italics, footnote and internal citations omitted; cf. *Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 234 fn. 3 [206 Cal.Rptr.3d 841] [case did not present so-called "typical" disability discrimination case, as described in *Wallace*, in that the parties disputed the employer's reasons for terminating plaintiff's employment].)

- "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.)

- "Although the same statutory language that prohibits disability discrimination also prohibits discrimination based on race, age, sex, and other factors, we conclude that disability discrimination claims are fundamentally different from the discrimination claims based on the other factors listed in section 12940, subdivision (a). These differences arise because (1) additional statutory provisions apply to disability discrimination claims, (2) the Legislature made separate findings and declarations about protections given to disabled persons, and (3) discrimination cases involving race, religion, national origin, age and sex, often involve pretexts for the adverse employment action—an issue about motivation that appears less frequently in disability discrimination cases." (*Wallace, supra*, 245 Cal.App.4th at p. 122.)

- "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.)

- "To establish a prima facie case of mental disability discrimination under FEHA, a plaintiff must show the following elements: (1) She suffers from a mental disability; (2) she is otherwise qualified to do the job with or without reasonable accommodation; and (3) she was subjected to an adverse employment action because of the disability." (*Higgins-Williams v. Sutter Medical Foundation* (2015) 237 Cal.App.4th 78, 84 [187 Cal.Rptr.3d 745].)

- "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,* 220 Cal.App.4th at p. 659, 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.)

- "We note that the court in *Harris* discussed the employer's motivation and the link between the employer's consideration of the plaintiff's physical condition and the adverse employment action without using the terms "animus," "animosity," or "ill will." The absence of a discussion of these terms necessarily implies an employer can violate section 12940, subdivision (a) by taking an adverse employment action against an employee "because of" the employee's physical disability even if the employer harbored no animosity or ill will against the employee or the class of persons with that disability." (*Wallace, supra,* 245 Cal.App.4th at p. 128.)

- Based on *Harris,* we conclude that an employer has treated an employee differently 'because of' a disability when the disability is a substantial motivating reason for the employer's decision to subject

the [employee] to an adverse employment action. This conclusion resolves how the jury should have been instructed on [defendant]'s motivation or intent in connection with the disability discrimination claim." (*Wallace, supra,* 245 Cal.App.4th at p. 128.)

- "We conclude that where, as here, an employee is found to be able to safely perform the essential duties of the job, a plaintiff alleging disability discrimination can establish the requisite employer intent to discriminate by proving (1) the employer knew that plaintiff had a physical condition that limited a major life activity, or perceived him to have such a condition, and (2) the plaintiff's actual or perceived physical condition was a substantial motivating reason for the defendant's decision to subject the plaintiff to an adverse employment action. … [T]his conclusion is based on (1) the interpretation of section 12940's term 'because of' adopted in *Harris*; (2) our discussion of the meaning of the statutory phrase 'to discriminate against'; and (3) the guidance provided by the current versions of CACI Nos. 2540 and 2507. [¶] Therefore, the jury instruction that [plaintiff] was required to prove that [defendant] 'regarded or treated [him] as having a disability in order to discriminate' was erroneous." (*Wallace, supra,* 245 Cal.App.4th at p. 129.)

- "The word 'animus' is ambiguous because it can be interpreted narrowly to mean 'ill will' or 'animosity' or can be interpreted broadly to mean 'intention.' In this case, it appears [defendant] uses 'animus' to mean something more than the intent described by the substantial-motivating-reason test adopted in *Harris*. (*Wallace, supra,* 245 Cal.App.4th at p. 130, fn. 14, internal citation omitted.)

- "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)

2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her] [***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 plaintiff***] had/[***name of defendant***] treated [***name of plaintiff***] as if [he/she] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

[4. That [*name of defendant***] knew of [***name of plaintiff***]'s [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties with reasonable accommodation for [his/her] [***e.g., physical condition***];**

6. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [***e.g., physical condition***];**

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

8. **That [***name of defendant***]'s failure to provide reasonable accommodation was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In determining whether [*name of plaintiff***]'s [***e.g., physical condition***] limits [***insert major life activity***], you must consider the [***e.g., physical condition***] [in its unmedicated state/without assistive devices/[***describe mitigating measures***]].]**

New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010, December 2011, June 2012, June 2013

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

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).)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(i)) is alleged, omit "that limited [*insert major life activity*]" in elements 3 and 4 and do not include the last paragraph. (Compare Gov. Code, § 12926(i) with Gov. Code, § 12926(j), (m) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include "[*name of defendant*] treated [*name of plaintiff*] as if [he/she] had" in element 3, and delete optional element 4. (See Gov. Code, § 12926(j)(4), (m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, include "**[***name of plaintiff*] had" in element 3, and give element 4.

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).)

The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P.3d 118].) While the court left open the question of whether the same rule should apply to cases under Government Code section 12940(m) (see *id.* at p. 265), appellate courts have subsequently placed the burden on the employee to prove that he or she would be able to perform the job duties with reasonable accommodation (see element 5). (See *Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 766 [123 Cal.Rptr.3d 562]; *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190].)

There may still be an unresolved issue if the employee claims that the employer failed to provide him or her with other suitable job positions that he or she might be able to perform with reasonable accommodation. The rule has been that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142]; see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 745 [151 Cal.Rptr.3d 292]; *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, other courts have said that it is the employee's burden to prove that a reasonable accommodation could have been made, i.e., that he or she was qualified for a position in light of the potential accommodation. (See *Nadaf-Rahrov, supra,* 166 Cal.App.4th at p. 978; see also *Cuiellette, supra,* 194 Cal.App.4th at p. 767 [plaintiff proves he or she is a qualified individual by establishing that he or she can perform the essential functions of the position to which reassignment is sought].) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process*), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra,* 53 Cal.App.4th at pp. 950–951.)

Sources and Authority

- Reasonable Accommodation Required. Government Code section 12940(m).
- "Reasonable Accommodation" Explained. Government Code section 12926(p).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "The essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability." (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)
- "Under the FEHA, 'reasonable accommodation' means 'a modification or adjustment to the workplace that enables the employee to perform the essential functions of the job held or desired.' " (*Cuiellette, supra,* 194 Cal.App.4th at p. 766.)
- "Reasonable accommodations include '[j]ob restructuring, part-time or modified work schedules, *reassignment to a vacant position,* … and other similar accommodations for individuals with disabilities.' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 968 [181 Cal.Rptr.3d 553], original italics.)
- "The examples of reasonable accommodations in the relevant statutes and regulations include reallocating nonessential functions or modifying how or when an employee performs an essential function, but not eliminating essential functions altogether. FEHA does not obligate the employer to accommodate the employee by excusing him or her from the performance of essential functions." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 375 [184 Cal.Rptr.3d 9].)
- "A term of leave from work can be a reasonable accommodation under FEHA, and, therefore, a request for leave can be considered to be a request for accommodation under FEHA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 243 [206 Cal.Rptr.3d 841], internal citation omitted.)

- “The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, … an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of ‘reasonable accommodation’ by way of example). Had the Legislature intended the employer to bear the burden of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, … it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff.” (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 977–978, internal citations omitted.)

- “ ‘If the employee cannot be accommodated in his or her existing position and the requested accommodation is reassignment, an employer must make affirmative efforts to determine whether a position is available. [Citation.] A reassignment, however, is not required if “there is no vacant position for which the employee is qualified.” [Citations.] “The responsibility to reassign a disabled employee who cannot otherwise be accommodated does ‘not require creating a new job, moving another employee, promoting the disabled employee or violating another employee's rights … .” ’ [Citations.] “What is required is the ‘duty to reassign a disabled employee if an already funded, vacant position at the same level exists.’ [Citations.]” [Citations.]’ ” (*Furtado, supra,* 212 Cal.App.4th at p. 745.)

- “[A] disabled employee seeking reassignment to a vacant position ‘is entitled to preferential consideration.’ ” (*Swanson, supra,* 232 Cal.App.4th at p. 970.)

- “Although no particular form of request is required, ‘ “[t]he duty of an employer reasonably to accommodate an employee's handicap does not arise until the employer is ‘aware of respondent's disability and physical limitations.’ … ” ’ ‘ “[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge. …” … ’ ” (*Avila, supra,* 165 Cal.App.4th at pp. 1252–1253, internal citations omitted.)

- “Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an ‘undue hardship.’ ” (*Prilliman, supra,* 53 Cal.App.4th at p. 947.)

- “ ‘Ordinarily the reasonableness of an accommodation is an issue for the jury.’ ” (*Prilliman, supra,* 53 Cal.App.4th at p. 954, internal citation omitted.)

- “[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA.” (*Bagatti, supra,* 97 Cal.App.4th at p. 362.)

- "Under the FEHA ... an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an 'undue hardship' on its operations or if there is no vacant position for which the employee is qualified." (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)

- "On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal, interactive process to determine any effective accommodations." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)

- "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Moore, supra*, 248 Cal.App.4th at p. 242.)

- "[A] pretextual termination of a perceived-as-disabled employee's employment in lieu of providing reasonable accommodation or engaging in the interactive process does not provide an employer a reprieve from claims for failure to accommodate and failure to engage in the interactive process." (*Moore, supra*, 248 Cal.App.4th at p. 244.)

- "Appellant also stated a viable claim under section 12940, subdivision (m), which mandates that an employer provide reasonable accommodations for the known physical disability of an employee. She alleged that she was unable to work during her pregnancy, that she was denied reasonable accommodations for her pregnancy-related disability and terminated, and that the requested accommodations would not have imposed an undue hardship on [defendant]. A finite leave of greater than four months may be a reasonable accommodation for a known disability under the FEHA." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1341 [153 Cal.Rptr.3d 367].)

- "To the extent [plaintiff] claims the [defendant] had a duty to await a vacant position to arise, he is incorrect. A finite leave of absence may be a reasonable accommodation to allow an employee time to recover, but FEHA does not require the employer to provide an indefinite leave of absence to await possible future vacancies." (*Nealy, supra*, 234 Cal.App.4th at pp. 377−378.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 762

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2250–9:2285, 9:2345–9:2347 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.32[2][c], 41.51[3] (Matthew Bender)

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

California Civil Practice: Employment Litigation § 2:50 (Thomson Reuters)

2546. Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive Process (Gov. Code, § 12940(n))

[*Name of plaintiff***] contends that [***name of defendant***] failed to engage in a good-faith interactive process with [him/her] to determine whether it would be possible to implement effective reasonable accommodations so that [***name of plaintiff***] [***insert job requirements requiring accommodation***]. In order to establish this claim, [***name of plaintiff***] must prove 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***] had [a] [***select term to describe basis of limitations, e.g., physical condition***] that was known to [***name of defendant***];**

4. **That [***name of plaintiff***] requested that [***name of defendant***] make reasonable accommodation for [his/her] [***e.g., physical condition***] so that [he/she] would be able to perform the essential job requirements;**

5. **That [***name of plaintiff***] was willing to participate in an interactive process to determine whether reasonable accommodation could be made so that [he/she] would be able to perform the essential job requirements;**

6. **That [***name of defendant***] failed to participate in a timely good-faith interactive process with [***name of plaintiff***] to determine whether reasonable accommodation could be made;**

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

8. **That [***name of defendant***]'s failure to engage in a good-faith interactive process was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2007; Revised April 2009, December 2009

Directions for Use

In elements 3 and 4, select a term 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."

Modify elements 3 and 4, as necessary, if the employer perceives the employee to have a disability. (See *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 61, fn. 21 [43 Cal.Rptr.3d 874].)

In element 4, specify the position at issue and the reason why some reasonable accommodation was needed. In element 5, you may add the specific accommodation requested, though the focus of this cause of action is on the failure to discuss, not the failure to provide.

For an instruction on a cause of action for failure to make reasonable accommodation, see CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements*. For an instruction defining "reasonable accommodation," see CACI No. 2542, *Disability Discrimination—"Reasonable Accommodation" Explained*.

There is a split of authority as to whether the employee must also prove that reasonable accommodation was possible before there is a violation for failure to engage in the interactive process. (Compare *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424–425 [69 Cal.Rptr.3d 1] [jury's finding that no reasonable accommodation was possible is not inconsistent with its finding of liability for refusing to engage in interactive process] and *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837] with *Nadaf-Rahrov v. The Nieman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 980–985 [83 Cal.Rptr.3d 190] [employee who brings a section 12940(n) claim bears the burden of proving a reasonable accommodation was available before the employer can be held liable under the statute]; see also *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1018–1019 [93 Cal.Rptr.3d 338] [attempting to reconcile conflict].)

Sources and Authority

- Good-Faith Interactive Process. Government Code section 12940(n).
- Federal Interpretive Guidance Incorporated. Government Code section 12926.1(e).
- Interactive Process. The Interpretive Guidance on title I of the Americans With Disabilities Act, title 29 Code of Federal Regulations Part 1630 Appendix.
- An employee may file a civil action based on the employer's failure to engage in the interactive process. (*Claudio, supra,* 134 Cal.App.4th at p. 243.)
- "Two principles underlie a cause of action for failure to provide a reasonable accommodation. First, the employee must request an accommodation. Second, the parties must engage in an interactive process regarding the requested accommodation and, if the process fails, responsibility for the failure rests with the party who failed to participate in good faith. ~~While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other.~~" (*Gelfo, supra,* 140 Cal.App.4th at p. 54, internal citations omitted.)
- "While a claim of failure to accommodate is independent of a cause of action for failure to engage in an interactive dialogue, each necessarily implicates the other." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 242 [206 Cal.Rptr.3d 841].)
- "FEHA requires an informal process with the employee to attempt to identify reasonable

accommodations, not necessarily ritualized discussions." (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 379 [184 Cal.Rptr.3d 9].)

- "The point of the interactive process is to find reasonable accommodation for a disabled employee, or an employee regarded as disabled by the employer, in order to *avoid* the employee's termination. Therefore, a pretextual termination of a perceived-as-disabled employee's employment in lieu of providing reasonable accommodation or engaging in the interactive process does not provide an employer a reprieve from claims for failure to accommodate and failure to engage in the interactive process." (*Moore, supra,* 248 Cal.App.4th at pp. 243−244, original italics.)

- "FEHA's reference to a 'known' disability is read to mean a disability of which the employer has become aware, whether because it is obvious, the employee has brought it to the employer's attention, it is based on the employer's own perception—mistaken or not—of the existence of a disabling condition or, perhaps as here, the employer has come upon information indicating the presence of a disability." (*Gelfo, supra,* 140 Cal.App.4th at p. 61, fn. 21.)

- "Once initiated, the employer has a continuous obligation to engage in the interactive process in good faith. 'Both employer and employee have the obligation "to keep communications open" and neither has "a right to obstruct the process." [Citation.] "Each party must participate in good faith, undertake reasonable efforts to communicate its concerns, and make available to the other information which is available, or more accessible, to one party. Liability hinges on the objective circumstances surrounding the parties' breakdown in communication, and responsibility for the breakdown lies with the party who fails to participate in good faith." [Citation.]' " (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 971−972 [181 Cal.Rptr.3d 553].)

- "[Employer] asserts that, if it had a duty to engage in the interactive process, the duty was discharged. 'If anything,' it argues, 'it was [employee] who failed to engage in a good faith interactive process.' [Employee] counters [employer] made up its mind before July 2002 that it would not accommodate [employee]'s limitations, and nothing could cause it reconsider that decision. Because the evidence is conflicting and the issue of the parties' efforts and good faith is factual, the claim is properly left for the jury's consideration." (*Gelfo, supra,* 140 Cal.App.4th at p. 62, fn. 23.)

- "None of the legal authorities that [defendant] cites persuades us that the Legislature intended that after a reasonable accommodation is granted, the interactive process continues to apply in a failure to accommodate context. … To graft an interactive process intended to apply to the determination of a reasonable accommodation onto a situation in which an employer failed to provide a reasonable, agreed-upon accommodation is contrary to the apparent intent of the FEHA and would not support the public policies behind that provision." (*A.M. v. Albertsons, LLC* (2009) 178 Cal.App.4th 455, 464 [100 Cal.Rptr.3d 449].)

- "[T]he verdicts on the reasonable accommodations issue and the interactive process claim are not inconsistent. They involve separate causes of action and proof of different facts. Under FEHA, an employer must engage in a good faith interactive process with the disabled employee to explore the alternatives to accommodate the disability. 'An employee may file a civil action based on the

employer's failure to engage in the interactive process.' Failure to engage in this process is a separate FEHA violation independent from an employer's failure to provide a reasonable disability accommodation, which is also a FEHA violation. An employer may claim there were no available reasonable accommodations. But if it did not engage in a good faith interactive process, 'it cannot be known whether an alternative job would have been found.' The interactive process determines which accommodations are required. Indeed, the interactive process could reveal solutions that neither party envisioned." (*Wysinger, supra,* 157 Cal.App.4th at pp. 424–425, internal citations omitted.)

- "We disagree … with *Wysinger's* construction of section 12940(n). We conclude that the availability of a reasonable accommodation (i.e., a modification or adjustment to the workplace that enables an employee to perform the essential functions of the position held or desired) is necessary to a section 12940(n) claim. [¶] Applying the burden of proof analysis in *Green, supra,* 42 Cal.4th 254, we conclude the burden of proving the availability of a reasonable accommodation rests on the employee." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 984–985.)

- "We synthesize *Wysinger, Nadaf-Rahrov,* and *Claudio* with our analysis of the law as follows: To prevail on a claim under section 12940, subdivision (n) for failure to engage in the interactive process, an employee must identify a reasonable accommodation that would have been available at the time the interactive process should have occurred. An employee cannot necessarily be expected to identify and request all possible accommodations during the interactive process itself because ' " '[e]mployees do not have at their disposal the extensive information concerning possible alternative positions or possible accommodations which employers have. …' " ' However, as the *Nadaf-Rahrov* court explained, once the parties have engaged in the litigation process, to prevail, the employee must be able to identify an available accommodation the interactive process should have produced: 'Section 12940[, subdivision](n), which requires proof of failure to engage in the interactive process, is the appropriate cause of action where the employee is unable to identify a specific, available reasonable accommodation while in the workplace and the employer fails to engage in a good faith interactive process to help identify one, but the employee is able to identify a specific, available reasonable accommodation through the litigation process.' " (*Scotch, supra,* 173 Cal.App.4th at pp. 1018–1019.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 936(2)

Chin, et al., California Practice Guide: Employment Litigation, Ch. 9-C, *Disability Discrimination—California Fair Employment and Housing Act (FEHA),* ¶¶ 9:2280–9:2285, 9:2345–9:2347 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.51[3][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.35[1][a] (Matthew Bender)

1 California Civil Practice: Employment Litigation, § 2:50 (Thomson Reuters)

2600. Violation of CFRA Rights—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] [refused to grant [him/her] [family care/medical] leave] [refused to return [him/her] to the same or a comparable job when [his/her] [family care/medical] leave ended] [***other violation of CFRA rights***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**

2. **That [***name of plaintiff***] [requested/took] leave [***insert one of the following:***]**

   [for the birth of [*name of plaintiff***]'s child or bonding with the child;]**

   [for the placement of a child with [*name of plaintiff***] for adoption or foster care;]**

   [to care for [*name of plaintiff***]'s [child/parent/spouse] who had a serious health condition;]**

   [for [*name of plaintiff***]'s own serious health condition that made [him/her] unable to perform the functions of [his/her] job with [***name of defendant***];]**

3. **That [***name of plaintiff***] provided reasonable notice to [***name of defendant***] of [his/her] need for [family care/medical] leave, including its expected timing and length. [If [***name of defendant***] notified [his/her/its] employees that 30 days' advance notice was required before the leave was to begin, then [***name of plaintiff***] must show that [he/she] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she] gave notice as soon as possible];**

4. **That [***name of defendant***] [refused to grant [***name of plaintiff***]'s request for [family care/medical] leave/refused to return [***name of plaintiff***] to the same or a comparable job when [his/her] [family care/medical] leave ended/***other violation of CFRA rights***];**

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

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

New September 2003; Revised October 2008

Directions for Use

This instruction is intended for use when an employee claims violation of the CFRA (Gov. Code, § 12945.1 et seq.). In addition to a qualifying employer's refusal to grant CFRA leave, CFRA violations include failure to provide benefits as required by CFRA and loss of seniority.

The last bracketed option in element 2 does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions. If there is a dispute concerning the existence of a "serious health condition," the court must instruct the jury as to the meaning of this term. (See Gov. Code, § 12945.2(c)(8).)

Give the bracketed sentence under element 3 only if the facts involve an expected birth, placement for adoption, or planned medical treatment, and there is evidence that the employer required 30 days' advance notice of leave. (See Cal. Code Regs., tit. 2, § 11091(a)(2).)

~~The last bracketed option in element 2 does not include leave taken for disability on account of pregnancy, childbirth, or related medical conditions. If there is a dispute concerning the existence of a "serious health condition," the court must instruct the jury as to the meaning of this term pursuant to Government Code section 12945.2(c)(8).~~

Sources and Authority

- California Family Rights Act. Government Code section 12945.2.

- "The CFRA entitles eligible employees to take up to 12 unpaid workweeks in a 12-month period for family care and medical leave to care for their children, parents, or spouses, or to recover from their own serious health condition. An employee who takes CFRA leave is guaranteed that taking such leave will not result in a loss of job security or other adverse employment actions. Upon an employee's timely return from CFRA leave, an employer must generally restore the employee to the same or a comparable position. An employer is not required to reinstate an employee who cannot perform her job duties after the expiration of a protected medical leave." (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 487 [130 Cal.Rptr.3d 350], footnote and internal citations omitted.)

- "[C]ourts have distinguished between two theories of recovery under the CFRA and the FMLA. 'Interference' claims prevent employers from wrongly interfering with employees' approved leaves of absence, and 'retaliation' or 'discrimination' claims prevent employers from terminating or otherwise taking action against employees because they exercise those rights." (*Richey v. AutoNation, Inc.* (2015) 60 Cal.4th 909, 920 [182 Cal. Rptr. 3d 644, 341 P.3d 438]~~-~~.)

- "An interference claim under CFRA does not invoke the burden shifting analysis of the *McDonnell Douglas* test. Rather, such a claim requires only that the employer deny the employee's entitlement to CFRA-qualifying leave. A CFRA interference claim 'consists of the following elements: (1) the employee's entitlement to CFRA leave rights; and (2) the employer's interference with or denial of those rights.' " (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 250 [206 Cal.Rptr.3d 841], internal citations omitted.)

- "The right to reinstatement is unwaivable but not unlimited." (*Richey, supra,* 60 Cal.4th at p. 919.)

- "It is not enough that [plaintiff's] mother had a serious health condition. [Plaintiff's] participation to provide care for her mother had to be 'warranted' during a 'period of treatment or supervision ... .' "

(*Pang v. Beverly Hospital, Inc.* (2000) 79 Cal.App.4th 986, 995 [94 Cal.Rptr.2d 643], internal citation and footnote omitted.)

- "[T]he relevant inquiry is whether a serious health condition made [plaintiff] unable to do her job at defendant's hospital, not her ability to do her essential job functions 'generally' … ." (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 214 [74 Cal.Rptr.3d 570, 180 P.3d 321].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 942–944

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview Of Key Statutes*, ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:146, 12:390, 12:421, 12:857, 12:1201, 12:1300 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, §§ 8.25[2], 8.30[1], [2], 8.31[2], 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][a], [b] (Matthew Bender)

California Civil Practice: Employment Litigation § 5:40 (Thomson Reuters)

2602. Reasonable Notice of CFRA Leave

For notice of the need for leave to be reasonable, [*name of plaintiff*] must make [*name of defendant*] aware that [he/she] needs [family care/medical] leave, when the leave will begin, and how long it is expected to last. The notice can be verbal or in writing and does not need to mention the law. An employer cannot require disclosure of any medical diagnosis, but should ask for information necessary to decide whether the employee is entitled to leave.

New September 2003

Sources and Authority

- Reasonable Notice Required. Government Code section 12945.2(h).
- CFRA Notice Requirements. Title 2 California Code of Regulations section 11091(a)(1).
- "An employee 'shall provide the employer with reasonable advance notice of the need for the leave.' 'An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA ... , or even mention CFRA ... , to meet the notice requirement; however, the employee must state the reason the leave is needed, such as, for example, the expected birth of a child or for medical treatment. The employer should inquire further of the employee if it is necessary to have more information about whether CFRA leave is being sought by the employee and obtain the necessary details of the leave to be taken.'" (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 6–7 [87 Cal.Rptr.2d 554], quoting Cal. Code Regs., tit. 2, § 7297.4(a)(1).)
- "The employee must 'provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA-qualifying leave, and the anticipated timing and duration of the leave. The employer in turn is charged with responding to the leave request "as soon as practicable and in any event no later than ten calendar days after receiving the request.' " (*Olofsson v. Mission Linen Supply* (2012) 211 Cal.App.4th 1236, 1241 [150 Cal.Rptr.3d 446], internal citations omitted.)
- "[A]n employer bears a burden, under CFRA, to inquire further if an employee presents the employer with a CFRA-qualifying reason for requesting leave." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 249 [206 Cal.Rptr.3d 841].)
- "That plaintiff called in sick was, by itself, insufficient to put [defendant] on notice that he needed CFRA leave for a serious health condition." (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1255 [82 Cal.Rptr.3d 440].)
- "Under the CFRA regulations, the employer has a duty to respond to the leave request within 10 days, but clearly and for good reason the law does not specify that the response must be tantamount to approval or denial." (*Olofsson, supra,* 211 Cal.App.4th at p. 1249.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:852–12:853, 12:855–12:857 (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][e] (Matthew Bender)

2620. CFRA Rights Retaliation—Essential Factual Elements (Gov. Code, § 12945.2(*l*))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [[requesting/taking] [family care/medical] leave/[***other protected activity***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**

2. **That [***name of plaintiff***] [[requested/took] [family care/medical] leave/[***other protected activity***]];**

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

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

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

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

New September 2003; Revised December 2012, June 2013

Directions for Use

Use this instruction in cases of alleged retaliation for an employee's exercise of rights granted by the California Family Rights Act (CFRA). (See Gov. Code, § 12945.2(*l*).) The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be modified if the defendant is a prospective employer or other person.

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

Element 4 uses the term "substantial motivating reason" to express both intent and causation between the employee's exercise of a CFRA right and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to

CFRA retaliation cases has not been addressed by the courts.

Sources and Authority

- Retaliation Prohibited. Government Code section 12945.2(*l*), (t).

- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).

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

- "Similar to causes of action under FEHA, the *McDonnell Douglas* burden shifting analysis applies to retaliation claims under CFRA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 248 [206 Cal.Rptr.3d 841].)

Secondary Sources

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

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.32 (Matthew Bender)

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

2800. Employer's Affirmative Defense—Injury Covered by Workers' Compensation

[*Name of defendant***] claims that [he/she/it] is not responsible for any harm that [***name of plaintiff***] may have suffered because [he/she] was [***name of defendant***]'s employee and therefore can only recover under California's Workers' Compensation Act. To succeed, [***name of defendant***] must prove all of the following:**

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

2. **That [***name of defendant***] [had workers' compensation insurance [covering [***name of plaintiff***] at the time of injury]/was self-insured for workers' compensation claims [at the time of [***name of plaintiff***]'s injury]]; and**

3. **That [***name of plaintiff***]'s injury occurred while [he/she] was performing a task for or related to the work [***name of defendant***] hired [him/her] to do.**

Any person performing services for another, other than as an independent contractor, is presumed to be an employee.

New September 2003; Revised October 2004

Directions for Use

This instruction is intended for use if the plaintiff is suing a defendant claiming to be the plaintiff's employer. This instruction is not intended for use if the plaintiff is suing under an exception to the workers' compensation exclusivity rule.

For other instructions regarding employment status, such as special employment and independent contractors, see instructions in the Vicarious Responsibility series (CACI Nos. 3700–3726). These instructions may need to be modified to fit this context. Note that this instruction should not be given if the plaintiff/employee has been determined to fall within a statutory exception. For exceptions to Labor Code section 3351, see Labor Code section 3352.

If appropriate to the facts of the case, see instructions on the going-and-coming rule in the Vicarious Responsibility series. These instructions may need to be modified to fit this context.

Sources and Authority

- Exclusive Remedy. Labor Code section 3602(a).
- Conditions of Compensation. Labor Code section 3600(a).
- If Conditions of Compensation Not Met. Labor Code section 3602(c).

- "Employee" Defined. Labor Code section 3351.

- Presumption of Employment Status. Labor Code section 3357.

- Failure to Secure Payment of Compensation. Labor Code section 3706.

- "[T]he basis for the exclusivity rule in workers' compensation law is the 'presumed "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' " (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)

- ~~"Employer conduct is considered outside the scope of the workers' compensation scheme when the employer steps outside of its proper role, or engages in conduct unrelated to the employment relationship, that is not a normal incident of employment, or that violates a fundamental public policy." (*Gomez v. Acquistapace* (1996) 50 Cal.App.4th 740, 751 [57 Cal.Rptr.2d 821], internal citations omitted.)~~

- "Because an employer faced with a civil complaint seeking to enforce a common law remedy which does not state facts indicating coverage by the act bears the burden of pleading and proving 'that the (act) is a bar to the employee's ordinary remedy,' we believe that the burden includes a showing by the employer-defendant, through appropriate pleading and proof, that he had 'secured the payment of compensation' in accordance with the provisions of the act." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 98, fn. 8 [151 Cal.Rptr. 347, 587 P.2d 1160], internal citations omitted.)

- "A defendant need not plead and prove that it has purchased workers' compensation insurance where the plaintiff alleges facts that otherwise bring the case within the exclusive province of workers' compensation law, and no facts presented in the pleadings or at trial negate the workers' compensation law's application or the employer's insurance coverage." (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 14 [87 Cal.Rptr.2d 554], internal citations omitted.)

- "[T]he fact that an employee has received workers' compensation benefits from some source does not bar the employee's civil action against an uninsured employer. Instead, '[t]he price that must be paid by each employer for immunity from tort liability is the purchase of a workers' compensation policy [and where the employer chooses] not to pay that price ... it should not be immune from liability.' " (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 987 [101 Cal.Rptr.2d 325], internal citations omitted.)

- "Under the Workers' Compensation Act, employees are automatically entitled to recover benefits for injuries 'arising out of and in the course of the employment.' 'When the conditions of compensation exist, recovery under the workers' compensation scheme "is the exclusive remedy against an employer for injury or death of an employee." ' " (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 986 [105 Cal.Rptr.2d 88], internal citations omitted.)

- “Unlike many other states, in California workers’ compensation provides the exclusive remedy for at least some intentional torts committed by an employer. *Fermino* described a ‘tripartite system for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers’ compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under section 4553. Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought.’ ” (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 723 [112 Cal.Rptr.2d 195], internal citations omitted.)

- “It has long been established in this jurisdiction that, generally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers’ Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application.” (*Doney, supra,* 23 Cal.3d at p. 96, internal citations and footnote omitted.)

- “California courts have held worker’s compensation proceedings to be the exclusive remedy for certain third party claims deemed collateral to or derivative of the employee’s injury. Courts have held that the exclusive jurisdiction provisions bar civil actions against employers by nondependent parents of an employee for the employee’s wrongful death, by an employee’s spouse for loss of the employee’s services or consortium, and for emotional distress suffered by a spouse in witnessing the employee’s injuries.” (*Snyder v. Michael’s Stores, Inc.* (1997) 16 Cal.4th 991, 997 [68 Cal.Rptr.2d 476, 945 P.2d 781], internal citations omitted.)

- “ ‘An employer-employee relationship must exist in order to bring the ... Act into effect. (§ 3600)’ However, the coverage of the Act extends beyond those who have entered into ‘traditional contract[s] of hire.’ ‘[S]ection 3351 provides broadly that for the purpose of the ... Act, “ ‘Employee’ means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written ... .’ ” Given this ‘section’s explicit use of the disjunctive,’ a contract of hire is not ‘a prerequisite’ to the existence of an employment relationship. Moreover, under section 3357, ‘[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded ... , is presumed to be an employee.’ ” (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060−1061 [40 Cal.Rptr.2d 116, 892 P.2d 150], internal citations omitted.)

- “Given these broad statutory contours, we believe that an ‘employment’ relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen’s Compensation Act.” (*Laeng v. Workmen’s Comp. Appeals Bd.* (1972) 6 Cal.3d 771, 777 [100 Cal.Rptr. 377, 494 P.2d 1], internal citations omitted.)

- “[C]ourts generally are more exacting in requiring proof of an employment relationship when such a relationship is asserted as a defense by the employer to a common law action.” (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799, 808 [247 Cal.Rptr. 347], internal citation omitted.)

- "The question of whether a person is an employee may be one of fact, of mixed law and fact, or of law only. Where the facts are undisputed, the question is one of law, and the Court of Appeal may independently review those facts to determine the correct answer." (*Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 642 [240 Cal.Rptr. 811], internal citations omitted.)

- "An employee may have more than one employer for purposes of workers' compensation, and, in situations of dual employers, the second or 'special' employer may enjoy the same immunity from a common law negligence action on account of an industrial injury as does the first or 'general' employer. Identifying and analyzing such situations 'is one of the most ancient and complex questions of law in not only compensation but tort law.' " (*Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 578 [239 Cal.Rptr. 578], internal citation omitted.)

- "In determining whether an employee is covered within the compensation system and thus entitled to recover compensation benefits, the 'definitional reach of these covered employment relationships is very broad.' A covered employee is 'every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.' 'Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.' ... [T]hese provisions mandate a broad and generous interpretation in favor of inclusion in the system. Necessarily the other side of that coin is a presumption against the availability of a tort action where an employment relation exists. One result cannot exist without the other. Further, this result does not depend upon 'informed consent,' but rather on the parties' legal status. ... [W]here the facts of employment are not disputed, the existence of a covered relationship is a question of law." (*Santa Cruz Poultry, Inc., supra,* 194 Cal.App.3d at pp. 583-584, internal citations omitted.)

- " 'The requirement of ... section 3600 is twofold. On the one hand, the injury must occur "in the course of the employment." This concept "ordinarily refers to the time, place, and circumstances under which the injury occurs." Thus " '[a]n employee is in the "course of his employment" when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do.' " And, ipso facto, an employee acts within the course of his employment when " 'performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied.' " ' [¶] 'On the other hand, the statute requires that an injury "arise out of" the employment. ... It has long been settled that for an injury to "arise out of the employment" it must "occur by reason of a condition or incident of [the] employment ... ." That is, the employment and the injury must be linked in some causal fashion.' " (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [72 Cal.Rptr.2d 217, 951 P.2d 1184], internal citations and footnote omitted.)

- "The requirements that an injury arise out of employment or be proximately caused by employment are sometimes referred to together as the requirement of industrial causation. It is a looser concept of causation than the concept of proximate cause employed in tort law. In general, the industrial causation requirement is satisfied 'if the connection between work and the injury [is] a contributing cause of the injury … .' " (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 624 [210 Cal.Rptr.3d 362], internal citation omitted.)

- "For our purposes here, it is important that 'arising out of' and 'in the course of' are two separate

requirements. Even if it is conceded that an employee was injured while performing job tasks in the workplace during working hours, the exclusivity rule applies only if it also is shown that the work was a contributing cause of the injury." (*Lee, supra,* 5 Cal.App.5th at p. 625.)

- "The jury could properly make this finding [that conduct was not within scope of employment] by applying special instruction No. 5, the instruction stating that an employer's conduct falls outside the workers' compensation scheme when an employer steps outside of its proper role or engages in conduct unrelated to the employment. This instruction stated the doctrine of *Fermino* correctly." (*Lee, supra,* 5 Cal.App.5th at pp. 628–629.)

- ~~"Generally, 'in the course of employment' refers to the time and place of the injury. The phrase 'arise out of employment' refers to a causal connection between the employment and the injury." (*Atascadero Unified School Dist. v. Workers' Compensation Appeals Bd.* (2002) 98 Cal.App.4th 880, 883 [120 Cal.Rptr.2d 239].)~~

- "The concept of 'scope of employment' in tort is more restrictive than the phrase 'arising out of and in the course of employment,' used in workers' compensation." (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1057 [103 Cal.Rptr.2d 790], internal citations omitted.)

- "Whether an employee's injury arose out of and in the course of her employment is generally a question of fact to be determined in light of the circumstances of the particular case. However, where the facts are undisputed, resolution of the question becomes a matter of law." (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 353 [115 Cal.Rptr.2d 503], internal citations omitted.)

- ~~" 'The requirement of ... section 3600 is twofold. On the one hand, the injury must occur "in the course of the employment." This concept "ordinarily refers to the time, place, and circumstances under which the injury occurs." Thus " '[a]n employee is in the "course of his employment" when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do.' " And, ipso facto, an employee acts within the course of his employment when " 'performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied.' " ' [¶] 'On the other hand, the statute requires that an injury "arise out of" the employment. ... It has long been settled that for an injury to "arise out of the employment" it must "occur by reason of a condition or incident of [the] employment ... ." That is, the employment and the injury must be linked in some causal fashion.' " (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [72 Cal.Rptr.2d 217, 951 P.2d 1184], internal citations and footnote omitted.)~~

- "Injuries sustained while an employee is performing tasks within his or her employment contract but outside normal work hours are within the course of employment. The rationale is that the employee is still acting in furtherance of the employer's business." (*Wright, supra,* 95 Cal.App.4th at p. 354.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 20, 24–26, 31, 34, 39–42

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 3:515, 12:192, 15:507, 15:509, 15:523.2, 15:523.10, 15:526.1, 15:556, 15:573, 15:580, 15:591

1 Hanna, California Law of Employee Injuries and Workers' Compensation (2d ed.) Ch. 4, §§ 4.03−4.06 (Matthew Bender)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 10, *The Injury*, § 10.09 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.10 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, §§ 10.02, 10.03[3], 10.10 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, §§ 577.310, 577.530 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

2810. Co-Employee's Affirmative Defense—Injury Covered by Workers' Compensation

[*Name of defendant***] claims that [he/she] is not responsible for any harm that [***name of plaintiff***] may have suffered because [he/she] was [***name of defendant***]'s co-employee and therefore can recover only under California's Workers' Compensation Act. To succeed, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] were [***name of employer***]'s employees;**

2. **That [***name of employer***] [had workers' compensation insurance [covering [***name of plaintiff***] at the time of injury]/was self-insured for workers' compensation claims [at the time of [***name of plaintiff***]'s injury]]; and**

3. **That [***name of defendant***] was acting in the scope of [his/her] employment at the time [***name of plaintiff***] claims [he/she] was harmed.**

New September 2003; Revised October 2004

Directions for Use

This instruction is intended for use i~~n cases where~~if a co-employee is the defendant and he or she claims that the case falls within the workers' compensation exclusivity rule. For instructions on scope of employment see instructions in the Vicarious Liability series (CACI Nos. 3700-3726). Scope of employment in this instruction is the same as in the context of respondeat superior. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 740 [1 Cal.Rptr.2d 543, 819 P.2d 1].) See instructions in the Vicarious Responsibility series regarding the definition of "scope of employment."

Sources and Authority

- Exclusive Remedy. Labor Code section 3601.
- "Employee" Defined. Labor Code section 3351.
- Presumption of Employment Status. Labor Code section 3357.
- "CACI No. 2810, which the trial court gave to the jury, is intended for use when a coemployee defendant asserts the exclusivity rule as a defense. It has three elements: (1) the plaintiff and the coemployee were employees of the employer; (2) the employer had a workers' compensation insurance policy covering the plaintiff at the time of injury; and (3) the coemployee was acting in the scope of his or her employment at the time of injury." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 633 [210 Cal.Rptr.3d 362].)
- "Labor Code section 3601 affords coemployees the benefit of the exclusivity rule only '[w]here the conditions of compensation set forth in Section 3600 concur … .' Those conditions, as has been mentioned, include the requirement of industrial causation." (*Lee, supra,* 5 Cal.App.5th at p. 634,

internal citation omitted.)

- "[A] coemployee's conduct is within the scope of his or her employment if it could be imputed to the employer under the doctrine of respondeat superior. If the coemployee was not 'engaged in any active service for the employer,' the coemployee was not acting within the scope of employment." (*Hendy, supra*, 54 Cal.3d at p. 740, internal citation omitted.)

- "[G]enerally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers' Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 96 [151 Cal.Rptr. 347, 587 P.2d 1160].)

- "In general, if an employer condones what courts have described as 'horseplay' among its employees, an employee who engages in it is within the scope of employment under section 3601, subdivision (a), and is thus immune from suit, unless exceptions apply." (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1006 [111 Cal.Rptr.2d 564, 30 P.3d 57], internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 67, 68

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 5:624, 12:192, 13:951, 15:546, 15:569, 15:632

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 12, *Tort Actions—Subrogation*, § 12.22 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.43 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, § 10.13 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, § 577.316 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

3002. "Official Policy or Custom" Explained (42 U.S.C. § 1983)

"Official [policy/custom]" means: [*insert one of the following:***]**

[A rule or regulation approved by the [city/county]'s legislative body;] [or]

[A policy statement or decision that is officially made by the [city/county]'s lawmaking officer or policymaking official;] [or]

[A custom that is a permanent, widespread, or well-settled practice of the [city/county];] [or]

[An act or omission approved by the [city/county]'s lawmaking officer or policymaking official.]

New September 2003; Revised June 2012; Renumbered from CACI No. 3008 December 2012

Directions for Use

These definitions are selected examples of official policy drawn from the cited cases. The instruction may need to be adapted to the facts of a particular case. The court may need to instruct the jury regarding the legal definition of "policymakers."

In some cases, it may be necessary to include additional provisions addressing factors that may indicate an official custom in the absence of a formal policy. The Ninth Circuit has held that in some cases the plaintiff is entitled to have the jury instructed that evidence of governmental inaction—specifically, failure to investigate and discipline employees in the face of widespread constitutional violations—can support an inference that an unconstitutional custom or practice has been unofficially adopted. (*Hunter v. County of Sacramento* (9th Cir. 2011) 652 F.3d 1225, 1234, fn. 8.)

Sources and Authority

- "The [entity] may not be held liable for acts of [employees] unless 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers' or if the constitutional deprivation was 'visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.' " (*Redman v. County of San Diego* (9th Cir. 1991) 942 F.2d 1435, 1443-1444, internal citation omitted.)

- ~~"[T]he official municipal policy in question may be either formal or informal." (*Castro v. Cnty. of L.A.* (9th Cir. 2015) 797 F.3d 654, 670.)~~

- "[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law." (*Bd. of the County Comm'rs v. Brown* (1997) 520 U.S.

397, 404 [117 S.Ct. 1382, 137 L.Ed.2d 626].)

- "The custom or policy must be a 'deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.' " (*Castro v. Cnty. of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1075~~A formal policy exists when '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.'. When pursuing a *Monell* claim stemming from a formal policy, a plaintiff must prove that the municipality 'acted with the state of mind required to prove the underlying violation.' " (*Castro*, *supra*, 797 F.3d at p. 670-671, internal citation omitted~~.)

- ~~"An informal policy, on the other hand, exists when a plaintiff can prove the existence of a widespread practice that, although not authorized by an ordinance or an express municipal policy, is 'so permanent and well settled as to constitute a custom or usage with the force of law.' Such a practice, however, cannot ordinarily be established by a single constitutional deprivation, a random act, or an isolated event. Instead, a plaintiff … must show a pattern of similar incidents in order for the factfinder to conclude that the alleged informal policy was 'so permanent and well settled' as to carry the force of law." (*Castro*, *supra*, 797 F.3d at p. 671, internal citations omitted.)~~

- "While a rule or regulation promulgated, adopted, or ratified by a local governmental entity's legislative body unquestionably satisfies *Monell's* policy requirement, a 'policy' within the meaning of § 1983 is not limited to official legislative action. Indeed, a decision properly made by a local governmental entity's authorized decisionmaker—i.e., an official who 'possesses final authority to establish [local government] policy with respect to the [challenged] action'—may constitute official policy. 'Authority to make municipal policy may be granted directly by legislative enactment or may be delegated by an official who possesses such authority, and of course whether an official had final policymaking authority is a question of state law.' " (*Thompson v. City of Los Angeles* (9th Cir. 1989) 885 F.2d 1439, 1443, internal citations and footnote omitted.)

- "[A] plaintiff can show a custom or practice of violating a written policy; otherwise an entity, no matter how flagrant its actual routine practices, always could avoid liability by pointing to a pristine set of policies." (*Castro*, *supra*, 833 F.3d at p. 1075 fn. 10.)

- "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 v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 737 [109 S.Ct. 2702, 105 L.Ed.2d 598].)

- "[I]t is settled that whether an official is a policymaker for a county is dependent on an analysis of state law, not fact." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 352 [70 Cal.Rptr.2d 823, 949 P.2d 920], internal citations omitted.)

- "Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental

entity." (*Jett, supra,* 491 U.S. at p. 737, internal citations omitted.)

- "A "policy" is ' "a deliberate choice to follow a course of action . . . made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." ' *Gibson v. County of Washoe* [(9th Cir. 2002) 290 F.3d 1175, 1186] discussed two types of policies: those that result in the municipality itself violating someone's constitutional rights or instructing its employees to do so, and those that result, through omission, in municipal responsibility 'for a constitutional violation committed by one of its employees, even though the municipality's policies were facially constitutional, the municipality did not direct the employee to take the unconstitutional action, and the municipality did not have the state of mind required to prove the underlying violation.' We have referred to these two types of policies as policies of action and inaction." (*Tsao v. Desert Palace, Inc.* (9th Cir. 2012) 698 F.3d 1128, 1143, internal citations omitted.)

- "A policy of inaction or omission may be based on failure to implement procedural safeguards to prevent constitutional violations. To establish that there is a policy based on a failure to preserve constitutional rights, a plaintiff must show, in addition to a constitutional violation, 'that this policy "amounts to deliberate indifference" to the plaintiff's constitutional right[,]' and that the policy caused the violation, 'in the sense that the [municipality] could have prevented the violation with an appropriate policy.' " (*Tsao, supra,* 698 F.3d at p. 1143, internal citations omitted.)

- "To show deliberate indifference, [plaintiff] must demonstrate 'that [defendant] was on actual or constructive notice that its omission would likely result in a constitutional violation.' " (*Tsao, supra,* 698 F.3d at p. 1145.)

- "Discussing liability of a municipality under the federal Civil Rights Act based on 'custom,' the California Court of Appeal for the Fifth Appellate District recently noted, 'If the plaintiff seeks to show he was injured by governmental "custom," he must show that the governmental entity's "custom" was "made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." ' " (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 569, fn. 11 [195 Cal.Rptr. 268], internal citations omitted.)

- "The federal courts have recognized that local elected officials and appointed department heads can make official policy or create official custom sufficient to impose liability under section 1983 on their governmental employers." (*Bach, supra,* 147 Cal.App.3d at p. 570, 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)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12*, 8.40

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, overruled en banc on other grounds in *Castro v. Cnty. of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1070.) 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.

- "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].)

- "The ninth cause of action was for 'Failure to Train.' The elements of such cause of action are well established, and include that the City 'knew because of a pattern of similar violations that the inadequate training was likely to result in a deprivation' of some right of plaintiffs. Put otherwise, the inadequate training must amount to a deliberate indifference to constitutional rights. Such deliberate indifference requires proof of a pattern of violations (except in those few very rare situations in which the unconstitutional consequences of failing to train are patently obvious)." (*Squires v. City of Eureka*

(2014) 231 Cal.App.4th 577, 597 [180 Cal.Rptr.3d 10], footnote and internal citations 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, 1160 [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, overruled en banc on other grounds in *Castro v. Cnty. of L.A.* (9th Cir. 2016) 833 F.3d 1060, 1070, 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 may be liable for an 'isolated constitutional violation when the person causing the violation has final policymaking authority.' " (*Garmon v. County of L.A.* (9th Cir. 2016) 828 F.3d 837, --, internal citation omitted.)
- "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].)

- "[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.)

- "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, based on all of the facts and circumstances, what force a reasonable law enforcement officer on the scene would have used under the same or similar circumstances. You should consider the following:

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

(b) The seriousness of the crime at issue; [and]

(c) Whether [*name of plaintiff***] was actively [resisting [arrest/detention]/ [or] attempting to avoid [arrest/detention] by flight][./; and]**

(d) [*specify other factors particular to the case***].**

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised June 2015, June 2016

Directions for Use

The "official duties" referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

The three factors (a), (b), and (c) 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.

Additional considerations and verdict form questions will be needed if there is a question of fact as to whether the defendant law enforcement officer had time for reflective decision-making before applying force. If the officers' conduct required a reaction to fast-paced circumstances presenting competing public safety obligations, the plaintiff must prove intent to harm. (See *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372 [190 Cal.Rptr.3d 693].)

No case has yet determined, and therefore it is unclear, whether the defense has either the burden of proof or the burden of producing evidence on reaction to fast-paced circumstances. (See Evid. Code, §§ 500 [party has burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted], 550 [burden of producing evidence as to particular fact is on party against whom a finding on the fact would be required in absence of further evidence].)

For an instruction for use in a negligence claim under California common law based on the same event and facts, see CACI No. 440, *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*. For an instruction for use alleging excessive force as a battery, see CACI No. 1305, *Battery by Police Officer.*

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.)

- "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra,* 490 U.S. at p. 396.)

- "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' ... its proper application requires careful attention to the facts

and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citation omitted.)

- "The most important of these [factors from *Graham,* above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553] .)

- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (*Glenn, supra,* 661 F.3d at p. 467, internal citations omitted.)

- "Courts 'also consider, under the totality of the circumstances, the quantum of force used to arrest the plaintiff, the availability of alternative methods of capturing or detaining the suspect, and the plaintiff's mental and emotional state.' " (*Brooks v. Clark Cnty.* (9th Cir. 2016) 828 F.3d 910, ~~.~~)920.)

- "Because the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.' " (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125.)

- "Justice Stevens incorrectly declares [the 'objective reasonableness' standard under *Graham*] to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.'. At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, the reasonableness of [defendant]'s actions--or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' is a pure question of law." (*Scott v. Harris* (2007) 550 U.S. 372, 381, fn. 8 [127 S. Ct. 1769; 167 L. Ed. 2d 686], original italics, internal citations omitted.)

- "In the absence of material factual disputes, the objective reasonableness of a police officer's conduct is 'a pure question of law.' 'Where the objective reasonableness of an officer's conduct turns on disputed issues of material fact,' however, 'it is "a question of fact best resolved by a jury." ' " (*Lowry v. City of San Diego* (2016) (9th Cir. 2016) 818 F.3d 840, 846.)

- "A reasonable jury could find that any belief on the officers' part that they faced an immediate threat when they released [dog] was unjustified. Thus, viewing the evidence in the light most favorable to [plaintiff], the City has failed to show that there are no questions of fact precluding summary judgment in its favor. [¶][¶] The district court found otherwise, reasoning that the 'officers reasonably and objectively feared for their own safety and any possible hostage's safety,' because they were searching for a 'burglary suspect . . . at night,' because they 'did not know whether the suspect was

armed,' and because the door … was " 'ajar, but no lights were on inside.' [¶] A reasonable jury could easily disagree with this portrayal. The district court's reasoning assumes that any person inside an office building where a security alarm has been tripped at night necessarily poses an immediate threat to their safety or that of others. We find this assumption unwarranted. These facts, standing alone, do not provide an 'articulable basis for believing that" the occupant is 'armed or that [she or] he posed an immediate threat to anyone's safety.' " (*Lowry, supra,* 818 F.3d at pp. 849−851, footnotes omitted.)

- "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, supra,* 57 Cal.4th at p. 639.)

- "[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.)

- "Deadly force is permissible only 'if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.' " (*A. K. H. v. City of Tustin* (9th Cir. 2016) 837 F.3d 1005, 1011.)

- "[A]n officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' " (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)

- "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.)

- " In any event, the court correctly instructed the jury on the mental state required in a Fourteenth Amendment excessive use of force case under section 1983 because this case did not involve reflective decisionmaking by the officers, but instead their reaction to fast-paced circumstances presenting competing public safety obligations. Given these circumstances, [plaintiff] was required to prove that the officers acted with a purpose to cause harm to her son." (*Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372 [190 Cal.Rptr.3d 693].)

- "[T]he fact that the 'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment. [¶] This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." (*George v. Morris* (9th Cir. 2013) 724 F.3d 1191, 1200, original italics, internal citations omitted.)

- " '[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.' Here, whether objective factors supported [defendant]'s supposed subjective fear is not a question that can be answered as a matter of law based upon the limited evidence in the record, especially given that on summary judgment that evidence must be construed in the light most favorable to [plaintiff], the non-moving party. Rather, whether [defendant]'s claim that he feared a broccoli-based assault is credible and reasonable presents a genuine question of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact." (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163–1164.)

- "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." (*Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825, 838 [196 Cal.Rptr.3d 848].)

- "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.)

- "This Court has 'refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.' The Court has, however, 'found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a mentally ill individual.' A reasonable jury could conclude, based upon the information available to

[defendant officer] at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force." (*Hughes v. Kisela* (9th Cir. 2016) 841 F.3d 1081, 1086.)

- "~~[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.)

- "*Heck* requires the reviewing court to answer three questions: (1) Was there an underlying conviction or sentence relating to the section 1983 claim? (2) Would a 'judgment in favor of the plaintiff [in the section 1983 action] "necessarily imply" … the invalidity of the prior conviction or sentence?' (3) 'If so, was the prior conviction or sentence already invalidated or otherwise favorably terminated?' " (*Fetters, supra,* 243 Cal.App.4th at p. 834.)

- "The *Heck* inquiry does not require a court to consider whether the section 1983 claim would establish beyond all doubt the invalidity of the criminal outcome; rather, a court need only 'consider whether a judgment in favor of the plaintiff would necessarily *imply* the invalidity of his conviction or sentence.' " (*Fetters, supra,* 243 Cal.App.4th at p. 841, original italics.)

- "[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.)

- "[T]he district court effectively required the jury to presume that the arrest *was* constitutionally lawful, and so not to consider facts concerning the basis for the arrest. Doing so removed critical factual questions that were within the jury's province to decide. For instance, by taking from the jury the question whether [officer]'s arrest of [plaintiff] for resisting or obstructing a police officer was lawful, the district judge implied simultaneously that [plaintiff] was in fact resisting or failing to obey the police officer's lawful instructions. Presuming such resistance could certainly have influenced the jury's assessment of 'the need for force,' as well as its consideration of the other *Graham* factors, including 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight. By erroneously granting judgment as a matter of law on [plaintiff]'s unlawful arrest claim, the district court impermissibly truncated the jury's consideration of [plaintiff]'s excessive force claim." (*Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, --, 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)

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.)

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.)

- "We previously have recognized that officers acting in their community caretaking capacities and responding to a perceived emergency may conduct certain searches without a warrant or probable cause. To determine whether the emergency exception applies to a particular warrantless search, we examine whether: '(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.' " (*Ames v. King Cnty.* (9th Cir. 2017) 846 F.3d 340, 350.)

  "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) —565 U.S. 469–, ––477 [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.)

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)

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***] knew that [***name of plaintiff***] faced a substantial risk of serious harm if [his/her] medical need went untreated;**

3. **That [***name of defendant***] consciously disregarded that risk by not taking reasonable steps to treat [***name of plaintiff***]'s medical need;**

4. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

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

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

A serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and pointless infliction of pain.

Neither medical negligence alone, nor a difference of opinion between medical personnel or between doctor and patient, is enough to establish a violation of [*name of plaintiff***]'s constitutional rights.**
[In determining whether [*name of defendant***] consciously disregarded a substantial risk, you should consider the personnel, financial, and other resources available to [him/her] 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, June 2015

Directions for Use

Give this instruction in a case involving the deprivation of medical care to a prisoner. For an instruction on the creation of a substantial risk of serious harm, see CACI No. 3040, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*. For an instruction involving the deprivation of necessities, see CACI No. 3043, *Violation of Prisoner's Federal Civil Rights—Eight*

Amendment—Deprivation of Necessities.

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. In a medical-needs case, deliberate indifference requires that the prison officials have known of and disregarded an excessive risk to the inmate's health or safety. Negligence is not enough. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834−837 [114 S.Ct. 1970, 128 L.Ed.2d 811].) Elements 2 and 3 express deliberate indifference.

The "official duties" referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

The Ninth Circuit has held that in considering whether an individual prison medical provider was deliberately indifferent, the jury should be instructed to consider the economic resources made available to the prison health care system. (See *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, 1084 [*en banc*].) Although this holding is not binding on California courts, the last optional paragraph may be given if the defendant has presented evidence of lack of economic resources and the court decides that this defense should be presented to the jury.

Sources and Authority

- Deprivation of Civil Rights: Title 42 United States Code section 1983.

- "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983." (*Estelle v. Gamble* (1976) 429 U.S. 97, 104-105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra,* 511 U.S. at p. 834, internal citations omitted.)

- " 'To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, first the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, a plaintiff must show the defendant's response to the need was deliberately indifferent.' The 'deliberate indifference' prong requires '(a) a purposeful act or failure to

respond to a prisoner's pain or possible medical need, and (b) harm caused by the indifference.' 'Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison [officials] provide medical care.' '[T]he indifference to [a prisoner's] medical needs must be substantial. Mere "indifference," "negligence," or "medical malpractice" will not support this [claim].' Even gross negligence is insufficient to establish deliberate indifference to serious medical needs." (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1081−1082, internal citations omitted.)

- "Indications that a plaintiff has a serious medical need include '[t]he existence of an injury that a reasonable doctor or patient would find important and worthy of comment or treatment; the presence of a medical condition that significantly affects an individual's daily activities; or the existence of chronic and substantial pain.' " (*Colwell v. Bannister* (9th Cir. 2014) 763 F.3d 1060, 1066.)

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "The subjective standard of deliberate indifference requires 'more than ordinary lack of due care for the prisoner's interests or safety.' The state of mind for deliberate indifference is subjective recklessness. But the standard is 'less stringent in cases involving a prisoner's medical needs . . . because "the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns." ' " (*Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 985, internal citations omitted.)

- "[D]eliberate indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.'. … '[A] prisoner need not show his harm was substantial.' " (*Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122, internal citation omitted.)

- "[A]llegations that a prison official has ignored the instructions of a prisoner's treating physician are sufficient to state a claim for deliberate indifference." (*Wakefield v. Thompson* (9th Cir. 1999) 177 F.3d 1160, 1165.)

- "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." (*Estelle, supra,* 429 U.S. at p. 106.)

- " 'A difference of opinion between a physician and the prisoner—or between medical professionals—concerning what medical care is appropriate does not amount to deliberate indifference.' Rather, '[t]o show deliberate indifference, the plaintiff "must show that the course of treatment the doctors chose was medically unacceptable under the circumstances" and that the defendants "chose this course in conscious disregard of an excessive risk to plaintiff's health." ' " (*Colwell, supra,* 763 F.3d at p. 1068.)

- "It has been recognized ... that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia,* for example, the plaintiff alleged that defendants acted 'carelessly, recklessly and negligently' when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: '... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. ...'" (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176-177 [216 Cal.Rptr. 661, 703 P.2d 1], internal citations omitted.)

- "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citation omitted.)

- "[T]here is a two-pronged test for evaluating a claim for deliberate indifference to a serious medical need: First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." (*Akhtar v. Mesa* (9th Cir. 2012) 698 F.3d 1202, 1213.)

- "A prison medical official who fails to provide needed treatment because he lacks the necessary resources can hardly be said to have intended to punish the inmate. The challenged instruction properly advised the jury to consider the resources [defendant] had available in determining whether he was deliberately indifferent." (*Peralta, supra,* 744 F.3d at p. 1084.)

- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in excessive force and conditions of confinement cases, we instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security. [¶] Such deference is generally absent from serious medical needs cases, however, where deliberate indifference 'can typically be established or disproved without the necessity of balancing competing institutional concerns for the safety of prison staff or other inmates.' " (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citations omitted.)

- "[T]rial judges in prison medical care cases should not instruct jurors to defer to the adoption and implementation of security-based prison policies, unless a party's presentation of the case draws a plausible connection between a security-based policy or practice and the challenged medical care decision." (*Chess v. Dovey* (9th Cir. 2015) 790 F.3d 961, 962.)

- "We now turn to the second prong of the inquiry, whether the defendants were deliberately indifferent. This is not a case in which there is a difference of medical opinion about which treatment

is best for a particular patient. Nor is this a case of ordinary medical mistake or negligence. Rather, the evidence is undisputed that [plaintiff] was denied treatment for his monocular blindness solely because of an administrative policy, even in the face of medical recommendations to the contrary. A reasonable jury could find that [plaintiff] was denied surgery, not because it wasn't medically indicated, not because his condition was misdiagnosed, not because the surgery wouldn't have helped him, but because the policy of the [defendant] is to require an inmate to endure reversible blindness in one eye if he can still see out of the other. This is the very definition of deliberate indifference." (*Colwell, supra,* 763 F.3d at p. 1068.)

- "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, California 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)

3042. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force (42 U.S.C. § 1983)

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

1. **That [***name of defendant***] used force against [***name of plaintiff***];**

2. **That the force used 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 excessive if it is used maliciously and sadistically to cause harm. In deciding whether excessive force was used, you should consider, among other factors, the following:

(a) The need for the use of force;

(b) The relationship between the need and the amount of force that was used;

(c) The extent of injury inflicted;

(d) The extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; [and]

(e) Any efforts made to temper the severity of a forceful response; [and]

(f) [*Insert other relevant factor.***]**

Force is not excessive if it is used in a good-faith effort to protect the safety of inmates, staff, or others, or to maintain or restore discipline.

New September 2003; Revised June 2010; Renumbered from CACI No. 3010 December 2010; Renumbered from CACI No. 3013 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.

There is law suggesting that the jury should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. This principle is covered in the final sentence by the term "good faith."

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.

- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)

- "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.' In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.' " (*Farmer v. Brennan* (1994) 511 U.S. 825, 832 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)

- "[A]pplication of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, 'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." ' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 6 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley:* whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (*Hudson, supra,* 503 U.S. at pp. 6–7, internal citations omitted.)

- "Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that 'prison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.' " (*Hudson, supra,* 503 U.S. at p. 6, internal citations omitted.)

- "We recognize that prison officials have a 'better grasp' of the policies required to operate a correctional facility than either judges or juries. For this reason, in excessive force … cases, we

instruct juries to defer to prison officials' judgments in adopting and executing policies needed to preserve discipline and maintain security." (*Mendiola-Martinez v. Arpaio* (9th Cir. 2016) 836 F.3d 1239, 1254, internal citations omitted.)

- "[T]his Court rejected the notion that 'significant injury' is a threshold requirement for stating an excessive force claim. … 'When prison officials maliciously and sadistically use force to cause harm,' … 'contemporary standards of decency always are violated . . . whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.' " (*Wilkins v. Gaddy* (2010) 559 U.S. 34, 37 [130 S.Ct. 1175, 175 L.Ed.2d 995].)

- "This is not to say that the 'absence of serious injury' is irrelevant to the Eighth Amendment inquiry. '[T]he extent of injury suffered by an inmate is one factor that may suggest "whether the use of force could plausibly have been thought necessary" in a particular situation.' The extent of injury may also provide some indication of the amount of force applied. … [N]ot 'every malevolent touch by a prison guard gives rise to a federal cause of action.' 'The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.' An inmate who complains of a 'push or shove' that causes no discernible injury almost certainly fails to state a valid excessive force claim. … [¶] Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts." (*Wilkins, supra*, 559 U.S. at pp. 37–38, original italics, internal citations omitted.)

- " '[S]uch factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,' are relevant to that ultimate determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." (*Whitley v. Albers* (1986) 475 U.S. 312, 321 [106 S.Ct. 1078, 89 L.Ed.2d 251], internal citations 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

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 826

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.01 (Matthew Bender)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶ 11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.70 (Matthew Bender)

3051. Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully removed [***name of plaintiff***]'s child from [his/her] parental custody because [***name of defendant***] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] removed [***name of plaintiff***]'s child from [his/her] parental custody without a warrant;**

2. **That [***name of defendant***] was performing or purporting to perform [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 June 2016

Directions for Use

This instruction is a variation on CACI No. 3021, *Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements*, and CACI No. 3023, *Unreasonable Search—Search Without a Warrant—Essential Factual Elements*, in which the warrantless act is the removal of a child from parental custody rather than an arrest or search. This instruction asserts a parent's due process right to familial association under the Fourteenth Amendment. It may be modified to assert or include the child's right under the Fourth Amendment to be free of a warrantless seizure. (See *Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1473−1474 [150 Cal.Rptr.3d 735].)

Warrantless removal is a constitutional violation unless the authorities possess information at the time of the seizure that establishes reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury. (*Arce, supra,* 211 Cal.App.4th at p. 1473.) The committee believes that the defendant bears the burden of proving imminent danger. (See Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."]; cf. *Welsh v. Wisconsin* (1984) 466 U.S. 740, 750 [104 S.Ct. 2091, 80 L.Ed.2d 732] ["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."].) CACI No. 3026, *Affirmative Defense─Exigent Circumstances* (to a warrantless search), may be modified to respond to this claim.

If the removal of the child was without a warrant and without exigent circumstances, but later found to be justified by the court, damages are limited to those caused by the procedural defect, not the removal. (See

Watson v. City of San Jose (9th Cir. 2015) 800 F.3d 1135, 1139.)

Sources and Authority

- " ' "Parents and children have a well-elaborated constitutional right to live together without governmental interference.' [Citation.] 'The Fourteenth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies." This 'right to family association' requires '[g]overnment officials … to obtain prior judicial authorization before intruding on a parent's custody of her child unless they possess information at the time of the seizure that establishes "reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury." [Citation.]' " (*Arce, supra*, 211 Cal.App.4th at p. 1473, internal citations omitted.)

- " 'The Fourth Amendment also protects children from removal from their homes [without prior judicial authorization] absent such a showing. [Citation.] Officials, including social workers, who remove a child from its home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant.' Because 'the same legal standard applies in evaluating Fourth and Fourteenth Amendment claims for the removal of children," we may "analyze [the claims] together.' " (*Arce, supra*, 211 Cal.App.4th at pp. 1473−1474.)

- "While the constitutional source of the parent's and the child's rights differ, the tests under the Fourteenth Amendment and the Fourth Amendment for when a child may be seized without a warrant are the same. The Constitution requires an official separating a child from its parents to obtain a court order unless the official has reasonable cause to believe the child is in 'imminent danger of serious bodily injury.' Seizure of a child is reasonable also where the official obtains parental consent." (*Jones v. County of L.A.* (9th Cir. 2015) 802 F.3d 990, 1000, internal citations omitted.)

- "[W]hether 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, supra*, 211 Cal.App.4th at p. 1475.)

- "Under the Fourth Amendment, government officials are ordinarily required to obtain prior judicial authorization before removing a child from the custody of her parent. However, officials may seize a child without a warrant 'if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.' " (*Kirkpatrick v. Cnty. of Washoe* (9th Cir. 2016) 843 F.3d 784, 790 (en banc) ~~Importantly, 'social workers who remove a child from its home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm *in the time that would be required to obtain a warrant*.' " (*Kirkpatrick v. County of Washoe* (9th Cir. 2015) 792 F.3d 1184, 1194, original italics~~.)

- "The parental right secured by the Fourteenth Amendment 'is not reserved for parents with full

legal and physical custody.' At the same time, however, '[p]arental rights do not spring full-blown from the biological connection between parent and child.' Judicially enforceable interests arising under the Fourteenth Amendment 'require relationships more enduring,' which reflect some assumption 'of parental responsibility.' It is '[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child,' that 'his interest in personal contact with his child acquires substantial protection under the due process clause.' Until then, a person with only potential parental rights enjoys a liberty interest in the companionship, care, and custody of his children that is 'unambiguously lesser in magnitude.' " (*Kirkpatrick, supra*, 843 F.3d at p. 789.)

- "[A] child is seized for purposes of the Fourth and Fourteenth Amendments when a representative of the state takes action causing a child to be detained at a hospital as part of a child abuse investigation, such that a reasonable person in the same position as the child's parent would believe that she cannot take her child home." (*Jones, supra*, 802 F.3d at p. 1001.)

- "[A] jury is needed to determine what a reasonable parent in the [plaintiffs'] position would have believed and whether [defendant]'s conduct amounted to a seizure." (*Jones, supra*, 802 F.3d at p. 1002.)

- "In sum, although we do not dispute that Shaken Baby Syndrome is a serious, life-threatening injury, we disagree with the County defendants' assertion that a child may be detained without prior judicial authorization based solely on the fact that he or she has suffered a serious injury. Rather, the case law demonstrates that the warrantless detention of a child is improper unless there is "specific, articulable evidence" that the child would be placed at imminent risk of serious harm absent an immediate interference with parental custodial rights." (*Arce, supra*, 211 Cal.App.4th at p. 1481.)

- "[I]n cases where 'a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure.' In such cases, … a plaintiff must 'convince the trier of fact that he actually suffered distress because of the denial of procedural due process itself.' " (*Watson, supra*, 800 F.3d at p. 1139, internal citation omitted; see *Carey v. Piphus* (1978) 435 U.S. 247, 263 [98 S.Ct. 1042, 55 L.Ed.2d 252].)

Secondary Sources

3 Civil Rights Actions, Ch. 12B, *Deprivation of Rights Under Color of State Law--Family Relations*, ¶ 12B.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)

3 California Points and Authorities, Ch. 35A, *Civil Rights: Equal Protection*, § 35A.29 et seq. (Matthew Bender)

3061. Discrimination in Business Dealings—Essential Factual Elements (Civ. Code, § 51.5)

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her] full and equal rights to conduct business because of [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [discriminated against/boycotted/blacklisted/refused to buy from/refused to contract with/refused to sell to/refused to trade with] [***name of plaintiff***];**

2. **[That a substantial motivating reason for [***name of defendant***]'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/ disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]];]**

   [*or***]**

   [That a substantial motivating reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]] of [***name of plaintiff***]'s [partners/members/stockholders/directors/officers/managers/superintendents/agents/ employees/business associates/suppliers/customers];]**

   [*or***]**

   [That a substantial motivating reason for [*name of defendant***]'s conduct was [its perception of] the [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]] of a person with whom [***name of plaintiff***] was associated;]**

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

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

New September 2003; Revised June 2012; Renumbered from CACI No. 3021 and Revised December 2012; Revised June 2013, December 2016

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Under the Unruh Civil Rights Act (see CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements*), the California Supreme Court has held that intentional discrimination is required. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159–1162 [278 Cal.Rptr. 614, 805 P.2d 873].) While there is no similar California case imposing an intent requirement under Civil Code section 51.5, Civil Code section 51.5 requires that the discrimination be *on account of* the protected category. (Civ. Code, § 51.5(a).) The kinds of prohibited conduct would all seem to involve intentional acts. (See *Nicole M. v. Martinez Unified Sch. Dist.* (N.D. Cal. 1997) 964 F.Supp. 1369, 1389, superseded by statute on other grounds as stated in *Sandoval v. Merced Union High Sch.* (E.D. Cal. 2006) 2006 U.S. Dist. LEXIS 28446.) The intent requirement is encompassed within the motivating-reason element (element 2).

There is an exception to the intent requirement under the Unruh Act for conduct that violates the Americans With Disabilities Act. (See *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623].). Because this exception is based on statutory construction of the Unruh Act (see Civ. Code, § 51(f)), the committee does not believe that it applies to section 51.5, which contains no similar language.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

Element 2 uses the term "substantial motivating reason" to express causation between the protected classification and the defendant's conduct. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under Civil Code section 51.5 has not been addressed by the courts.

For an instruction on damages under Civil Code section 51.5, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000. (Civ. Code, § 52(a).); see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

It is possible that elements 3 and 4 are not needed if only the statutory minimum $4,000 award is sought. With regard to the Unruh Act (Civ. Code, § 51), which is also governed by Civil Code section 52(a), the California Supreme Court has held that a violation is per se injurious, and that section 52 provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

Conceptually, this instruction has some overlap with CACI No. 3060, *Unruh Civil Rights Act—Essential Factual Elements.* For a discussion of the basis of this instruction, see *Jackson v. Superior Court* (1994) 30 Cal.App.4th 936, 941 [36 Cal.Rptr.2d 207].

Sources and Authority

- Discrimination in Business Dealings. Civil Code section 51.5.
- Protected Characteristics. Civil Code section 51(b).
- "In 1976 the Legislature added Civil Code section 51.5 to the Unruh Civil Rights Act and amended Civil Code section 52 (which provides penalties for those who violate the Unruh Civil Rights Act), in order to, inter alia, include section 51.5 in its provisions." (*Pines v. Tomson* (1984) 160 Cal.App.3d 370, 384 [206 Cal.Rptr. 866], footnote omitted.)
- "[I]t is clear from the cases under section 51 that the Legislature did not intend in enacting section 51.5 to limit the broad language of section 51 to include only selling, buying or trading. Both sections 51 and 51.5 have been liberally applied to all types of business activities. Furthermore, section 51.5 forbids a business to 'discriminate against' 'any person' and does not just forbid a business to 'boycott or blacklist, refuse to buy from, sell to, or trade with any person.' " (*Jackson, supra,* 30 Cal.App.4th at p. 941, internal citation and footnote omitted.)
- "Although the phrase 'business establishment of every kind whatsoever' has been interpreted by the Supreme Court and the Court of Appeal in the context of section 51, we are aware of no case which interprets that term in the context of section 51.5. We believe, however, that the Legislature meant the identical language in both sections to have the identical meaning." (*Pines, supra,* 160 Cal.App.3d at p. 384, internal citations omitted.)
- "[T]he classifications specified in section 51.5, which are identical to those of section 51, are likewise not exclusive and encompass other personal characteristics identified in earlier cases." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 538 [30 Cal.Rptr.2d 706], internal citations omitted.)
- "[T]he analysis under Civil Code section 51.5 is the same as the analysis we have already set forth for purposes of the [Unruh Civil Rights] Act." (*Semler v. General Electric Capital Corp*. (2011) 196 Cal.App.4th 1380, 1404 [127 Cal.Rptr.3d 794].)
- "[W]hen such discrimination occurs, a person has standing under section 51.5 if he or she is 'associated with' the disabled person and has also personally experienced the discrimination." (*Osborne v. Yasmeh* (2016) 1 Cal.App.5th 1118, 1134 [205 Cal.Rptr.3d 656].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 898–914

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business*

Establishments, §§ 116.10–116.13 (Matthew Bender)

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

3100. Financial Abuse—Essential Factual Elements (Welf. & Inst. Code, § 15610.30)

[*Name of plaintiff***] claims that [[***name of individual defendant***]/ [and] [***name of employer defendant***]] violated the Elder Abuse and Dependent Adult Civil Protection Act by taking financial advantage of [him/her/[***name of decedent***]]. To establish this claim, [***name of plaintiff***] must prove that all of the following are more likely to be true than not true:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [***insert one of the following:***]**

   [[took/hid/appropriated/obtained/ [or] retained] [*name of plaintiff/decedent***]'s property;]**

   [*or***]**

   [assisted in [taking/hiding/appropriating/obtaining/ [or] retaining] [*name of plaintiff/decedent***]'s property;]**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] at the time of the conduct;**

3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [[took/hid/appropriated/obtained/ [or] retained]/assisted in [taking/hiding/appropriating/obtaining/ [or] retaining]] the property [for a wrongful use/ [or] with the intent to defraud/ [or] by undue influence];**

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

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

[One way [*name of plaintiff***] can prove that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] [took/hid/appropriated/obtained/ [or] retained] the property for a wrongful use is by proving that [[***name of individual defendant***]/[***name of employer defendant***]'s employee] knew or should have known that [his/her] conduct was likely to be harmful to [***name of plaintiff/decedent***].**

[[[*Name of individual defendant***]/[***Name of employer defendant***]'s employee] [took/hid/appropriated/obtained/ [or] retained] the property if [***name of plaintiff/decedent***] was deprived of the property by an agreement, gift, will, [or] trust[, or] [***specify other testamentary instrument***] regardless of whether the property was held by [***name of plaintiff/decedent***] or by [his/her] representative.]**

New September 2003; Revised June 2005, October 2008, April 2009, June 2010, December 2013, June 2014

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act by the victim of elder financial abuse, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)* in the Damages series. Plaintiffs who are suing for their decedent's pain and suffering should also use CACI No. 3101, *Financial Abuse—Decedent's Pain and Suffering.*

If the individual responsible for the financial abuse is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

To recover compensatory damages, attorney fees, and costs against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

If "for a wrongful use" is selected in element 3, give the next-to-last optional paragraph on appropriate facts. This is not the exclusive manner of proving wrongful conduct under the statute. (See Welf. & Inst. Code, § 15610.30(b).)

If "by undue influence" is selected in element 3, also give CACI No. 3117, *Financial Abuse—"Undue Influence" Explained.*

Include the last optional paragraph if the elder was deprived of a property right by an agreement, donative transfer, or testamentary bequest. (See Welf. & Inst. Code, § 15610.30(c).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- Abuse of Elder or Dependent Adult. Welfare and Institutions Code section 15610.07.
- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Elder" Defined. Welfare and Institutions Code section 15610.27.
- "Financial Abuse" Defined. Welfare and Institutions Code section 15610.30.
- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)
- "The Legislature enacted the Act to protect elders by providing enhanced remedies to encourage private, civil enforcement of laws against elder abuse and neglect. An elder is defined as 'any person

residing in this state, 65 years of age or older.' The proscribed conduct includes financial abuse. The financial abuse provisions are, in part, premised on the Legislature's belief that in addition to being subject to the general rules of contract, financial agreements entered into by elders should be subject to special scrutiny." (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 478 [177 Cal.Rptr.3d 320], internal citations omitted.)

- "The probate court cited Welfare and Institutions Code section 15610.30 to impose financial elder abuse liability as to plaintiffs' first cause of action for fiduciary abuse of an elder. This liability is supported by the court's findings that '[decedent] did not know the extent of [defendant's] spending,' and that '[w]hile it is not uncommon for a spouse to spend money or purchase items of which the other is unaware, and the line between such conduct and financial abuse is not always clear, what [defendant] did in this case went well beyond the line of reasonable conduct and constituted financial abuse,' and the court's further conclusion that much of defendant's credit card spending and writing herself checks from decedent's bank account during the marriage amounted to financial abuse." (*Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1356 [167 Cal.Rptr.3d 50].)

- "[T]he Legislature enacted the Act, including the provision prohibiting a taking by undue influence, to protect elderly individuals with limited or declining cognitive abilities from overreaching conduct that resulted in a deprivation of their property rights. To require the victim of financial elder abuse to wait to file suit until an agreement obtained through the statutorily proscribed conduct has been performed would not further that goal." (*Bounds, supra*, 229 Cal.App.4th at p. 481.)

- "When the [operable pleading] was filed, former section 15610.30, subdivision (a)(3) referred to the definition of undue influence found in Civil Code section 1575. However, in 2013, the Legislature amended section 15610.30, subdivision (a)(3) to refer, instead, to a broader definition of undue influence found in the newly enacted section 15610.70." (*Bounds, supra*, 229 Cal.App.4th at p. 479.)

- "[A] party may engage in elder abuse by misappropriating funds to which an elder is entitled under a contract." (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 656 [203 Cal.Rptr.3d 785].)

- "[U]nder subdivision (b) of section 15610.30, wrongful conduct occurs only when the party who violates the contract actually knows that it is engaging in a harmful breach, or reasonably should be aware of the harmful breach." (*Paslay, supra*, 248 Cal.App.4th at p. 658.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

Balisok, Civil Litigation Series: Elder Abuse Litigation, §§ 5:1 et seq., 7.2, 22:9−22:12 (The Rutter Group)

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 6.23, 6.30–6.34

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elders*, § 5.33[4] (Matthew Bender)

3400. Horizontal and Vertical Restraints (Use for Direct Competitors)—Price Fixing—Essential Factual Elements

---

[*Name of plaintiff***] claims [***name of defendant***] was involved in price fixing. Price fixing is an agreement to set, raise, lower, maintain, or stabilize the prices or other terms of trade charged or to be charged for a product or service, whether the prices agreed on were high or low, reasonable or unreasonable. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [and [***name(s) of alleged coparticipant(s)***]] agreed to fix [or] [set/raise/lower/maintain/stabilize] prices [or other terms of trade] charged or to be charged for [***product/service***];**

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

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

New September 2003

Directions for Use

This instruction is intended to apply to both actual and potential competitors. For cases involving vertical restraints, use this instruction but see additional special vertical restraint instructions contained in this series (CACI No. 3409, *Vertical Restraints—Termination of Reseller*, and CACI No. 3410, *Vertical Restraints—Agreement Between Seller and Reseller's Competitor*).

In addition to price, price fixing includes any combination that "tampers with price structures." Like its federal counterpart, the Cartwright Act would seem to prohibit combinations that fix aspects of price such as costs, discounts, credits, financing, warranty, and delivery terms. Therefore, if this case concerns the fixing of an aspect of price, other than price itself, this instruction and those that are related to it should be adapted accordingly.

Sources and Authority

- Trusts Unlawful and Void. Business and Professions Code section 16726.
- "Trust" Defined. Business and Professions Code section 16720.
- Private Right of Action for Antitrust Violations. Business and Professions Code section 16750(a).
- " ' "To state a cause of action for conspiracy, the complaint must allege (1) the formation and operation of the conspiracy, (2) the wrongful act or acts done pursuant thereto, and (3) the damage resulting from such act or acts." ' Thus, the Supreme Court applied the pleading requirements for a civil conspiracy action under common law to a statutory action under the Cartwright Act for antitrust conspiracies." (*Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1236 [18

Cal.Rptr.2d 308], quoting *Chicago Title Insurance Co. v. Great Western Financial Corp.* (1968) 69 Cal.2d 305, 316 [70 Cal.Rptr. 849, 444 P.2d 481].)

- "A complaint for unlawful price fixing must allege facts demonstrating that separate entities conspired together. Only separate entities pursuing separate economic interests can conspire within the proscription of the antitrust laws against price fixing combinations." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 188-189 [91 Cal.Rptr.2d 534], internal citations omitted.)

- "The Cartwright Act prohibits every trust, defined as 'a combination of capital, skill or acts by two or more persons' for specified anticompetitive purposes. The federal Sherman Act prohibits every 'contract, combination ... or conspiracy, in restraint of trade.' The similar language of the two acts reflects their common objective to protect and promote competition. Since the Cartwright Act and the federal Sherman Act share similar language and objectives, California courts often look to federal precedents under the Sherman Act for guidance." (*Chavez v. Whirlpool Corp.* (2001) 93 Cal.App.4th 363, 369 [113 Cal.Rptr.2d 175], internal citations omitted.)

- "The Cartwright Act, like the Sherman Act, prohibits 'combinations' for the purpose of restraining trade. '[A] combination means a concert of action by individuals or entities maintaining separate and independent interests.' " (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 543 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "Two forms of conspiracy may be used to establish a violation of the antitrust laws: a horizontal restraint, consisting of a collaboration among competitors; or a vertical restraint, based upon an agreement between business entities occupying different levels of the marketing chain." (*G.H.I.I. v. Mts, Inc.* (1983) 147 Cal.App.3d 256, 267 [195 Cal.Rptr. 211], internal citations omitted.)

- " 'Horizontal combinations are cartels or agreements among competitors which restrain competition among enterprises at the same level of distribution. They are ordinarily illegal per se. Vertical restraints are imposed by persons or firms further up the chain of distribution of a specific product (or in rare cases, further down the chain) than the enterprise restrained. Vertical non-price restraints are tested under the rule of reason; that is, the plaintiff must prove that the restraint had an anticompetitive effect in the relevant market in order to prevail.' " (*Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680-1681 [60 Cal.Rptr.2d 195], internal citations and footnote omitted.)

- "In general, a Cartwright Act price fixing complaint must allege specific facts in addition to stating the purpose or effect of the price fixing agreement and that the accused was a member of or acted pursuant to the price fixing agreement." (*Cellular Plus, Inc., supra,* 14 Cal.App.4th at p. 1237.)

- "[W]hile some sort of concerted activity is necessary for an antitrust claim, it is well settled that an explicit or formal agreement is not required. … [A]ll that is required from an antitrust plaintiff is ' "direct or circumstantial evidence that reasonably tends to prove that the [defendant] and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " ' " (*In re Automobile Antitrust Cases I & II* (2016) 1 Cal.App.5th 127, 152−153 [204 Cal.Rptr.3d 330].)

- "[A] conspiracy among competitors to restrict output and/or raise prices [is] unlawful per se without

regard to any of its effects … .” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851 [107 Cal.Rptr.2d 841, 24 P.3d 493].)

- “ ‘Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.’ ‘The “per se” doctrine means that a particular practice and the setting in which it occurs is sufficient to compel the conclusion that competition is unreasonably restrained and the practice is consequently illegal.’ ” (*Oakland-Alameda County Builders’ Exchange v. F. P. Lathrop Construction Co.* (1971) 4 Cal.3d 354, 361-362 [93 Cal.Rptr. 602, 482 P.2d 226], internal citations omitted.)

- “It has long been settled that an agreement to fix prices is unlawful per se. It is no excuse that the prices fixed are themselves reasonable.” (*Catalano Inc. v. Target Sales, Inc.* (1980) 446 U.S. 643, 647 [100 S.Ct. 1925, 64 L.Ed.2d 580].)

- “Under both California and federal law, agreements fixing or tampering with prices are illegal per se.” (*Oakland-Alameda County Builders’ Exchange, supra*, 4 Cal.3d at p. 363.)

- “These rules apply whether the price-fixing scheme is horizontal or vertical; that is, whether the price is fixed among competitors or businesses at different economic levels.” (*Mailand v. Burckle* (1978) 20 Cal.3d 367, 377 [143 Cal.Rptr. 1, 572 P.2d 1142], internal citations omitted.)

- “Under the authorities ... the agreement between plaintiffs and defendants and between defendants and Powerine were unlawful per se. It is, therefore, not necessary to inquire whether these arrangements had an actual anticompetitive effect.” (*Mailand, supra*, 20 Cal.3d at p. 380.)

- “The alleged antitrust violation need not be the sole or controlling cause of the injury in order to establish proximate cause, but only need be a substantial factor in bringing about the injury.” (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 23 [126 Cal.Rptr. 327], internal citation omitted.)

- “The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. The frequently stated ‘standing to sue’ requirement is merely a rule that an action for violation of the antitrust laws may be maintained only by a party within the ‘target area’ of the antitrust violation, and not by one incidentally injured thereby. An ‘antitrust injury’ must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants’ acts unlawful. Finally, a plaintiff must show an injury within the area of the economy that is endangered by a breakdown of competitive conditions.” (*Kolling v. Dow Jones & Co.* (1982) 137 Cal.App.3d 709, 723-724 [187 Cal.Rptr. 797], internal citations and footnote omitted.)

- “We acknowledge that a plaintiff ... must often rely on inference rather than evidence since, usually, unlawful conspiracy is conceived in secrecy and lives its life in the shadows. But, when he does so, he must all the same rely on an inference implying unlawful conspiracy *more likely than* permissible competition, either in itself or together with other inferences or evidence.” (*Aguilar, supra*, 25 Cal.4th at p. 857, internal citations omitted.)

- “The exact parameters of ‘antitrust injury’ under section 16750 have not yet been established through

either court decisions or legislation." (*Cellular Plus, Inc., supra,* 14 Cal.App.4th at p. 1234.)

- "Should an antitrust conspirator be permitted to raise as a defense that the direct purchaser passed on some or all of the overcharge to indirect purchasers downstream in the chain of distribution? [¶¶] We conclude that under the Cartwright Act, as under federal law, generally no pass-on defense is permitted." (*Clayworth v. Pfizer, Inc.* (2010) 49 Cal.4th 758, 763 [111 Cal.Rptr.3d 666, 233 P.3d 1066].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 591–607

6 Antitrust Laws and Trade Regulation, Ch. 105, *California*, § 105.02[1] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.168[2] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.77[2] (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 1, *Elements of Unfair Competition and Business Torts Causes of Action*, 1.05[4][a], Ch. 5, *Antitrust*, 5.04, 5.08, 5.09[1], 5.12

3513. Goodwill

In this case, [*name of business owner***] is entitled to compensation for any loss of goodwill as a part of just compensation. "Goodwill" is the benefit that a business gains as a result of its location, reputation for dependability, skill, or quality, and any other circumstances that cause a business to keep old customers or gain new customers. You must include the amount of any loss of goodwill as an item in your award for just compensation.**

New September 2003; Revised February 2007

Sources and Authority

- Compensation for Loss of Goodwill. Code of Civil Procedure section 1263.510.

- "Goodwill is the amount by which a business's overall value exceeds the value of its constituent assets, often due to a recognizable brand name, a sterling reputation, or an ideal location. Regardless of the cause, however, goodwill almost always translates into a business's profitability." (*People ex rel. Dept. of Transportation v. Dry Canyon Enterprises, LLC* (2012) 211 Cal.App.4th 486, 493−494 [149 Cal.Rptr.3d 601], internal citation omitted.)

- "Historically, lost business goodwill was not recoverable under eminent domain law. However, in 1975 the Legislature enacted section 1263.510 'in response to widespread criticism of the injustice wrought by the Legislature's historic refusal to compensate condemnees whose ongoing businesses were diminished in value by a forced relocation. [Citations.] The purpose of the statute was unquestionably to provide monetary compensation for the kind of losses which typically occur when an ongoing small business is forced to move and give up the benefits of its former location.' Thus, a business owner's right to compensation for loss of goodwill is a statutory right, not a constitutional right." (*City and County of San Francisco v. Coyne* (2008) 168 Cal.App.4th 1515, 1522 [86 Cal.Rptr.3d 255], internal citations omitted.)

- "Compensation for loss of goodwill in eminent domain proceedings 'involves a two-step process. Whether the qualifying conditions for such compensation [citation] have been met is a matter for the trial court to resolve. Only if the court finds these conditions exist does the remaining issue of the value of the goodwill loss, if any, go to the jury. [Citations.]' 'Under section 1263.510, subdivision (a), the business owner has the initial burden of showing entitlement to compensation for lost goodwill.' " (*City and County of San Francisco, supra*, 168 Cal.App.4th at pp. 1522–1523, internal citations omitted.)

  "Since the conditions set forth in subdivision (a) all pertain to the 'loss' of 'goodwill,' the initial obligation to establish entitlement to compensation requires a showing, 'as a threshold matter, that the business had goodwill to lose.' " (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation* (2016) 5 Cal.App.5th 190, 201 [209 Cal.Rptr.3d 461].)

  - "[I]n the entitlement phase, the party seeking compensation need only show that there

was *some* loss of the benefit that the business was enjoying before the taking due to its location, reputation, and the like, without necessarily having to quantify its precise value." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra*, 5 Cal.App.5th at p. 204, original italics.)

- "After entitlement to goodwill is shown (which includes a showing that compensation for the loss will not be duplicated) neither party has the burden of proof with regard to valuation." (*Redevelopment Agency of the City of Pomona v. Thrifty Oil Co.* (1992) 4 Cal.App.4th 469, 475 [5 Cal.Rptr.2d 687], internal citations omitted.)

- "Only an owner of a business conducted on the real property taken may claim compensation for loss of goodwill." (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 537 [86 Cal.Rptr.2d 473], internal citation omitted.)

- "[W]hile there are no explicit statutory requirements regarding an expert's use of a particular methodology for valuing lost goodwill, the expert's methodology must provide a fair estimate of *actual value* and cannot be based on hypothetical or speculative uses of a condemned business … ." (*City and County of San Francisco, supra,* 168 Cal.App.4th at p. 1523, original italics.)

- "The underlying purpose of this statute is to provide compensation for the kind of losses which typically occur when an ongoing business is forced to move and give up the benefits of its former location. It includes not only compensation for lost patronage itself, but also for expenses reasonably incurred in an effort to prevent a loss of patronage." (*San Diego Metropolitan Transit Development Bd., supra,* 73 Cal.App.4th at p. 537, internal citations omitted.)

- "Goodwill must, of course, be measured by a method which excludes the value of tangible assets or the normal return on those assets. However, the courts have wisely maintained that there is no single acceptable method of valuing goodwill. Valuation methods will differ with the nature of the business or practice and with the purpose for which the evaluation is conducted." (*People ex rel. Dept. of Transportation v. Muller* (1984) 36 Cal.3d 263, 271, fn. 7 [203 Cal.Rptr. 772, 681 P.2d 1340], internal citations omitted.)

- "The value of this goodwill may be determined using a variety of methods: for example, determining the total value of the business by capitalizing its cash flow, and then subtracting its tangible assets; or determining the amount by which the business's average profits exceed a fair rate of return on the fair market value of its tangible assets, and then capitalizing that amount. But the essential idea is that there is some intangible 'X-factor' that gives the business greater value than it would otherwise have." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra*, 5 Cal.App.5th at p. 201, internal citation omitted.)

- "Certainly a comparison of the pre-taking and post-taking goodwill values would be one way to quantify the amount of goodwill that was lost due to the taking. But it is not evident from the appellate record that the amount of lost goodwill could not be calculated in some other

manner." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation, supra*, 5 Cal.App.5th at p. 205.)

- "Section 1263.510 does not dictate that the only way to obtain compensation for the loss of goodwill is to prove pre-taking goodwill value based on a business value in excess of its tangible assets. Nor does the statute define goodwill as the value of a business not attributable to its tangible assets." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation*, *supra*, 5 Cal.App.5th at p. 211.)

- ~~"Although the statutory scheme applies only to eminent domain proceedings, the right to recover lost goodwill has been extended to the indirect condemnee. Thus, 'goodwill is compensable in an inverse condemnation action to the same extent and with the same limitations on recovery found in ... section 1263.510.' " (*San Diego Metropolitan Transit Development Bd.*, *supra*, 73 Cal.App.4th at p. 537, internal citations omitted.)~~

- ~~"Goodwill may be measured by the capitalized value of the net income or profits of a business or some similar method of calculating present value of anticipated profits. Valuation methods differ with the nature of the business and the purpose for which the evaluation is conducted. There is no single method to evaluate goodwill." (*People ex rel. Dept. of Transportation v. Leslie* (1997) 55 Cal.App.4th 918, 922–923 [64 Cal.Rptr.2d 252], internal citations omitted.)~~

- "[A] 'cost to create' approach is a permissible means by which to value goodwill under [Code of Civil Procedure] section 1263.510 where, as here, a nascent business has not yet experienced excess profits but clearly has goodwill within the meaning of the statute and experiences a total loss of goodwill due to condemnation of the property on which the business is operated." (*Inglewood Redevelopment Agency v. Aklilu* (2007) 153 Cal.App.4th 1095, 1102 [64 Cal.Rptr.3d 519].)

- "As *Aklilu* implicitly recognized, unless there is independent proof that a business possesses goodwill in the first place, the cost-to-create methodology does not reflect the cost of creating any actual goodwill. Instead, it simply adds up costs and calls the total 'goodwill.' The relationship between goodwill and the costs to create breaks down even further when the condemnation takes only a portion of the business's goodwill. In that situation, it becomes necessary to figure out which costs match up with which portions of goodwill that are lost; in most cases, this will devolve into an exercise in futility or fiction." (*Dry Canyon Enterprises, LLC, supra*, 211 Cal.App.4th at p. 494.)

- "Since quantifying the loss of goodwill is a matter concerning the amount of goodwill lost, it is for the jury to decide between the competing views of the experts." (*People ex rel. Dept. of Transportation v. Presidio Performing Arts Foundation*, *supra*, 5 Cal.App.5th at pp. 213–214.)

- "A business which is required to move because of the taking of the property on which it operates has suffered a loss from the taking. This is true whether the tenancy is for a fixed term, or is a periodic tenancy as in this case. The value of the lost goodwill is affected by the

probable remaining term of the tenancy. Evidence of the remaining length of a lease and the existence of an option to renew a lease are, of course, relevant for determining the amount of compensation, if any, to be paid for loss of goodwill. Similarly, evidence of the pre-condemnation duration of a periodic tenancy and the quality and mutual satisfaction in the landlord and tenant relationship are probative for determination of compensation for loss of goodwill." (*Los Angeles Unified Sch. Dist. v. Pulgarin* (2009) 175 Cal.App.4th 101, 107 [95 Cal.Rptr.3d 527], internal citation omitted.)

- "[I]n some circumstances, there may be a limited right to reimbursement for costs incurred to mitigate loss of goodwill." (*Los Angeles Unified School Dist. v. Casasola* (2010) 187 Cal.App.4th 189, 208 [114 Cal.Rptr.3d 318].)

- "Although the statutory scheme applies only to eminent domain proceedings, the right to recover lost goodwill has been extended to the indirect condemnee. Thus, 'goodwill is compensable in an inverse condemnation action to the same extent and with the same limitations on recovery found in ... section 1263.510.' " (*San Diego Metropolitan Transit Development Bd., supra*, 73 Cal.App.4th at p. 537, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 1245, 1246

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:314−7.316.3 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8C-H, *Foundation*, ¶ 8:748.2 (The Rutter Group)

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.64–4.78

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, § 508.19; Ch. 512, *Compensation*, § 512.13 (Matthew Bender)

4 Nichols on Eminent Domain, Ch. 13, *Loss of Business Goodwill*, § 13.18[5] (Matthew Bender)

6A Nichols on Eminent Domain, Ch. 29, *Loss of Business Goodwill*, §§ 29.01–29.08 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.136 (Matthew Bender)

3709. Ostensible Agent

[*Name of plaintiff***] claims that [***name of defendant***] is responsible for [***name of agent***]'s conduct because [he/she] was [***name of defendant***]'s apparent [employee/agent]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally or carelessly created the impression that [***name of agent***] was [***name of defendant***]'s [employee/agent];**

2. **That [***name of plaintiff***] reasonably believed that [***name of agent***] was [***name of defendant***]'s [employee/agent]; and**

3. **That [***name of plaintiff***] was harmed because [he/she] reasonably relied on [his/her] belief.**

New September 2003

Sources and Authority

- Agency Is Actual or Ostensible. Civil Code section 2298.
- "Ostensible Agency" Defined. Civil Code section 2300.
- "Ostensible Authority" Defined. Civil Code section 2317.
- When Principal is Bound by Ostensible Agent. Civil Code section 2334.
- " '[O]stensible authority arises as a result of conduct of the principal which causes the *third party* reasonably to believe that the agent possesses the authority to act on the principal's behalf.' 'Ostensible authority may be established by proof that the principal approved prior similar acts of the agent.' ' "[W]here the principal knows that the agent holds himself out as clothed with certain authority, and remains silent, such conduct on the part of the principal may give rise to liability. …" …' " (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 426–427 [115 Cal.Rptr.3d 707], original italics, internal citations omitted.)
- "Whether an agent has ostensible authority is a question of fact and such authority may be implied from circumstances." (*Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 635 [209 Cal.Rptr.3d 222~~Whether ostensible agency exist[s] is a question of fact and may be implied from [the] circumstances." (*Yanchor v. Kagan* (1971) 22 Cal.App.3d 544, 550 [99 Cal.Rptr. 367~~].)
- " 'It is elementary that there are three requirements necessary before recovery may be had against a principal for the act of an ostensible agent. The person dealing with the agent must do so with belief in the agent's authority and this belief must be a reasonable one; such belief must be generated by

some act or neglect of the principal sought to be charged; and the third person in relying on the agent's apparent authority must not be guilty of negligence.' " (*Associated Creditors' Agency v. Davis* (1975) 13 Cal.3d 374, 399 [118 Cal.Rptr. 772, 530 P.2d 1084], internal citations omitted.)

- "Ostensible agency cannot be established by the representations or conduct of the purported agent; the statements or acts of the principal must be such as to cause the belief the agency exists." (*American Way Cellular, Inc. v. Travelers Property Casualty Co. of America* (2013) 216 Cal.App.4th 1040, 1053 [157 Cal.Rptr.3d 385].)

- "Liability of the principal for the acts of an ostensible agent rests on the doctrine of 'estoppel,' the essential elements of which are representations made by the principal, justifiable reliance by a third party, and a change of position from such reliance resulting in injury." (*Preis v. American Indemnity Co.* (1990) 220 Cal.App.3d 752, 761 [269 Cal.Rptr. 617], internal citation omitted.)

- "But the adequacy of the notice is only one of the many fact questions that arise under ostensible agency. The jury must also determine whether the patient entrusted herself to the hospital, whether the hospital selected the doctor, and whether the patient reasonably believed the doctor was an agent of the hospital." (*Whitlow v. Rideout Memorial Hospital* (2015) 237 Cal.App.4th 631, 641 [188 Cal.Rptr.3d 246].)

- "Where a patient seeks to hold a hospital liable for the negligence of a physician, the doctrine of ostensible agency is now commonly expressed as having two elements: '(1) conduct by the hospital that would cause a reasonable person to believe that the physician was an agent of the hospital, and (2) reliance on that apparent agency relationship by the plaintiff.' " (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1038 [208 Cal.Rptr.3d 363].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 144–149

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Vicarious Liability*, ¶¶ 2:676, 2:677 (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04[6] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, §§ 427.11, 427.22 (Matthew Bender)

18 California Points and Authorities, Ch. 182, *Principal and Agent*, §§ 182.04, 182.120 et seq. (Matthew Bender)

1 California Civil Practice: Torts, § 3:29 (Thomson Reuters)

3724. Going-and-Coming Rule—Business-Errand Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if the employee, while commuting, is on an errand for the employer, then the employee's conduct is within the scope of his or her employment from the time the employee starts on the errand until he or she returns from the errand or until he or she completely abandons the errand for personal reasons.

In determining whether an employee has completely abandoned a business errand for personal reasons, you may consider the following:

a. The intent of the employee;

b. The nature, time, and place of the employee's conduct;

c. The work the employee was hired to do;

d. The incidental acts the employer should reasonably have expected the employee to do;

e. The amount of freedom allowed the employee in performing [his/her] duties; and

f. The amount of time consumed in the personal activity;

g. [*specify other factors, if any***].**

New September 2003; Revised June 2014, June 2017

Directions for Use

This instruction sets forth the business ~~or special~~ errand exception to the going-and-coming rule, sometimes called the "special errand" or "special mission" exception. (See *Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 632-633, fn.6 [209 Cal.Rptr.3d 222] [citing this instruction].) It may be given with CACI No. 3720, *Scope of Employment.*

Under the going-and-coming rule, commute time is not within the scope of employment. However, if the employee is engaged in a "special errand" or a "special mission" for the employer while commuting, it will negate the going-and-coming rule and put the employee within the scope of employment. (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435−436 [98 Cal.Rptr.3d 837].)

Scope of employment ends once the employee abandons or substantially deviates from the special errand. The second paragraph sets forth factors that the jury may consider in determining whether there has been abandonment of a business errand. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 907 [162 Cal.Rptr.3d 280] [opinion may be read to suggest that for the business-errand exception, CACI No. 3723, *Substantial Deviation,* should not be given].)

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. … This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. …' " (*Jeewarat, supra,* 177 Cal.App.4th at p. 435.)

- " 'The *special-errand* exception to the going-and-coming rule is stated as follows: "If the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, but is coming from his home or returning to it on a *special errand* either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons." ' " (*Moradi, supra,* 219 Cal.App.4th at p. 906, original italics.)

- "When an employee is engaged in a 'special errand' or a 'special mission' for the employer it will negate the 'going and coming rule.' … The employer is 'liable for torts committed by its employee while traveling to accomplish a special errand because the errand benefits the employer. … ' " (*Jeewarat, supra,* 177 Cal.App.4th at p. 436, internal citations omitted.)

  - "[I]n determining whether an employee has completely abandoned pursuit of a *business errand* for pursuit of a personal objective, a variety of relevant circumstances should be considered and weighed. Such factors may include [(1)] the intent of the employee, [(2)] the nature, time and place of the employee's conduct, [(3)] the work the employee was hired to do, [(4)] the incidental acts the employer should reasonably have expected the employee to do, [(5)] the amount of freedom allowed the employee in performing his duties, and [(6)] the amount of time consumed in the personal activity. … While the question of whether an employee has departed from his *special errand* is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law." (*Moradi, supra,* 219 Cal.App.4th at p. 907, original italics.)

- "Several general examples of the special-errand exception appear in the cases. One would be where an employee goes on a business errand for his employer leaving from his workplace and returning to his workplace. Generally, the employee is acting within the scope of his employment while traveling to the location of the errand and returning to his place of work. The exception also may be applicable to the employee who is called to work to perform a special task for the employer at an irregular time. The employee is within the scope of his employment during the entire trip from his home to work and back to his home. The exception is further applicable where the employer asks an employee to perform a special errand after the employee leaves work but before going home. In this case, as in the other examples, the employee is normally within the scope of his employment while traveling to the special errand and while traveling home from the special errand." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 931–932 [237 Cal.Rptr. 718], internal citations omitted.)

- “Plaintiffs contend an employee's attendance at an out-of-town business conference authorized and paid for by the employer may be a special errand for the benefit of the employer under the special errand doctrine. [Defendant] asserts that the special errand doctrine does not apply to commercial travel. We conclude that a special errand may include commercial travel such as the business trip in this case.” (*Jeewarat, supra,* 177 Cal.App.4th at p. 436.)

- “An employee who has gone upon a special errand does not cease to be acting in the course of his employment upon his accomplishment of the task for which he was sent. He is in the course of his employment during the entire trip.” (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 495 [48 Cal.Rptr. 765].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 181–184

Finley, California Summary Judgment and Related Termination Motions § 1:1 et seq. (The Rutter Group)

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles,* § 20.42[3] (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,* §§ 248.11, 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent,* § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior,* § 100A.28 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 3:10 (Thomson Reuters)

3725. Going-and-Coming Rule—Vehicle-Use Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.

The drive to and from work may also be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly. The employee's agreement may be either express or implied.

New September 2003; Revised June 2014, June 2017

Directions for Use

This instruction sets forth the ~~required~~ vehicle use exception to the going-and-coming rule, sometimes called the required-vehicle exception. (See (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 398, fn. 6 [207 Cal.Rptr.3d 586]; see also *Pierson v. Helmerich & Payne International Drilling Co.* (2016) 4 Cal.App.5th 608, 624–630 [209 Cal.Rptr.3d 222 [vehicle-use exception encompasses two categories; required-vehicle and incidental-use, both of which are expressed within CACI No. 3725].) It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, commute time is within the scope of employment if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has reasonably come to rely on its use and to expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. (See *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301 [105 Cal.Rptr.3d 718].) Whether there is such a requirement or agreement can be a question of fact for the jury. (See *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 723 [159 Cal. Rptr. 835, 602 P.2d 755].)

Under this exception, the commute itself is considered the employer's business. However, scope of employment may end if the employee substantially deviates from the commute route for personal reasons. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 899, 907–908 [162 Cal.Rptr.3d 280].) If substantial deviation is alleged, give CACI No. 3723, *Substantial Deviation*.

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. … This is based on the concept that the employment relationship is

suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. …' " (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].)

- "The 'required-vehicle' exception to the going and coming rule and its variants have been given many labels. In *Halliburton, supra*, 220 Cal.App.4th 87, we used the phrase 'incidental benefit exception' as the equivalent of the required-vehicle exception. In *Felix v. Asai* (1987) 192 Cal.App.3d 926 [237 Cal. Rptr. 718] (*Felix*), we used the phrase 'vehicle-use exception.' The phrase 'required-use doctrine' also has been used. The 'vehicle-use' variant appears in the title to California Civil Jury Instruction (CACI) No. 3725, 'Going-and-Coming Rule—Vehicle-Use Exception.' The various labels and the wide range of circumstances they cover have the potential to create uncertainty about the factual elements of the exception—a topic of particular importance when reviewing a motion for summary judgment for triable issues of *material* fact. [¶] To structure our analysis of this exception, and assist the clear statement of the factual elements of its variants, we adopt the phrase 'vehicle-use exception' from *Felix* and CACI No. 3725 to describe the exception in its broadest form. Next, under the umbrella of the vehicle-use exception, we recognize two identifiable categories with different factual elements. We label those two categories as the 'required-vehicle exception' and 'incidental benefit exception' because those labels emphasize the factual difference between the two categories." (*Pierson, supra*, 4 Cal.App.5th at pp. 624–625, original italics, internal citations omitted.)
- "Our division of the vehicle-use exception for purposes of this summary judgment motion should not be read as implying that this division is required, or even helpful, when presenting the scope of employment issue to a jury. The broad formulation of the vehicle-use exception in CACI No. 3725 correctly informs the jury that the issue of ultimate fact—namely, the scope of employment—may be proven in different ways." (*Pierson, supra*, 4 Cal.App.5th at p. 625, fn. 4.)

- "The portion of CACI No. 3725 addressing an employer requirement states: '[I]f an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.' " (*Pierson, supra*, 4 Cal.App.5th at p. 625.)

  "Our formulation of the incidental benefit exception is based on the part of CACI No. 3725 that states: 'The drive to and from work may … be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly.' The 'agreement may be either express or implied.' The existence of an express or implied agreement can be a question of fact for the jury." (*Pierson, supra*, 4 Cal.App.5th at p. 629.)

- " '[W]hen a business enterprise requires an employee to drive to and from its office in order to have his vehicle available for company business during the day, accidents on the way to or from the office are statistically certain to occur eventually, and, the business enterprise having required the driving to and from work, the risk of such accidents are risks incident to the business enterprise.' [¶] These holdings are the bases for the CACI instruction, the first paragraph of which tells the jury that the

drive to and from work is within the scope of employment if the "employer requires [the] employee to drive to and from the workplace so that the vehicle is available for the employer's business," and the second paragraph, that the drive may be if 'the use of the employee's vehicle provides some direct or incidental benefit to the employer' and 'there may be a benefit to the employer if, one, the employee has [agreed] to make the vehicle available as an accommodation to the employer, and two, the employer has reasonably come to rely on the vehicle's use and expect the employee to make it available regularly.' (CACI No. 3725.)" (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 401–402 [207 Cal.Rptr.3d 586], internal citation omitted.)

- " 'A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is whether there is an incidental benefit derived by the employer. [Citation.]' ~~This exception to the going and coming rule … has been referred to as the 'required-vehicle' exception.~~… The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has 'reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.' " (*Lobo, supra,* 182 Cal.App.4th at p. 297, original italics, internal citations omitted.)

- ~~"If an employer requires an employee to furnish a vehicle as an express or implied condition of employment, the employee will be in the scope of his employment while commuting to and from the place of his employment." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 932 [237 Cal.Rptr. 718], internal citations omitted.)~~

- " 'To be sure, ordinary commuting is beyond the scope of employment … . Driving a required vehicle, however, is a horse of another color because it satisfies the control and benefit elements of respondeat superior. An employee who is required to use his or her own vehicle provides an "essential instrumentality" for the performance of the employer's work. … When a vehicle must be provided by an employee, the employer benefits by not having to have available an office car and yet possessing a means by which off-site visits can be performed by its employees.' " (*Moradi, supra,* 219 Cal.App.4th at p. 899.)

- "When an employer requires an employee to use a personal vehicle, it exercises meaningful control over the method of the commute by compelling the employee to foreswear the use of carpooling, walking, public transportation, or just being dropped off at work." (*Moradi, supra,* 219 Cal.App.4th at p. 899.)

- "The cases invoking the required-vehicle exception all involve employees whose jobs entail the regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business." (*Tryer v. Ojai Valley School Dist.* (1992) 9 Cal.App.4th 1476, 1481 [12 Cal.Rptr.2d 114].)

- "[N]ot all benefits to the employer are of the type that satisfy the incidental benefits exception. The requisite benefit must be one that is 'not common to commute trips by ordinary members of the work force.' Thus, employers benefit when employees arrive at work on time, but this benefit is insufficient to satisfy the incidental benefits exception. An example of a sufficient benefit is where an employer

enlarges the available labor market by providing travel expenses and paying for travel time." (*Pierson, supra*, 4 Cal.App.5th at p. 630.)

- "Where the incidental benefit exception applies, the employee's commute directly between work and home is considered to be within the scope of employment for respondeat superior purposes. Minor deviations from a direct commute are also included, but there is no respondeat superior liability if the employee substantially departs from the employer's business or is engaged in a purely personal activity at the time of the tortious injury." (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 97 [162 Cal.Rptr.3d 752].)

- "Here, the required vehicle exception to the going and coming rule, not the special errand exception, governs our analysis. Accordingly, we have not applied the six factors used in special errand cases to determine whether [employee] was acting within the scope of her employment at the time of the accident. [¶] Rather, we have applied the relevant principles under the required vehicle exception. Those principles differ from the six factors used to determine whether the special errand exception applies. In the present case, [employer] required [employee] to use her personal vehicle to travel to and from the office and other destinations. She also had to use her personal vehicle before, during, and after regular work hours to develop new business. We have properly examined whether [employee]'s use of her personal vehicle conferred an incidental benefit on [employer]—it did; whether her planned stops at the frozen yogurt shop and the yoga studio were an unforeseeable, substantial departure from her commute—they were not; whether they were a foreseeable, minor deviation from her regular commute—they were; whether they were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer's business—they were not; and whether they were necessary for [employee]'s comfort, convenience, health, and welfare—they were." (*Moradi, supra,* 219 Cal.App.4th at pp. 907−908.)

- "[T]he employee's trip was outside the scope of his employment despite the payment of the travel allowance." (*Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, 1041 [222 Cal.Rptr. 494].)

- "[A]lthough the employment relationship is ordinarily suspended when the employee is going or coming, 'the employer may agree, either expressly or impliedly, that the relationship shall continue during the period of "going and coming," … . Such an agreement may be inferred from the fact that the employer furnishes transportation to and from work as an incident to the employment. [Citations.] It seems equally clear that such an agreement may also be inferred from the fact that the employer compensates the employee for the time consumed in traveling to and from work.' " (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 962 [88 Cal.Rptr. 188, 471 P.2d 988].)

- "One exception to the going and coming rule has been recognized when the commute involves ' "an incidental benefit to the employer, not common to commute trips by ordinary members of the work force." [Citation.]' When the employer incidentally benefits from the employee's commute, that commute may become part of the employee's workday for the purposes of respondeat superior liability. [¶] The incidental benefit exception has been applied when the employer furnishes, or requires the employee to furnish, a vehicle for transportation on the job, and the negligence occurs while the employee is traveling to or from work in that vehicle." (*Halliburton Energy Services, Inc., supra,* 220 Cal.App.4th at p. 96, internal citation omitted.)

- "Public policy would be ill-served by a rule establishing 24-hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of an accident." (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1610 [26 Cal.Rptr.2d 749].)

- "[T]he trier of fact remains free to determine in a particular case that the employee's use of his or her vehicle was too infrequent to confer a sufficient benefit to the employer so as to make it reasonable to require the employer to bear the cost of the employee's negligence in operating the vehicle. This is particularly true in the absence of an express requirement that the employee make his or her vehicle available for the employer's benefit or evidence that the employer actually relied on the availability of the employee's car to further the employer's purposes." (*Lobo v. Tamco* (2014) 230 Cal.App.4th 438, 447 [178 Cal.Rptr.3d 515].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 184

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, Part II *Theories Of Recovery—Vicarious Liability*, ¶ 2:803 (The Rutter Group)

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.42[3][d] (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* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 3:10 (Thomson Reuters)

3903A. Medical Expenses—Past and Future (Economic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] medical expenses.**

[To recover damages for past medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] has received.]**

[To recover damages for future medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] is reasonably certain to need in the future.]**

New September 2003

Sources and Authority

- "[A] person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, 640 [246 Cal.Rptr. 192], internal citations omitted; see also *Helfend v. Southern Cal Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 [84 Cal.Rptr. 173, 465 P.2d 61 [collateral source rule].)

- "An injured plaintiff is entitled to recover the reasonable value of medical services that are reasonably certain to be necessary in the future." (*J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 341 [181 Cal.Rptr.3d 286].)

- "The jury in this case was properly instructed with CACI No. 3903A, which directs the jury to determine 'the reasonable cost of reasonably necessary medical care that [plaintiff] is reasonably certain to need in the future.' " (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050 [208 Cal.Rptr.3d 363].)

- "The jury was properly instructed in this case to determine 'the reasonable cost of reasonably necessary medical care that [plaintiff] has received' and 'the reasonable cost of reasonably necessary medical care that [plaintiff] is reasonably certain to need in the future.' But as a consequence of the discrepancy in recent decades between the amount patients are typically billed by health care providers and the lower amounts usually paid in satisfaction of the charges (whether by a health insurer or otherwise), controversy has arisen as to how to measure the reasonable costs of medical care in a variety of factual scenarios." (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1328 [188 Cal.Rptr.3d 820].)

- "[A] plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less. California decisions have focused on 'reasonable value' in the context of *limiting* recovery to reasonable expenditures, not expanding recovery beyond the plaintiff's actual loss or liability. To be recoverable, a medical expense must be both incurred *and* reasonable." (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555 [129 Cal.Rptr.3d 325, 257 P.3d 1130], original italics,

internal citations omitted.)

- "[A]n injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial. In so holding, we in no way abrogate or modify the collateral source rule as it has been recognized in California; we merely conclude the negotiated rate differential—the discount medical providers offer the insurer—is not a benefit provided to the plaintiff in compensation for his or her injuries and therefore does not come within the rule." (*Howell, supra,* 52 Cal.4th at p. 566.)

- "[W]hen a medical care provider has, by agreement with the plaintiff's private health insurer, accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial. Evidence that such payments were made in whole or in part by an insurer remains, however, generally inadmissible under the evidentiary aspect of the collateral source rule. Where the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses." (*Howell, supra,* 52 Cal.4th at p. 567, internal citation omitted.)

- "*Howell* offered no bright-line rule on how to determine 'reasonable value' when uninsured plaintiffs have incurred (but not paid) medical bills. [Defendant] is correct that the concept of market or exchange value was endorsed by *Howell* as the proper way to think about the 'reasonable value' of medical services. But she is incorrect to the extent she suggests (1) [Plaintiff] is necessarily in the same market as insured health care recipients or wealthy health care recipients who can pay cash; or (2) *Howell* prescribes a particular method for determining the 'reasonable value' of medical services." (*Bermudez, supra,* 237 Cal.App.4th at p. 1330.)

- "In sum, the measure of medical damages is the lesser of (1) the amount paid or incurred, and (2) the reasonable value of the medical services provided. In practical terms, the measure of damages in insured plaintiff cases will likely be the amount paid to settle the claim in full. It is theoretically possible to prove the reasonable value of services is lower than the rate negotiated by an insurer. But nothing in the available case law suggests this will be a particularly fruitful avenue for tort defendants. Conversely, the measure of damages for uninsured plaintiffs who have not paid their medical bills will usually turn on a wide-ranging inquiry into the reasonable value of medical services provided, because uninsured plaintiffs will typically incur standard, nondiscounted charges that will be challenged as unreasonable by defendants." (*Bermudez, supra,* 237 Cal.App.4th at pp. 1330−1331.)

- "[T]he inquiry into reasonable value for the medical services provided to an uninsured plaintiff is not necessarily limited to the billed amounts where a defendant seeks to introduce evidence that a lesser payment has been made to the provider by a factor … . In such cases, the inquiry requires some additional evidence showing a nexus between the amount paid by the factor and the reasonable value of the medical services." (*Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 1007 [194 Cal.Rptr.3d 364].)

- "Where a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those

services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule." (*Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 769 [133 Cal.Rptr.3d 342].)

- "It is established that 'the reasonable value of nursing services required by the defendant's tortious conduct may be recovered from the defendant even though the services were rendered by members of the injured person's family and without an agreement or expectation of payment. Where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained. The fact that the injured party had a legal right to the nursing services (as in the case of a spouse) does not, as a general rule, prevent recovery of their value … .' " (*Hanif, supra,* 200 Cal.App.3d at pp. 644–645, internal citations omitted.)

- "Two points about the sufficiency of evidence to support a judgment can fairly be taken from *Howell*. First, the amount paid to settle in full an insured plaintiff's medical bills is likely substantial evidence on its own of the reasonable value of the services provided. Second, consistent with pre-*Howell* law, initial medical bills are generally insufficient on their own as a basis for determining the reasonable value of medical services. Ensuing cases have held that a plaintiff who relies solely on evidence of unpaid medical charges will not meet his burden of proving the reasonable value of medical damages with substantial evidence." (*Bermudez, supra,* 237 Cal.App.4th at p. 1335, internal citations omitted.)

- Nor is it necessary that the amount of the award equal the alleged medical expenses for it has long been the rule that the costs alone of medical treatment and hospitalization do not govern the recovery of such expenses. It must be shown additionally that the services were attributable to the accident, that they were necessary, and that the charges for such services were reasonable." (*Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216 [16 Cal.Rptr. 308].)

- "The intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by the medical provider for care and treatment, as long as the plaintiff legitimately incurs those expenses and remains liable for their payment. Nor does the rule [that a plaintiff in a tort action cannot recover more than the amount of medical expenses he or she paid or incurred, even if the reasonable value of those services might be a greater sum] forbid the jury from considering the amounts billed by the provider as evidence of the reasonable value of the services." (*Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1291 [62 Cal.Rptr.3d 309]; see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 436 [209 Cal.Rptr.3d 101] ["Nothing in *Howell* suggests a need to revisit the issues we addressed in *Katiuzhinsky*"].)

- "The fact that a hospital or doctor, for administrative or economic convenience, decides to sell a debt to a third party at a discount does not reduce the value of the services provided in the first place." (*Uspenskaya, supra,* 241 Cal.App.4th at p. 1003.)

- "Because the provider may no longer assert a lien for the full cost of its services, the Medicaid beneficiary may only recover the amount payable under Medicaid as his or her medical expenses in an action against a third party tortfeasor." (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827 [135 Cal.Rptr.2d 1, 69 P.3d 927], internal citation omitted.)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "It is for the jury to determine the probabilities as to whether future detriment is reasonably certain to occur in any particular case. [Citation.] It is 'not required' for a doctor to 'testify that he [is] reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty. [Citations.]' [Citation.] The fact that the amount of future damages may be difficult to measure or subject to various possible contingencies does not bar recovery." (*J.P., supra,* 232 Cal.App.4th at pp. 341−342.)

- "[I]t seems particularly appropriate for the trial court to perform its traditional gatekeeper role as to the admissibility of evidence and, pursuant to Evidence Code section 352, to determine whether evidence that is minimally probative should be admitted or whether it will require an undue consumption of time to try the collateral issues that evidence of what a third party paid for an account receivable and lien will necessarily raise." (*Moore*, *supra*, 4 Cal.App.5th at p. 443.)

- "[E]vidence which might be admissible in one case might not be admissible in another. '[T]he facts and circumstances of the particular case dictate what evidence is relevant to show the reasonable market value of the services at issue … .' " (*Moore*, *supra*, 4 Cal.App.5th at p. 442.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1670

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-A, *Damages: Introduction*, ¶¶ 3:1–3:19.4 (The Rutter Group)

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶¶ 3:33–3:233 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.19–1.31

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.01, 52.03 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.45 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.192 (Matthew Bender)

1 California Civil Practice: Torts § 5:12 (Thomson Reuters)

3903J. Damage to Personal Property (Economic Damage)

[*Insert number, e.g.,* "10."**] The harm to [***name of plaintiff***]'s [***item of personal property, e.g., automobile***].**

To recover damages for harm to personal property, [*name of plaintiff***] must prove the reduction in the [***e.g., automobile***]'s value or the reasonable cost of repairing it, whichever is less. [If there is evidence of both, [***name of plaintiff***] is entitled to the lesser of the two amounts.]**

[However, if you find that the [*e.g., automobile***] can be repaired, but after repairs it will be worth less than it was before the harm, the damages are (1) the difference between its value before the harm and its lesser value after the repairs have been made; plus (2) the reasonable cost of making the repairs. The total amount awarded may not exceed the [***e.g., automobile***]'s value before the harm occurred.]**

To determine the reduction in value if repairs cannot be made, you must determine the fair market value of the [*e.g., automobile***] before the harm occurred and then subtract the fair market value immediately after the harm occurred.**

"Fair market value" is the highest price that a willing buyer would have paid to a willing seller, assuming:

1. **That there is no pressure on either one to buy or sell; and**
2. **That the buyer and seller are fully informed of the condition and quality of the [***e.g., automobile***].**

New September 2003; Revised December 2011, June 2013, December 2015

Directions for Use

Do not give this instruction if the property had no monetary value either before or after injury. (See *Kimes v. Grosser* (2011) 195 Cal.App.4th 1556, 1560 [126 Cal.Rptr.3d 581] [CACI No. 3903J has no application to prevent proof of out-of-pocket expenses to save the life of a pet cat].) See CACI No. 3903O, *Injury to Pet (Economic Damage).*

Give the optional second paragraph if the property can be repaired, but the value after repair may be less than before the harm occurred. (See *Merchant Shippers Association v. Kellogg Express and Draying Co.* (1946) 28 Cal.2d 594, 600 [170 P.2d 923].)

Sources and Authority

- "The general rule is that the measure of damages for tortious injury to personal property is the difference between the market value of the property immediately before and immediately after the

injury, or the reasonable cost of repair if that cost be less than the diminution in value. This rule stems from the basic code section fixing the measure of tort damage as 'the amount which will compensate for all the detriment proximately caused thereby.' [citations]" (*Pacific Gas & Electric Co. v. Mounteer* (1977) 66 Cal.App.3d 809, 812 [136 Cal.Rptr. 280].)

- "It has also been held that the price at which a thing can be sold at public sale, or in the open market, is some evidence of its market value. In *San Diego Water Co. v. San Diego,* the rule is announced that the judicial test of market value depends upon the fact that the property in question is marketable at a given price, which in turn depends upon the fact that sales of similar property have been, and are being, made at ascertainable prices. In *Quint v. Dimond,* it was held competent to prove market value in the nearest market." (*Tatone v. Chin Bing* (1936) 12 Cal.App.2d 543, 545–546 [55 P.2d 933], internal citations omitted.)

- " 'Where personal property is injured but not wholly destroyed, one rule is that the plaintiff may recover the depreciation in value (the measure being the difference between the value immediately before and after the injury), and compensation for the loss of use.' In the alternative, the plaintiff may recover the reasonable cost of repairs as well as compensation for the loss of use while the repairs are being accomplished. If the cost of repairs exceeds the depreciation in value, the plaintiff may only recover the lesser sum. Similarly, if depreciation is greater than the cost of repairs, the plaintiff may only recover the reasonable cost of repairs. If the property is wholly destroyed, the usual measure of damages is the market value of the property." (*Hand Electronics, Inc. v. Snowline Joint Unified School Dist.* (1994) 21 Cal.App.4th 862, 870 [26 Cal.Rptr.2d 446], internal citations omitted.)

- The cost of replacement is not a proper measure of damages for injury to personal property. (*Hand Electronics Inc., supra,* 21 Cal.App.4th at p. 871.)

- "When conduct complained of consists of intermeddling with personal property 'the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use.' " (*Itano v. Colonial Yacht Anchorage* (1968) 267 Cal.App.2d 84, 90 [72 Cal.Rptr. 823], internal citations omitted.)

- "The measure of damage for wrongful injury to personal property is that difference between the market value of the property immediately before and immediately after the injury, or the reasonable cost of repair if such cost be less than the depreciation in value." (*Smith v. Hill* (1965) 237 Cal.App.2d 374, 388 [47 Cal.Rptr. 49], internal citations omitted.)

- "[I]t is said ... that 'if the damaged property cannot be completely repaired, the measure of damages is the difference between its value before the injury and its value after the repairs have been made, plus the reasonable cost of making the repairs. The foregoing rule gives the plaintiff the difference between the value of the machine before the injury and its value after such injury, the amount thereof being made up of the cost of repairs and the depreciation notwithstanding such repairs.' The rule urged by defendant, which limits the recovery to the cost of repairs, is applicable only in those cases in which the injured property 'can be entirely repaired.' This latter rule presupposes that the damaged property can be restored to its former state with no depreciation in its former value." (*Merchant Shippers Association, supra,* 28 Cal.2d at p. 600, internal citations omitted.)

- "In personal property cases, plaintiffs are entitled to present evidence of the cost of repairs even in cases where recovery is limited to the lost market value of property. The cost of repairs constitutes a prima facie measure of damages, and it is the defendant's burden to respond with proof of a lesser diminution in value." (*Kimes, supra,* 195 Cal.App.4th at p. 1560, internal citation omitted.)

- "In this case, the policy language was clear and explicit. Regarding coverage for car damage, it provided that [insurer] '*may* pay the loss in money *or* repair … damaged … property.' The policy's use of the term 'may' suggests [insurer] had the discretion to choose between the two options." (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 550 [204 Cal.Rptr.3d 433].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1718, 1719

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:220 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Vehicles and Other Personal Property, §§ 13.8–13.11

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, § 52.31 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.41, 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 5:16 (Thomson Reuters)

3935. Prejudgment Interest (Civ. Code, § 3288)

If you decide that [*name of plaintiff*] is entitled to recover damages for past economic loss in one or more of the categories of damages that [she/he/it] claims, then you must decide whether [he/she/it] should also receive prejudgment interest on each item of loss in those categories. Prejudgment interest is the amount of interest the law provides to a plaintiff to compensate for the loss of the ability to use the funds. If prejudgment interest is awarded, it is computed from the date on which each loss was incurred until the date on which you sign your verdict.

Whether [*name of plaintiff*] should receive an award of prejudgment interest on all, some, or none of any past economic damages that you may award is within your discretion. If you award these damages to [*name of plaintiff*], you will be asked to address prejudgment interest in the special verdict form.

New December 2016

Directions for Use

Give this instruction if the court determines that the jury may award prejudgment interest. In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury. (Civ. Code, § 3288.) The statute allows the jury to award prejudgment interest on any claim within its scope. (*Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22; 582 P.2d 109].) The special verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

The role of the jury in awarding prejudgment interest is not clear from Civil Code section 3288. This instruction assumes that the court exercises a gatekeeper function of deciding whether the case is one to which the statute applies. The jury does not select the interest rate, which is seven percent as a matter of law. (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1585 [36 Cal.Rptr.2d 343].)

It is settled that prejudgment interest cannot be awarded on damages for the intangible, noneconomic aspects of mental and emotional injury because they are inherently nonpecuniary, unliquidated, and not readily subject to precise calculation. (*Greater Westchester Homeowners Assn v. L.A.* (1979) 26 Cal.3d 86, 102−103 [160 Cal.Rptr.733, 603 P.2d 1329].) This instruction assumes that implicit in the reasoning for denying prejudgment interest for noneconomic damages is authorization to award it on all past economic damages, as these amounts are pecuniary and subject to more precise calculation. This instruction should not be given unless damages of this nature are claimed.

Since the statute is permissive, the jury has the discretion to deny prejudgment interest, even if it might otherwise be authorized. (See *King v. Southern Pacific Co.* (1895) 109 Cal.96, 99 [41 P. 786] [error to instruct jury that it must add prejudgment interest to award of damages].)

Whether interest may be compounded is also not resolved. (Compare *Douglas v. Westfall* (1952) 113 Cal.App. 2d 107, 112 [248 P.2d 68] [trustee cannot be charged with compound interest unless s/he has

been guilty of some positive misconduct or willful violation of duty; in cases of mere negligence, no more than simple interest can properly be added] and *State v. Day* (1946) 76 Cal.App.2d 536, 554 [173 P.2d 399] [general rule is that interest may not be computed on accrued interest unless by special statutory provision, or by stipulation of the parties] with *Michelson, supra,* 29 Cal.App.4th at p. 1588 [jury is vested with discretion to award prejudgment interest under section 3288, including compound interest] and *McNulty v. Copp* (1954) 125 Cal.App.2d 697, 712 [271 P.2d 90] [compound interest is properly allowed on a claim for wrongful and fraudulent detention of personalty].)

Sources and Authority

- Interest on obligation not arising from contract. Civil Code section 3288.

- "Under Civil Code section 3288, the trier of fact may award prejudgment interest '[in] an action for the breach of an obligation not arising from contract, *and* in every case of oppression, fraud, or malice . . . .' " (*Bullis, supra,* 21 Cal.3d at p. 814, original italics.)

- "[U]nlike Civil Code section 3287, which relates to liquidated and contractual claims, section 3288 permits discretionary prejudgment interest for unliquidated tort claims." (*Greater Westchester Homeowners Assn, supra,* 26 Cal.3d at p. 102.)

- "Conceptually, prejudgment interest is an element of damages, not a cost of litigation." (*Watson Bowman Acme Corp. v. RGW Construction, Inc.* (2016) 2 Cal.App.5th 279, 293 [206 Cal.Rptr.3d 281].)

- "In *Bullis,* we characterized prejudgment interest as 'awarded to compensate a party for the loss of his or her property.' The award of such interest represents the accretion of wealth which money or particular property could have produced during a period of loss. Using recognized and established techniques a fact finder can usually compute with fair accuracy the interest on a specific sum of money, or on property subject to specific valuation. Furthermore, the date of loss of the property is usually ascertainable, thus permitting an accurate interest computation." (*Greater Westchester Homeowners Assn, supra,* 26 Cal.3d at pp. 102−103, internal citations omitted.)

- "The award of [prejudgment] interest represents the accretion of wealth which money or particular property could have produced during a period of loss." (*Canavin v. Pac. Southwest Airlines* (1983)148 Cal.App.3d 512, 525 [196 Cal.Rptr. 82].)

- "However, damages for the intangible, noneconomic aspects of mental and emotional injury are of a different nature. They are inherently nonpecuniary, unliquidated and not readily subject to precise calculation. The amount of such damages is necessarily left to the subjective discretion of the trier of fact. Retroactive interest on such damages adds uncertain conjecture to speculation. Moreover where, as here, the injury was of a continuing nature, it is particularly difficult to determine when any particular increment of intangible loss arose. Acknowledging the problem, the trial court arbitrarily resorted to an 'averaging' method applied to both the amount and duration of the loss. In our view this process was impermissibly speculative." (*Greater Westchester Homeowners Assn, supra,* 26 Cal.3d at p. 103.)

- "The amount of damages awarded in a wrongful death case designed to compensate these noneconomic losses are akin to those awarded for pain and suffering and emotional distress in *Greater Westchester* and do not support prejudgment interest. However, plaintiffs are entitled to prejudgment interest on those damages attributable to an ascertainable economic value, such as loss of household services or earning capacity, as well as funeral and related expenses. '[It] is important to underscore that [an] award is invalid only to the extent it represents interest on "the intangible noneconomic aspects of mental and emotional injury" claimed by plaintiffs. [Citation.] If plaintiffs allege specific damage that is supported by tangible evidence, prejudgment interest may properly be awarded under Civil Code section 3288.' " (*Canavin, supra*, 148 Cal.App.3d at p. 527, internal citations omitted.)

- "Whether the proper interest rate was applied is a question of law. There is no legislative act specifying the rate of prejudgment interest for a fraud claim, and therefore the constitutional rate of 7 percent applies … ." (*Michelson, supra*, 29 Cal.App.4th at p. 1585.)

- "Section 3288 … allows interest from date of monetary loss at the discretion of the trier of fact even if the damages are unliquidated." (*Stein v. Southern Cal. Edison Co.* (1992) 7 Cal.App.4th 565, 572 [8 Cal. Rptr. 2d 907].)

- "[T]his action lies in tort and it is the generally accepted view that [prejudgment] interest cannot be awarded on damages for personal injury." (*Curtis v. State of California ex rel. Dept. of Transportation* (1982) 128 Cal.App.3d 668, 686 [180 Cal.Rptr. 843].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1643-1646

4 Levy et al., California Torts, Ch. 50, Damages, §§ 50.51, 50.52 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, Damages, § 177.53 (Matthew Bender)

12 California Points and Authorities, Ch. 121, Interest, §§ 121.33, 121.54 (Matthew Bender)

3940. Punitive Damages—Individual Defendant—Trial Not Bifurcated

If you decide that [*name of defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages only if [*name of plaintiff***] proves by clear and convincing evidence that [***name of defendant***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that [*name of defendant***] acted with intent to cause injury or that [***name of defendant***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**
2. **Whether [***name of defendant***] disregarded the health or safety of others;**
3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**
4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**
5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and

[*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, ~~*More Likely True*~~*Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given where an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of

wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,*

549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of

reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra,* 198 Cal.App.4th at p. 562, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.2d 263], internal citations omitted.)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances

that are ‘base,’ ‘vile,’ or ‘contemptible.’ As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, ‘malice’ requires more than a ‘willful and conscious’ disregard of the plaintiffs’ interests. The additional component of ‘despicable conduct’ must be found.” (*College Hospital, Inc., supra,* 8 Cal.4th at p. 725, internal citations omitted.)

- “We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages.” (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- “With the focus on the plaintiff’s injury rather than the amount of compensatory damages, the [‘reasonable relation’] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable.” (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- “The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff.” (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.01–54.06, 54.20–54.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3942. Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**
2. **Whether [***name of defendant***] disregarded the health or safety of others;**
3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**
4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**
5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the

conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed … that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- Evidence of Profits or Financial Condition. Civil Code section 3295(d).

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury

that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a

stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra,* 198 Cal.App.4th at p. 562, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–

425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.2d 263], internal citations omitted.)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "We conclude that the rule … that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.37–14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages,* §§ 54.20–54.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3943. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated

If you decide that [*name of employee/agent***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of defendant***] for [***name of employee/agent***]'s conduct. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages against [*name of defendant***] for [***name of employee/agent***]'s conduct only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of employee/agent***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that [*name of employee/agent***] acted with intent to cause injury or that [***name of employee/agent***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of employee/agent***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

[*Name of plaintiff***] must also prove [one of] the following by clear and convincing evidence:**

1. **[That [***name of employee/agent***] was an officer, a director, or a managing agent of [***name of defendant***], who was acting on behalf of [***name of defendant***]; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of [***name of employee/agent***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized [***name of employee/agent***]'s conduct; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of defendant***] knew of [***name of employee/agent***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately

determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**
2. **Whether [***name of defendant***] disregarded the health or safety of others;**
3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**
4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**
5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated.* When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, or managing agents,

use CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, ~~*More Likely True*~~*Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated,* for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an

employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The

precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible -- although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an

instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra*, 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra*, 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of

determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.2d 263], internal citations omitted.)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- The concept of "managing agent" "assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true, … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee

is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168, internal citations omitted.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.20–14.23, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3945. Punitive Damages—Entity Defendant—Trial Not Bifurcated

If you decide that [*name of defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages against [*name of defendant***] only if [***name of plaintiff***] proves that [***name of defendant***] engaged in that conduct with malice, oppression, or fraud. To do this, [***name of plaintiff***] must prove [one of] the following by clear and convincing evidence:**

1. **[That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [***name of defendant***], who acted on behalf of [***name of defendant***]; [or]]**

2. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [***name of defendant***]; [or]]**

3. **[That one or more officers, directors, or managing agents of [***name of defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [*name of defendant***] acted with intent to cause injury or that [***name of defendant***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant*]'s conduct? In deciding how reprehensible [*name of defendant*]'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether [*name of defendant*] disregarded the health or safety of others;

3. Whether [*name of plaintiff*] was financially weak or vulnerable and [*name of defendant*] knew [*name of plaintiff*] was financially weak or vulnerable and took advantage of [him/her/it];

4. Whether [*name of defendant*]'s conduct involved a pattern or practice; and

5. Whether [*name of defendant*] acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/its] conduct]?

(c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]

[Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

New September 2004; Revised April 2004, June 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, or managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated.* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, ~~*More Likely True*~~*Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated,* for additional sources and authority.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d

525].) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294..

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA,*

Inc. (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra*, 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra*, 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful

conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 987 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."

(*State Farm Mutual Automobile Insurance Co.*, *supra*, 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams*, *supra*, 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams*, *supra*, 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.2d 263], internal citations omitted.)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc.*, *supra*, 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc.*, *supra*, 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3947. Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated

If you decide that [*name of individual defendant***]'s or [***name of entity defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] engaged in that conduct with malice, oppression, or fraud.**

You may award punitive damages against [*name of entity defendant***] only if [***name of plaintiff***] proves that [***name of entity defendant***] acted with malice, oppression, or fraud. To do this, [***name of plaintiff***] must prove [one of] the following by clear and convincing evidence:**

1. **[That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [***name of entity defendant***], who acted on behalf of [***name of entity defendant***]; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of entity defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [***name of entity defendant***]; [or]]**

4. **[That one or more officers, directors, or managing agents of [***name of entity defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff***].**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether the defendant disregarded the health or safety of others;

3. Whether [*name of plaintiff***] was financially weak or vulnerable and the defendant knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her];**

4. Whether the defendant's conduct involved a pattern or practice; and

5. Whether the defendant acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that the defendant knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish a defendant for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended to apply if punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated,* or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not*

Bifurcated. When punitive damages are sought against an individual defendant, use CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, ~~*More Likely True*~~*Highly Probable—Clear and Convincing Proof*.

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's

definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)
- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether

the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions

(Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra*, 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra*, 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the 'net'

concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.2d 263], internal citations omitted.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee

is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens,*

supra, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Evidence of Profits or Financial Condition. Civil Code section 3295(d).
- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)
- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)
- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)
- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citations omitted.)
- "In light of our holding that evidence of a defendant's financial condition is essential to support an

award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an

individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra*, 198 Cal.App.4th at p. 562, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due

3949. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether the defendant disregarded the health or safety of others;

3. Whether [*name of plaintiff***] was financially weak or vulnerable and the defendant knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**

4. Whether the defendant's conduct involved a pattern or practice; and

5. Whether the defendant acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that the defendant knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish a defendant for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … .” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- “Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- “In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered.” (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 427, internal citation omitted.)

- “[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]” (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra*, 54 Cal.3d at p. 112.)

- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra*, 54 Cal.3d at p. 112, internal citations omitted.)

- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- “[N]et worth is not the only measure of a defendant’s wealth for punitive damages purposes that is recognized by the California courts. ‘Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.’ ” (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139

Cal.Rptr.3d 849].)

- "Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.2d 263], internal citations omitted.)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.21, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew

Bender)

3963. No Deduction for Workers' Compensation Benefits Paid

Do not consider whether or not [*name of plaintiff*] received workers' compensation benefits for [his/her] injuries. If you decide in favor of [*name of plaintiff*], you should determine the amount of your verdict according to my instructions concerning damages.

New September 2003; Revised December 2009

Directions for Use

This instruction is intended for use in conjunction with a special verdict form, in which case the judge can make any necessary deductions if double recovery is an issue. It may also be read in cases in which there are no allegations regarding the employer's comparative fault.

Sources and Authority

- If the employer has not been negligent, the workers' compensation benefits do "not constitute an impermissible double recovery but rather a payment from a source wholly independent of the wrongdoer." (*Curtis v. State of California ex rel. Department of Transportation* (1982) 128 Cal.App.3d 668, 682 [180 Cal.Rptr. 843].)

- "Here the collateral source was workers' compensation benefits paid by the [defendant]'s policy. Under the general principles just described, this would not be an independent source; defendant is the policyholder, so the collateral source rule would not apply. Yet the California Supreme Court held that the rule did apply in a case in which an employee received benefits from the employer's workers' compensation policy and then sued a third party tortfeasor, the compensation insurer having waived its right of subrogation against the third party." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 637 [210 Cal.Rptr.3d 362] [action by employee against employer on claim alleged to not be within scope of employment].)

- " 'The average reasonably well-informed person who may be called to serve upon a jury knows that a workman injured in his employment receives compensation. It is a delusion to think that this aspect of the case can be kept from the minds of the jurors simply by not alluding to it in the course of the trial.' " (*Berryman v. Bayshore Construction Co.* (1962) 207 Cal.App.2d 331, 336 [24 Cal.Rptr. 380], internal citations omitted.)

- "To prevent a double recovery, the court may instruct the jury to segregate types of damage as between the employee and employer, awarding to the employee only those tort damages not recoverable by the employer." (*Demkowski v. Lee* (1991) 233 Cal.App.3d 1251, 1259 [284 Cal.Rptr. 919], footnote omitted.)

- "Alternatively, the jury may generally be instructed on the types of tort damages to which the employee may be entitled and then given a special verdict form that requires the jury to find whether the defendant was negligent, whether the negligence was the proximate cause of the employee's

injuries, what the employee's total tort damages are, without taking into account his or her receipt of workers' compensation benefits, and what the reasonable amount of benefits paid by the employer were. Thereafter, the court enters individual judgments on the special verdict for the amounts to which the employee and employer are entitled." (*Demkowski, supra,* 233 Cal.App.3d at p. 1259, footnote omitted.)

- "Prior to Proposition 51, a negligent third party was allowed an offset for the workers' compensation benefits paid to the plaintiff. This prevented double recovery under the then-existing joint and several liability rule. Proposition 51, however, limited joint and several liability to plaintiff's economic damages." (*Rosales v. Thermex-Thermatron, Inc.* (1998) 67 Cal.App.4th 187, 197 [78 Cal.Rptr.2d 861].)

- "The *Espinoza* approach has provided an effective solution for pre-verdict settlements, and we believe that it is also the most suitable means of dealing with workers' compensation benefits." (*Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 37 [56 Cal.Rptr.2d 455].)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, §§ 20, 24–26, 31, 34, 39–42

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law,* § 10.10 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation,* § 577.319 (Matthew Bender)

4002. "Gravely Disabled" Explained

The term "gravely disabled" means that a person is presently unable to provide for his or her basic needs for food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism]. [The term "gravely disabled" does not include mentally retarded persons by reason of being mentally retarded alone.]

[[*Insert one or more of the following*:**] [psychosis/bizarre or eccentric behavior/delusions/hallucinations/[***insert other***]] [is/are] not enough, by [itself/themselves], to find that [***name of respondent***] is gravely disabled. [He/She] must be unable to provide for the basic needs of food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism].]**

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

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

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

New June 2005

Directions for Use

Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case.

The principle regarding the likelihood of future deterioration may not apply in cases where the respondent has no insight into his or her mental disorder. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

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

Sources and Authority

- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "The enactment of the LPS and with it the substitution of 'gravely disabled' for 'in need of treatment' as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the constitutional requirements of precision. The term 'gravely disabled' is

sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter." (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], footnotes omitted.)

- "[T]he public guardian must prove beyond a reasonable doubt that the proposed conservatee is gravely disabled." (*Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, 461 [203 Cal.Rptr.3d 667].)

- "~~The public guardian must prove the proposed conservatee was 'gravely disabled' beyond a reasonable doubt.~~ The stricter criminal standard is used because the threat to the conservatee's individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions." (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)

- "Bizarre or eccentric behavior, even if it interferes with a person's normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival." (*Conservatorship of Smith, supra*, 187 Cal.App.3d at p. 909.)

- "Under [Welfare and Institutions Code] section 5350, subdivision (e)(1), 'a person is not "gravely disabled" if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person's basic personal needs for food, clothing, or shelter.' " (*Conservatorship of Jesse G., supra,* 248 Cal.App.4th at p. 460.)
- "While [third person] may not have shown that he could manage appellant's mental health symptoms as adeptly as would a person professionally trained to care for someone with a mental disorder, that is not the standard. As appellant states, '[t]he question in a LPS conservatorship case where the proposed conservatee asserts a third party assistance claim is not whether the third party will be able to manage the person's mental health symptoms completely. Rather, the dispositive question is whether the person is able to provide the proposed conservatee with food, clothing, and shelter on a regular basis." (*Conservatorship of Jesse G., supra*, 248 Cal.App.4th at p. 463 fn. 4.)

- "We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons." (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)

- "[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled." (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr. 860].)

- "[T]he pivotal issue is whether [respondent] was 'presently' gravely disabled and the evidence demonstrates that he was not. Accordingly, the order granting the petition must be overturned."

(*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d. 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)

- "[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted." (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577].)

- "A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory provisions allowing rehearings to evaluate a conservatee's current status." (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415], internal citation omitted.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 97

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

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

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.)

- "Even in the absence of a fiduciary duty to the buyer, listing agents are required to disclose to prospective purchasers all facts materially affecting the value or desirability of a property that a reasonable visual inspection would reveal. And regardless of whether a listing agent also represents the buyer, it is required to disclose to the buyer all known facts materially affecting the value or desirability of a property that are not known to or reasonably discoverable by the buyer." (*Horiike v. Coldwell Banker Residential Brokerage Co.* (2016) 1 Cal.5th 1024, 1040 [210 Cal.Rptr.3d 1, 383 P.3d 1094].)

- “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.)

- "The primary difference between the disclosure obligations of an exclusive representative of a seller and a dual agent representing the seller and the buyer is the dual agent's duty to learn and disclose facts material to the property's price or desirability, including those facts that might reasonably be discovered by the buyer." (*Horiike, supra,* 1 Cal.5th at pp. 1040–1041.)

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)

4606. Whistleblower Protection—Unsafe Patient Care and Conditions—Essential Factual Elements (Health & Saf. Code, § 1278.5)

[*Name of plaintiff***] claims that [***name of defendant***] discriminated against [him/her] in retaliation for [his/her] [***briefly specify protected conduct***] regarding unsafe patient care, services, or conditions at [***specify hospital or other health care facility***], [***name of defendant***]'s health care facility. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was [a/an] [patient/employee/member of the medical staff/***specify other health care worker***] of [***name of defendant***];**

2. **That [***name of plaintiff***] [***select one or both of the following options:***]**

   [a. presented a grievance, complaint, or report to [[*name of defendant***]/an entity or agency responsible for accrediting or evaluating [***name of defendant***]/[***name of defendant***]'s medical staff/ [or] a governmental entity] related to, the quality of care, services, or conditions at [***name of defendant***]'s health care facility;]**

   [or]

   [b. initiated, participated, or cooperated in an [investigation [or] administrative proceeding] related to, the quality of care, services, or conditions at [*name of defendant***]'s health care facility that was carried out by [an entity or agency responsible for accrediting or evaluating the facility/its medical staff/a governmental entity];]**

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

4. **That [***name of plaintiff***]'s [***specify***] was a substantial motivating reason for [***name of defendant***]'s [mistreatment/discharge/[***other adverse action***]] of [***name of plaintiff***];**

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

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

New June 2016

Directions for Use

A patient, employee, member of the medical staff, or any other health care worker of a health facility is protected from discrimination or retaliation if he or she, or his or her family member, takes specified acts regarding suspected unsafe patient care and conditions at a health care facility. (Health & Saf. Code, § 1278.5.) A person alleging discrimination or retaliation by the facility has a private right of action against the facility. (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 676 [168 Cal.Rptr.3d 165,

318 P.3d 833].)

For elements 3 and 4, choose "mistreated" and "mistreatment" if the plaintiff was a patient. Choose "discharge" or specify another adverse action if the plaintiff is or was an employee, member of the medical staff, or other health care worker of the defendant's facility. Other adverse actions include, but are not limited to, demotion, suspension, or any unfavorable changes in, or breach of, the terms or conditions of the plaintiff's contract, employment, or privileges, or the threat of any of these actions. (Health & Saf. Code, § 1278.5(d)(2).)

There are rebuttable presumptions of retaliation and discrimination if acts are taken within a certain time after the filing of a grievance. (See Health & Saf. Code, § 1278.5(c), (d).) However, these presumptions affect only the burden of producing evidence. (Health & Saf. Code, § 1278.5(e).) A presumption affecting only the burden of producing evidence drops out if evidence is introduced that would support a finding of its nonexistence. (Evid. Code, § 604.) Therefore, unless there is no such evidence, the jury should not be instructed on the presumptions.

Sources and Authority

- Whistleblower Protection for Patients and Health Care Personnel. Health and Safety Code section 1278.5.

- "Section 1278.5 declares a policy of encouraging workers in a health care facility, including members of a hospital's medical staff, to report unsafe patient care. The statute implements this policy by forbidding a health care facility to retaliate or discriminate 'in any manner' against such a worker 'because' he or she engaged in such whistleblower action. It entitles the worker to prove a statutory violation, and to obtain appropriate relief, in a civil suit before a judicial fact finder." (*Fahlen, supra,* 58 Cal.4th at pp. 660−661; internal citation omitted.)

- "A medical staff member who has suffered retaliatory discrimination 'shall be entitled' to redress, including, as appropriate, reinstatement and reimbursement of resulting lost income. Section 1278.5 does not affirmatively state that these remedies may be pursued by means of a civil action, but it necessarily assumes as much when it explains certain procedures that may apply when 'the member of the medical staff … has filed *an action pursuant to this section … ' .*" (*Fahlen, supra,* 58 Cal.4th at p. 676, original italics, internal citation omitted.)

- "*Fahlen* squarely held that a physician could prosecute a section 1278.5 action without first having to prevail in an administrative mandate proceeding attacking a peer review determination, but the court did not go so far as to excuse the physician from completing the internal peer review process before filing a section 1278.5 action. The case before us now presents that very question: Is completion of peer review a prerequisite of a section 1278.5 action? Based on the analysis in *Fahlen* and the text and legislative history of section 1278.5, we hold that a physician need not complete the internal peer review process prior to filing a section 1278.5 action." (*Armin v. Riverside Community Hospital* (2016) 5 Cal.App.5th 810, 814 [210 Cal.Rptr.3d 388].)

- "The common law legal dynamics of retaliation statutes require a prima facie showing of a causal connection between an adverse action and the complaint that allegedly engendered the retaliation.

Absent such a showing, the retaliation claim is unviable. And even if the plaintiff does make a prima facie showing of a causal connection, that merely shifts the case into the classic *McDonnell Douglas* burden-of-proof ping pong. In that back and forth burden-shifting, the hospital would have the opportunity to demonstrate the reason for the initiation of its peer review proceedings was perfectly legitimate. The plaintiff would then be required to show the initiation of such proceedings was just pretextual, i.e., the real reason was to retaliate against the plaintiff for some earlier complaint about unsafe patient care. All that is hardly an interference with the peer review process as long as—to allude to subdivision (l)—the hospital's peer review action is legitimate in the first place, i.e., not itself retaliatory." (*Armin, supra,* 5 Cal.App.5th at p. 830, internal citation and footnote omitted.)

- "[S]ection 1278.5 does not allow individual doctors to be sued—even if their motives are not honorable… ," (*Armin, supra*, 5 Cal.App.5th at p. 832.)

- "[Defendant] also appears to contend that it was entitled to judgment as a matter of law on [plaintiff]'s claim for violation of Health and Safety Code section 1278.5 because the undisputed evidence established that [defendant] terminated [plaintiff] for *refusing to perform* nurse-led stress testing, rather than for making complaints concerning [defendant]'s nurse-led stress testing. We are not persuaded. In light of the evidence of [plaintiff]'s complaints pertaining to the legality of nurse-led stress testing and the disciplinary actions discussed above, a jury could reasonably find that [defendant] retaliated against her for making these complaints. This is particularly so given that many of the complaints and disciplinary actions occurred within 120 days of each other, thereby triggering the rebuttable presumption of discrimination established in Health and Safety Code section 1278.5, subdivision (d)(1)." (*Nosal-Tabor v. Sharp Chula Vista Medical Center* (2015) 239 Cal.App.4th 1224, 1246 [191 Cal.Rptr.3d 651], original italics.)

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2014) Crimes Against Public Peace and Welfare, § 393

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

25 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, § 295.13[14] (Matthew Bender)

Item number: 08

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Circulate for comment (out of cycle)**

RUPRO Meeting: April 19, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Procedure: Judicial Council Form Under Proposition 63
Approve form CR-210

Committee or other entity submitting the proposal:
Criminal Law Advisory Committee

Staff contact (name, phone and e-mail):
Sarah Fleischer-Ihn
415-865-7702
Sarah.Fleischer-Ihn@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: CLAC: December 15, 2016
Project description from annual agenda: Review all approved initiatives and enacted legislation referred to the committee by the Judicial Council's Governmental Affairs office that may have an impact on criminal court administration and propose, for the council's consideration, rules and forms as may be appropriate for implementation of these initiatives and legislation.

If requesting July 1 or out of cycle, explain:
Relevant parts of Proposition 63 that will significantly affect the courts are scheduled to go into effect on January 1, 2018. This proposal is being advanced out of cycle so that it will be reviewed at the September 2017 Judicial Council meeting.

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

JUDICIAL COUNCIL OF CALIFORNIA

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

INVITATION TO COMMENT

[ItC prefix as assigned]-__

Title
Criminal Procedure: Judicial Council Form Under Proposition 63

Action Requested
Review and submit comments by May 31, 2017

Proposed Rules, Forms, Standards, or Statutes
Approve form CR-210

Proposed Effective Date
January 1, 2018

Proposed by
Criminal Law Advisory Committee
Hon. Tricia Ann Bigelow, Chair

Contact
Sarah Fleischer-Ihn, Attorney
415-865-7702
Sarah.Fleischer-Ihn@jud.ca.gov

Executive Summary and Origin

On November 8, 2016, the people of California voted to enact "The Safety for All Act of 2016" ("Proposition 63"). To implement relevant parts of Proposition 63, the Criminal Law Advisory Committee proposes an optional form for courts to use to make appropriate findings concerning firearms relinquishment in criminal cases under Penal Code section 29810.[1]

Background

Effective January 1, 2018, courts are required to provide defendants subject to firearms and ammunition prohibitions upon conviction with a new Prohibited Persons Relinquishment Form (PPRF).[2] Section 29810, subdivision (a)(2) directs the California Department of Justice (DOJ) to develop the form, and subdivisions (c)(1) and (c)(2) direct county probation departments to (1) investigate through credible information whether the defendant owns any firearms, (2) receive the PPRF from the defendant, and (3) report the defendant's compliance with relinquishment procedures to the court. Defendants subject to the relinquishment requirements must relinquish their firearms, through named designees, within five days of conviction if they are not in custody[3] and within 14 days of conviction if they are in custody.[4] Courts may either shorten or lengthen those time periods for good cause or allow an alternative method of relinquishment.[5]

1 All further references are to the Penal Code.
2 § 29810(a)(2).
3 § 29810(d).
4 § 29810(e).
5 § 29810(f).

Prior to the final disposition or sentencing in the case, the court will be required to make specific findings as to (1) whether the probation officer's report indicates that the defendant has relinquished all of his or her firearms, and (2) whether the court has received a completed PPRF along with itemized receipts detailing who took possession of the relinquished firearms.[6] Further, if the court finds probable cause to believe that the defendant has failed to comply with the relinquishment requirements, the court must order the search for and removal of the firearms at any location the judge has probable cause to believe the defendant's firearms are located.[7]

The Proposal

The proposal recommends that the Judicial Council approve an optional form for the court to enter its findings under section 29810.

Findings form. Optional *Prohibited Persons Relinquishment Form Findings (Penal Code, § 29810(c))* (form CR-210) provides the court with the ability to:

- Enter findings on whether the defendant has completed a PPRF developed by the DOJ;
- Enter findings on whether the PPRF includes receipts;
- Enter findings on whether the court finds probable cause that the defendant has failed to relinquish all firearms;
- Enter findings on whether the court finds probable cause for the search for and removal of the defendant's firearms; and
- Indicate whether a search is required, pursuant to a term or condition of probation, or whether a search warrant is required, with the matter referred to the prosecuting agency of the county for appropriate action.

Implementation Requirements, Costs, and Operational Impacts

It is anticipated that the volume of potential cases requiring these procedures under section 29810 may be significant, considering that relevant offenses include all felonies and over 40 misdemeanors. The requirements of section 29810 may impose significant workload burdens on the court to process. The optional form is intended to mitigate the burden by providing courts with a form to streamline the process. Because the forms are optional, expected costs are limited to training, possible case management system updates, and the production of new forms.

[6] § 29810(c)(3).
[7] § 29810(c)(4).

Request for Specific Comments

In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the following:

- Does the proposal appropriately address the stated purpose?

The advisory committee also seeks comments from *courts* on the following cost and implementation matters:

- Would the proposal provide cost savings? If so, please quantify.
- What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.
- Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
- How well would this proposal work in courts of different sizes?

Attachments and Links

1. Proposed form CR-210, at page 4

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY* DRAFT NOT APPROVED BY JUDICIAL COUNCIL
PEOPLE OF THE STATE OF CALIFORNIA v. DEFENDANT:	
PROHIBITED PERSONS RELINQUISHMENT FORM FINDINGS **(Penal Code, § 29810(c))**	CASE NUMBER: *FOR COURT USE ONLY* Date: Time: Department:

The defendant is prohibited from owning, purchasing, receiving, possessing, or having under his or her custody any firearms, ammunition, and ammunition feeding devices, including but not limited to magazines, and shall relinquish all firearms pursuant to Penal Code section 29810.

The court finds as follows:

1. Defendant has completed a Prohibited Persons Relinquishment Form ☐ Yes ☐ No
2. Prohibited Persons Relinquishment Form includes relinquishment receipts ☐ Yes ☐ No
3. Defendant has relinquished all firearms per Probation Officer's report ☐ Yes ☐ No
4. The court finds probable cause that the defendant has failed to relinquish all firearms ☐ Yes ☐ No
   a. Probable cause obtained from:
      ☐ Probation Officer's report ☐ Statements made in open court
      ☐ Other:
5. The court finds probable cause for the search for and removal of defendant's firearms.
   a. Type of firearm, if known:
   b. Location and scope:
   c. Probable cause obtained from:
      ☐ Probation Officer's report ☐ Statements made in open court
      ☐ Other:
6. Search required, pursuant to a term or condition of probation ☐ Yes ☐ No
7. Search warrant required; matter referred to the prosecuting agency of the county for appropriate action ☐ Yes ☐ No

_____ (DATE)

_____ (SIGNATURE OF JUDICIAL OFFICER)

Form Approved for Optional Use
Judicial Council of California
CR-210 [New January 1, 2018]

PROHIBITED PERSONS RELINQUISHMENT FORM FINDINGS
(Penal Code, § 29810(c))

Penal Code, § 29810(c)(3) & (4)
www.courts.ca.gov

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 May 18–19, 2017

Title
Rules and Forms: Miscellaneous Technical Changes

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 1.31, 3.1546, 4.155, 5.130, and 10.3; revise forms DV-800/JV-252, FW-008, MC-010, MC-011, and WG-005

Recommended by
Judicial Council staff
Susan R. McMullan, Senior Attorney
Legal Services

Agenda Item Type
Action Required

Effective Date
September 1, 2017

Date of Report
April 5, 2017

Contact
Susan R. McMullan, 415-865-7990
susan.mcmullan@jud.ca.gov

Executive Summary

Various members of the branch, members of the public, and Judicial Council staff have identified errors in the California Rules of Court and Judicial Council forms resulting from typographical errors, and changes resulting from legislation and previous rule amendments and form revisions. Judicial Council staff recommends making the necessary corrections to avoid confusing court users, clerks, and judicial officers.

Recommendation

Judicial Council staff recommends that the council, effective September 1, 2017:

1. Amend rule 1.31(e) to reflect the sunset of rule 7.101.5. Rule 7.101.5 was repealed by its own provisions effective January 1, 2012.

2. Amend rule 3.1546(c)(3) to correctly reference the title of form EJT-004.

3. Amend rule 4.155(a) to correct a reference from “Penal Code section 1037c” to “Penal Code section 1037.”

4. Amend rule 5.130(c) to correct a reference from "5.92(a)(6)(A)–(C)" to "5.92(f)(1)–(3)." Rule 5.92 was amended effective July 1, 2016, to eliminate paragraph (a)(6) and move the service requirements to a new subdivision (f).

5. Amend rule 10.3(b) to correctly reference rule 10.10(e).

6. Revise form DV-800/JV-252, footer on page 1, to change a reference from "5.488" to "5.495."

7. Revise form FW-008, item 5(a), to correct "our" to "your."

8. Revise forms MC-010 and MC-011 to reflect changes to Code of Civil Procedure, section 1033.5, regarding fees for interpreters and electronic filing or service, as well as a change from the word "blowups" to "enlargements."

9. Revise form WG-005 to correct the instructions on page 1 from "the mailing information above" to "the mailing information below."

Copies of the revised rule and forms are attached at pages 3–16.

Previous Council Action

Although the Judicial Council has acted on these rules and forms previously, this proposal recommends only minor corrections unrelated to any prior action.

Rationale for Recommendation

The changes to these rules are technical in nature and necessary to correct inadvertent omissions and incorrect references.

Comments, Alternatives Considered, and Policy Implications

These proposals were not circulated for public comment because they are noncontroversial, involve technical revisions, and are therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Implementation Requirements, Costs, and Operational Impacts

Operational impacts are expected to be minor. The proposed revisions may result in reproduction costs if courts provide hard copies of any of the forms recommended for revision. Because the proposed changes are technical corrections, case management systems are unlikely to need updating to implement them.

Attachments and Links

1. Rules 1.31, 3.1546, 4.155, 5.130, and 10.3 at pages 3–4
2. Forms DV-800/JV-252, FW-008, MC-010, MC-011, and WG-005 at pages 5–16

Rules 1.31, 3.1546, 4.155, 5.130, and 10.3 of the California Rules of Court are amended, effective September 1, 2017, to read:

Rule 1.31. Mandatory forms

(a)–(d) * * *

(e) No alteration of forms

Except as provided in rule 3.52(6), concerning court fee waiver orders, rule 5.504, concerning court orders in juvenile court proceedings, ~~and rule 7.101.5,~~ concerning court orders in proceedings under the Probate Code, courts may not require the use of an altered mandatory Judicial Council form in place of the Judicial Council form. However, a judicial officer may modify a Judicial Council form order as necessary or appropriate to adjudicate a particular case.

(f)–(g) * * *

Rule 3.1546. Pretrial procedures for mandatory expedited jury trials

(a)–(b) * * *

(c) Opting out of mandatory expedited jury trial procedures

(1)–(2) * * *

(3) Except on a showing of good cause, any objection to the request must be served and filed within 15 days after the date of service of the request, on an ~~*Opposition*~~ *Objection to Request to Opt Out of Mandatory Expedited Jury Trial Procedures* (form EJT-004).

(4) * * *

(d) * * *

Rule 4.155. Guidelines for reimbursement of costs in change of venue cases—criminal cases

(a) General

Consistent with Penal Code section 1037~~(c)~~, the court in which an action originated must reimburse the court receiving a case after an order for change of venue for any ordinary expenditure and any extraordinary but reasonable-and-necessary expenditure that would not have been incurred by the receiving court but for the change of venue.

(b)–(g) * * *

Rule 5.130. Request for Special Immigrant Juvenile findings

(a)–(b) * * *

(c) Notice of hearing

Notice of a hearing on a request for SIJ findings must be served with a copy of the request and all supporting papers in the appropriate manner specified in rule 5.92~~(a)(6)(A)–(C)~~ (f)(1)–(3) on the following persons:

(1)–(3) * * *

(d)–(g) * * *

Rule 10.3. Nonvoting members

(a) * * *.

(b) Voting

A nonvoting council member may make or second motions at a council meeting but may not vote. A nonvoting member may vote on an internal committee matter as specified in rule 10.10~~(d)~~(e).

DV-800/JV-252 Proof of Firearms Turned In, Sold, or Stored

Clerk stamps date here when form is filed.

Fill in court name and street address:

Superior Court of California, County of

Court fills in case number when form is filed.

Case Number:

1 Protected Person

Name: _____

2 Restrained Person

a. Your Name: _____

Your Lawyer *(if you have one for this case):*

Name: _____ State Bar No.: _____

Firm Name: _____

b. Your Address *(If you have a lawyer, give your lawyer's information. If you do not have a lawyer and want to keep your home address private, you may give a different mailing address instead. You do not have to give telephone, fax, or e-mail.):*

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____

E-Mail Address: _____

3 To the Restrained Person:

If the court has ordered you to turn in, sell, or store your firearms, you may use this form to prove to the court that you have obeyed its orders. When you deliver your unloaded weapons, ask the law enforcement officer or the licensed gun dealer to complete item 4 or 5 and item 6. After the form is signed, file it with the court clerk. Keep a copy for yourself. For help, read Form DV-800-INFO/JV-252-INFO, *How Do I Turn In, Sell, or Store My Firearms?*

4 To Law Enforcement

Fill out items 4 and 6 of this form. Keep a copy and give the original to the person who turned in the firearms.

The firearms listed in 6 were turned in on:

Date: _____ at: _____ ☐ a.m. ☐ p.m.

To: _____

Name and title of law enforcement agent

_____

Name of law enforcement agency

_____

_____

Address

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

▶ _____

Signature of law enforcement agent

5 To Licensed Gun Dealer

Fill out items 5 and 6 of this form. Keep a copy and give the original to the person who sold you the firearms or stored them with you.

The firearms listed in 6 were

☐ sold to me ☐ transferred to me for storage on:

Date: _____ at: _____ ☐ a.m. ☐ p.m.

To: _____

Name of licensed gun dealer

_____ _____

License number *Telephone*

_____

_____

Address

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

▶ _____

Signature of law enforcement agent

Case Number:

6 Firearms

	Make	Model	Serial Number
a.			
b.			
c.			
d.			
e.			

☐ *Check here if you turned in, sold, or stored more firearms. Attach a sheet of paper and write* "DV-800/JV-252, Item 6—Firearms Turned In, Sold, or Stored" *for a title. Include make, model, and serial number of each firearm. You may use Form MC-025,* Attachment.

7 Do you have, own, possess, or control any other firearms besides the firearms listed in **6**? ☐ Yes ☐ No

If you answered yes, have you turned in, sold, or stored those other firearms? ☐ Yes ☐ No

If yes, check one of the boxes below:

a. ☐ I filed a *Proof of Firearms Turned In, Sold, or Stored* for those firearms with the court on (*date):*

b. ☐ I am filing the proof for those firearms along with this proof.

c. ☐ I have not yet filed the proof for the other firearms. *(explain why not):*

☐ *Check here if there is not enough space below for your answer. Put your complete answer on the attached sheet of paper or Form MC-025 and write* "Attachment 7c" *for a title.*

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

_____
Type or print your name

▶ _____
Sign your name

FW-008 Order on Court Fee Waiver After Hearing (Superior Court)

Clerk stamps date here when form is filed.

1 Person who asked the court to waive court fees:

Name: _____

Street or mailing address: _____

City: _____ State: _____ Zip: _____

2 Lawyer, if person in 1 has one *(name, address, phone number, e-mail, and State Bar number):*

_____

_____

_____

Fill in court name and street address:

Superior Court of California, County of

3 A request to waive court fees was filed *(date):* _____

4 There was a hearing on *(date):* _____

at *(time):* _____ in *(Department):* _____

The following people were at the hearing *(check all that apply):*

☐ Person in 1 ☐ Lawyer in 2

☐ Others *(names):* _____

_____

Fill in case number and name:

Case Number:

Case Name:

Read this form carefully. All checked boxes ☒ are court orders.

Notice: The court may order you to answer questions about your finances and later order you to pay back the waived fees. If this happens and you do not pay, the court can make you pay the fees and also charge you collection fees. If there is a change in your financial circumstances during this case that increases your ability to pay fees and costs, you must notify the trial court within five days. (Use form FW-010.) If you win your case, the trial court may order the other side to pay the fees. If you settle your civil case for **$10,000** or more, the trial court will have a lien on the settlement in the amount of the waived fees. The trial court may not dismiss the case until the lien is paid.

5 After reviewing your: ☐ Request to Waive Court Fees ☐ Request to Waive Additional Court Fees **the court makes the following order:**

a. ☐ The court **grants** your request and waives your court fees and costs as follows:

(1) ☐ **Fee Waiver.** The court **grants** your request and waives your court fees and costs listed below *(Cal. Rules of Court, rules 3.55 and 8.818.)* You do not have to pay the court fees for the following:

- Filing papers in superior court
- Making copies and certifying copies
- Sheriff's fee to give notice
- Giving notice and certificates
- Sending papers to another court department
- Court-appointed interpreter in small claims court
- Reporter's fee for attendance at hearing or trial, if reporter provided by the court
- Assessment for court investigations under Probate Code section 1513, 1826, or 1851
- Preparing and certifying the clerk's transcript on appeal
- Court fees for phone hearing
- Holding in trust the deposit for a reporter's transcript on appeal under rule 8.130 or 8.834
- Making a transcript or copy of an official electronic recorder under rule 8.835

(2) ☐ **Additional Fee Waiver.** The court **grants** your request and waives your additional superior court fees and costs that are checked below. *(Cal. Rules of Court, rule 3.56.)* You do not have to pay for the checked items.

☐ Jury fees and expenses

☐ Fees for court-appointed experts

☐ Fees for a peace officer to testify in court

☐ Court-appointed interpreter fees for a witness

☐ Other*: (specify):* _____

Case Name:	Case Number:

b. ☐ The court **denies** your request and **will not waive or reduce** your fees and costs.
(1) The reason for this denial is as follows:
(a) ☐ Your request is incomplete, and you did not provide the information that the court requested *(specify items missing):* _____
(b) ☐ You did not go to court on the hearing date to provide the information the court needed to make a decision.
(c) ☐ The information you provide shows that you are not eligible for the fee waiver you requested because *(check all that apply):*
i. ☐ Your income is too high.
ii. ☐ Other *(explain):* _____
(d) ☐ There is not enough evidence to support a fee waiver.
(e) ☐ Other *(state reasons)*: _____

(2) ☐ You may pay some court fees and costs over time. You must make monthly payments of $ _____ beginning *(date):* _____ and then payable on the 1st of each month after that, until the fees checked below are paid in full.
☐ Filing fees
☐ Other *(specify):* _____
You must pay all other court fees and costs as they are due.

c. ☐ The court **partially grants** your request so you can pay court fees without using money you need to pay for your household's basic needs. You are ordered to pay a portion of your fees, **as checked below.** The court only partially grants the request because *(state reasons for partial denial):*

(1) ☐ You must pay _____ % of your court fees.
(2) ☐ The court waives some fees. The fees checked below are waived. You must pay all other court fees.
☐ Filing papers at superior court
☐ Sheriff's fee to give notice
☐ Court-appointed interpreter
☐ Giving notice and certificates
☐ Sending papers to another court department
☐ Court-appointed interpreter fees for a witness
☐ Reporter's fee for attendance at trial or hearing if reporter provided by the court.
☐ Jury fees and expenses
☐ Court-appointed experts' fees
☐ Making certified copies
☐ Fees for a peace officer to testify in court
☐ Court fees for telephone hearings
☐ Other *(specify):* _____
(3) ☐ Other *(specify):* _____

Warning! If b or c above are checked: You have **10 days** after the clerk gives notice of this order (see date below) to pay your fees as ordered, unless there is a later date for beginning payments in item b(2). If you do not pay, your court papers will not be processed. If the papers are a notice of appeal, your appeal may be dismissed.

Date: _____

▶ _____
Signature of Judicial Officer

Clerk's Certificate of Service

I certify that I am not involved in this case and *(check one):* ☐ A certificate of mailing is attached.
☐ I handed a copy of this order to the party and attorney, if any, listed in (1) and (2), at the court, on the date below.
☐ This order was mailed first class, postage paid, to the party and attorney, if any, at the addresses listed in (1) and (2), from *(city)*: _____, California on the date below.

Date: _____ Clerk, by _____, Deputy

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
PLAINTIFF:		
DEFENDANT:		
MEMORANDUM OF COSTS (SUMMARY)		CASE NUMBER:

The following costs are requested: **TOTALS**

1.	Filing and motion fees	$
2.	Jury fees	$
3.	Jury food and lodging	$
4.	Deposition costs	$
5.	Service of process	$
6.	Attachment expenses	$
7.	Surety bond premiums	$
8.	Witness fees	$
9.	Court-ordered transcripts	$
10.	Attorney fees *(enter here if contractual or statutory fees are fixed without necessity of a court determination; otherwise a noticed motion is required)*	$
11.	Court reporter fees as established by statute	$
12.	Models, enlargements, and photocopies of exhibits	$
13.	Interpreter fees	$
14.	Fees for electronic filing or service	$
15.	Fees for hosting electronic documents	$
16.	Other	$
TOTAL COSTS		$

I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

(Proof of service on reverse)

Form Approved for Optional Use
Judicial Council of California
MC-010 [Rev. September 1, 2017]

MEMORANDUM OF COSTS (SUMMARY)

Code of Civil Procedure,
§§ 1032, 1033.5

SHORT TITLE	CASE NUMBER:

PROOF OF ☐ MAILING ☐ PERSONAL DELIVERY

1. At the time of mailing or personal delivery, I was at least 18 years of age and **not a party** to this legal action.
2. *My residence or business address is (specify)*:

3. I mailed or personally delivered a copy of the *Memorandum of Costs (Summary)* as follows *(complete either a or b)*:
   a. ☐ **Mail.** I am a resident of or employed in the county where the mailing occurred.
      (1) I enclosed a copy in an envelope AND
         (a) ☐ **deposited** the sealed envelope with the United States Postal Service with the postage fully prepaid.
         (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.
      (2) The envelope was addressed and mailed as follows:
         (a) Name of person served:
         (b) *Address on envelope:*
         (c) Date of mailing: _____
         (d) Place of mailing *(city and state)*:
   b. ☐ **Personal delivery.** I personally delivered a copy as follows:
      (1) Name of person served:
      (2) *Address where delivered:*
      (3) Date delivered: _____
      (4) Time delivered:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

SHORT TITLE	CASE NUMBER:

MEMORANDUM OF COSTS (WORKSHEET)

1. **Filing and motion fees**

	Paper filed	Filing fee
a.		$
b.		$
c.		$
d.		$
e.		$
f.		$

g. ☐ Information about additional filing and motion fees is contained in Attachment 1g.

TOTAL 1. $

2. **Jury fees**

	Date	Fee & mileage
a.		$
b.		$
c.		$
d.		$

e. ☐ Information about additional jury fees is contained in Attachment 2e.

TOTAL 2. $

3. **Juror food:** $ _____ **and lodging:** $ _____ TOTAL 3. $

4. **Deposition costs**

	Name of deponent	Taking	Transcribing	Travel	Videotaping	Subtotals
a.		$	$	$	$	$
b.		$	$	$	$	$
c.		$	$	$	$	$
d.		$	$	$	$	$

e. ☐ Information about additional deposition costs is contained in Attachment 4e.

TOTAL 4. $

(Continued on reverse)

Form Approved for Optional Use
Judicial Council of California
MC-011 [Rev. September 1, 2017]

Code of Civil Procedure, §§ 1032, 1033.5

SHORT TITLE	CASE NUMBER:

5. **Service of process**

	Name of person served	Public officer	Registered process	Publication	Other *(specify)*
a.		$	$	$	$
b.		$	$	$	$
c.		$	$	$	$

d. ☐ Information about additional costs for service of process is contained in Attachment 5d.

TOTAL 5. $

6. **Attachment expenses** *(specify):* 6. $

7. **Surety bond premiums** *(itemize bonds and amounts):* 7. $

8. a. **Ordinary witness fees**

	Name of witness	Daily fee	Mileage	Total
(1)		days at $/day	miles at ¢/mile:	$
(2)		days at $/day	miles at ¢/mile:	$
(3)		days at $/day	miles at ¢/mile:	$
(4)		days at $/day	miles at ¢/mile:	$
(5)		days at $/day	miles at ¢/mile:	$

(6) ☐ Information about additional ordinary witness fees is contained in Attachment 8a(6).

SUBTOTAL 8a. $

(Continued on next page)

SHORT TITLE	CASE NUMBER:

8. b. **Expert fees** *(per Code of Civil Procedure section 998)*

	Name of witness	Fee	
(1)	_____	_____ hours at $ _____ /hr	$
(2)	_____	_____ hours at $ _____ /hr	$
(3)	_____	_____ hours at $ _____ /hr	$
(4)	_____	_____ hours at $ _____ /hr	$

(5) ☐ Information about additional ordinary witness fees is contained in Attachment 8b(5).

SUBTOTAL 8b. $

c. **Court-ordered expert fees**

	Name of witness	Fee	
(1)	_____	_____ hours at $ _____ /hr	$
(2)	_____	_____ hours at $ _____ /hr	$

(3) ☐ Information about additional ordinary witness fees is contained in Attachment 8c(3).

SUBTOTAL 8c. $

TOTAL (8a, 8b, & 8c) 8. $

9. ***Court-ordered transcripts*** *(specify)*: 9. $

10. ***Attorney fees*** *(enter here if contractual or statutory fees are fixed without necessity of a court determination; otherwise a noticed motion is required)*: 10. $

11. ***Models, enlargements, and photocopies of exhibits*** *(specify)*: 11. $

12. **Court reporter fees** *(as established by statute)*

a. *(Name of reporter)*: _____ Fees: $ _____

b. *(Name of reporter)*: _____ Fees: $ _____

c. ☐ Information about additional court reporter fees is contained in Attachment 12c.

TOTAL 12. $

13. **Interpreter fees**

a. Fees of a certified or registered interpreter for the deposition of a party or witness

(Name of interpreter): _____ Fees: $ _____

(Name of interpreter): _____ Fees: $ _____

b. Fees for a qualified court interpreter authorized by the court for an indigent person represented by a qualified legal services project or a pro bono attorney

(Name of interpreter): _____ Fees: $ _____

(Name of interpreter): _____ Fees: $ _____

c. ☐ Information about additional court reporter fees is contained in Attachment 13c.

TOTAL 13. $

14. **Fees for electronic filing or service of documents through an electronic filing service provider** (enter here if required or ordered by the court) *(specify):* 14. $

15. **Fees for hosting electronic documents through an electronic filing service provider** (enter here if required or ordered by the court) *(specify):* 15. $

16. ***Other*** *(specify)*: _____ 16. $

TOTAL COSTS $

(Additional information may be supplied on the reverse) Page ____ of ____

SHORT TITLE	CASE NUMBER:

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	LEVYING OFFICER *(Name and Address):*
TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT:	COURT CASE NUMBER.:
EMPLOYER'S RETURN (Wage Garnishment)	LEVYING OFFICER FILE NUMBER.:

EMPLOYER: You must complete both copies of this form and mail them to the levying officer within 15 days.

Please correct any errors in the mailing information below and provide any missing information, including the name of the person to whom notices should be directed.

FAILURE TO COMPLETE AND RETURN THESE FORMS MAY SUBJECT YOU TO PAYMENT OF ATTORNEY FEES AND OTHER CIVIL PENALTIES.

Name and address of employer

Attn:

(Insert name above)

Name and address of employee

Social Security No. ☐ on form WG-035 ☐ unknown

1. I received the Earnings Withholding Order on *(date):*

2. The employee is
   a. ☐ not employed by this employer *(if not employed, omit items 2b through 6 and proceed to the declaration at the end of this form).*
   b. ☐ now employed by this employer and in the last pay period had gross earnings of: $

3. The employee's pay period is
   a. ☐ daily b. ☐ weekly c. ☐ every two weeks
   d. ☐ twice a month e. ☐ monthly f. ☐ other *(specify):*

(IF YOU HAVE RECEIVED NO OTHER ORDERS THAT PRESENTLY AFFECT THIS EMPLOYEE'S EARNINGS, OMIT ITEMS 4, 5 AND 6, AND PROCEED TO THE DECLARATION AT THE END OF THIS FORM.)

The Federal Wage Garnishment Law and federal rules provide the basic protections on which the California law is based.

(Continued on reverse)

SHORT TITLE:	LEVYING OFFICER FILE NO.:	COURT CASE NO.:

If you have received other orders that presently affect this employee's earnings, another order may have priority over this one. The following list indicates the priority of orders:

Wage and Earnings Assignment Order (for Support)	First priority
Earnings Withholding Order for Support	Second priority
Earnings Withholding Order for Taxes	Third priority
Earnings Withholding Order for Elder or Dependent Adult Financial Abuse	Fourth priority
Earnings Withholding Order	Fifth priority

If two or more orders have the same priority, comply with the one received first. If both were received on the same date, comply with the one with the earlier date of judgment. If the dates of judgment are the same, you may select which order you choose to comply with.

4. ☐ This order appears to have higher priority than any other order. Earnings will be withheld for this order in accord with the EMPLOYER'S INSTRUCTIONS (*on reverse of* Earnings Withholding Order).

5. ☐ The employer has received another order affecting the employee's earnings and earnings are being withheld for the other order because:

   a. ☐ The other order was received first. The other order was received on *(date):*

   b. ☐ This order does not have higher priority.

   c. ☐ A copy of the other order is attached. (*Retain original for your records. If a copy is not attached, complete item d.)*

   d. ☐ A copy of the other order is NOT attached. *Describe the other order by providing the following information:*

      (1) Court name, address, and case number:

      (2) Levying officer name and address and file number:

      (3) Total amount to be withheld: $

6. ☐ This order is not effective for the reason shown in item 5. It is returned to the levying officer with this return.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DECLARANT)

If an Earnings Withholding Order is not effective when served, for any reason, do not hold it. Return it to the levying officer with this return.

FAILURE TO COMPLETE AND RETURN THIS FORM MAY SUBJECT AN EMPLOYER TO CIVIL PENALTIES AND ATTORNEY FEES.

Item number: 10

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Approve**

RUPRO Meeting: April 19. 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Request to Approve (1) Additions to Annual Agendas, and (2) Formation of a Joint Ad Hoc Subcommittee.

Committee or other entity submitting the proposal:
Five advisory committees submit this request to add an item (i.e., working on rules for justice partners to have remote access to electronic court records) to their Annual Agendas: the Appellate Advisory Committee, the Civil and Small Claims Advisory Committee, the Family and Juvenile Law Advisory Committee, the Probate and Mental Health Advisory Committee, and the Traffic Advisory Committee. (The Criminal Law Advisory Committee already had this item approved as part of its 2017 Annual Agenda.) In addition, these committees request authorization to form a joint ad hoc subcommittee for the purpose of coordinating the work on this rules project.

Staff contact (name, phone and e-mail): :Patrick O'Donnell, (415) 865-7665

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Previously approved by RUPRO only for the Criminal Law Advisory Committee (CLAC). JCTC separately had approved the Information Technology Advisory Committee (ITAC) working on this project in 2017-2018.
Project description from annual agenda: CLAC's 2017 Annual Agenda described the project as folllows: In conjunction with ITAC, CLAC will consider "potential amendments to rules governing remote access to electronic court records by parties, attorneys, and local justice partners." (CLAC Annual Agenda, item 10.)

If requesting July 1 or out of cycle, explain:
Not applicable

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
The Judicial Council on March 24, 2017 adopted the Tactical Plan for Technology, 2017–2018. This two-year plan includes a project to develop rules, standards, and guidelines for online access to court records for parties, their attorneys, and justice partners. Currently, only two advisory bodies include in their Annual Agendas items expressly providing for the development of rules on online access for parties, their attorneys, and justice partners, although several other committees have items that are consistent with working on such a project.

This request asks RUPRO to expressly approve the requests of five advisory committees to amend their 2017 Annual Agendas so that they can assist on this project.(A similar request will be made to E&P to add this new project to the Annual Agendas of two of the advisory committeess that it oversees: the Advisory Committtee on Providing Access and Fairness and the Tribal Court-State Court Forum.

All nine committees are also asking their respective oversight committees to approve the formation of a joint ad hoc subcommittee to permit representatives from the committees to provide input and work collaboratively on the project in 2017–2018. The joint subcommitttee will meet only by telephone and will be staffed using existing resources.

JUDICIAL COUNCIL OF CALIFORNIA

LEGAL SERVICES

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

Telephone 415-865-7446 • Fax 415-865-7664 • TDD 415-865-4272

MEMORANDUM

Date
April 17, 2017

To
Rules and Projects Committee,
Hon. Harry E. Hull, Chair

Executive and Planning Committee,
Hon. Douglas P. Miller, Chair

Judicial Council Technology Committee,
Hon. Marsha G. Slough, Chair

From
Information Technology Advisory Committee
Hon. Sheila F. Hanson, Chair

Advisory Committee on Providing Access and Fairness, Hon. Kathleen E. O'Leary and Hon. Laurie D. Zelon, Cochairs

Appellate Advisory Committee,
Hon. Louis R. Mauro, Chair

Civil and Small Claims Advisory Committee,
Hon. Raymond M. Cadei, Chair

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

Action Requested
Approve:
(1) Additions to Annual Agendas, and
(2) Formation of a Joint Ad Hoc Subcommittee

Deadline
April 19, 2017 [RUPRO]

Contact
Patrick O'Donnell, (415) 865-7665, patrick.o'donnell@jud.ca.gov, and
Andrea L. Jaramillo, (916) 263-0991, andrea.jaramillo@jud.ca.gov

Family and Juvenile Law Advisory Committee,
Hon. Jerilyn Borack and Hon. Mark. A. Juhas, Cochairs

Probate and Mental Health Advisory Committee,
Hon. John H. Sugiyama, Chair

Traffic Advisory Committee,
Hon. Gail Dekreon, Chair

Tribal Court-State Court Forum,
Hon. Abby Abinanti and Hon. Dennis M. Perluss, Cochairs

Subject
Request to Approve (1) Additions to Annual Agendas, and (2) Formation of a Joint Ad Hoc Subcommittee

---

Executive Summary

The Judicial Council on March 24, 2017 adopted the *Tactical Plan for Technology, 2017–2018*. This two-year plan includes projects to promote rule and legislative changes, including a major project to develop rules, standards, and guidelines for online access to court records for parties, their attorneys, and justice partners. Currently, only two advisory bodies include in their Annual Agendas items expressly providing for the development of rules on online access for parties, their attorneys, and justice partners, although several other committees have items that are consistent with working on such a project.

This request asks the Judicial Council's internal oversight committees to approve adding participation on this rules project to the Annual Agendas of seven additional advisory bodies so that they can assist on the project. Also, the request asks the oversight committees to approve the formation of a joint ad hoc subcommittee to permit representatives from the nine committees to provide input and work collaboratively on the project in 2017–2018.

Action Requested

Five advisory bodies[1] ask RUPRO and two advisory bodies [2] ask E& P:

1. To approve adding to their 2017 Annual Agendas working on the project to develop rules, standards, and guidelines for online access to court records for parties, their attorneys, local justice partners, and other government agencies.[3]

In addition, nine advisory bodies[4] ask their oversight committees:

2. To approve the formation of joint ad hoc subcommittee to work on this project.

Basis for Request

Background: The Rules Gap

The California Rules of Court include a chapter on Public Access to Electronic Court Records. (See Cal. Rules of Court, title 2, division 4, chapter 2 [rules 2.500–2.507].) However, the rules in chapter 2 are limited in scope: "The rules in this chapter apply only to access to court records by the public. They do not limit access to court records by a party to an action or a proceeding, by the attorney of a party, or to other persons or entities that are entitled to access by statute or rule." (Rule 2.501(b).)

The difficulty is that there is little existing law on what kinds of remote access are or should be made available to parties, their attorneys, and justice partners. Basically, there is a gap in the law. As technology has advanced and parties and justice partners increasingly want and need remote access to records, this gap has become more problematic. Courts are providing remote access to parties, attorneys, and justice partners on an ad hoc basis, with little guidance.

Recognizing this problem, the *Tactical Plan for Technology, 2017–2018* includes as a major task to be addressed in the next two years the development of "rules, standards, and guidelines . . . for online access to court records for parties and justice partners . . . ."[5] The plan recognizes that the

---

[1] The Appellate Advisory Committee, the Civil and Small Claims Advisory Committee, the Family and Juvenile Law Advisory Committee, the Probate and Mental Health Advisory Committee, and the Traffic Advisory Committee.

[2] The Advisory Committee on Providing Access and Fairness and the Tribal Court–State Court Forum.

[3] Two advisory committees, the Information Technology Advisory Committee (ITAC) and the Criminal Law Advisory Committee (CLAC), have already obtained approval to work on this project in their 2017 Annual Agendas, and so do not need to join in this request.

[4] This second request is made by all nine committees identified in the caption of this memorandum. They ask their respective oversight committees to approve the formation of a joint ad hoc subcommittee and the participation of their members on the joint subcommittee.

[5] A link to the *Tactical Plan* is available at the end of this memorandum. The identification of the project on online access to records for parties and justice partners is on page 47 of the plan.

implementation of the major tasks identified in it will require action by various entities including the council's internal committees, advisory committees, external stakeholders, and the Legal Services office. A review of the project for justice partner access rules indicates that its implementation will require at least some involvement by nine advisory bodies and, to effectively carry out this project, the formation of a joint ad hoc subcommittee is desirable to coordinate the rule-making effort and obtain advice from experts and input from key stakeholders.

Amending the Annual Agendas

The seven committees identified in Request 1 above ask that their 2017 Annual Agendas be amended to include the project in the *Tactical Plan* to develop rules, standards, and guidelines for online access to court records for parties, their attorneys, local justice partners, and other government agencies. These committees will work with the Information Technology Advisory Committee (ITAC) and the Criminal Law Advisory Committee (CLAC), which already have this item on their agendas.[6]

It is anticipated that ITAC will take the lead in developing this rules proposal with the cooperation and assistance of the other committees.

The Specifications for the items on this project to be added to the agendas are as follows:

- **Judicial Council Direction:**
  "Develop rules, standards, and guidelines . . . for online access to court records for parties and justice partners . . . ." (*Tactical Plan for Technology, 2017–2018,* at page 47.*)*

- **Origin of Project:**
  This project was part of the *Tactical Plan for Technology, 2017–2018* prepared by ITAC, recommended by the Judicial Council Technology Committee, and adopted by the Judicial Council on March 24, 2017.

- **Resources:**
  Committees:
  Appellate Advisory Committee, Civil and Small Claims Advisory Committee, Criminal Law Advisory Committee, Family and Juvenile Law Advisory Committee, Information Technology Committee, Probate and Mental Health Advisory Committee, and Traffic Advisory Committee.

  Judicial Council staffing:
  Legal Services
  Information Technology
  Advisory committees' staff

---

[6] Links to the advisory committees' Annual Agendas are attached to the end of this memorandum. Explicit authorization to work in 2017 on rules for remote access to court records by justice partners is already included in the ITAC Annual Agenda (item 10, page 15) and the CLAC Annual Agenda (item 10, page 8).

The Completion Date proposed for the basic new rules on access for parties, their attorneys, and justice partners to be added to title 2, Trial Court Rules, is January 1, 2019. If additional rules, standards, or guidelines need to be developed, those may take a little longer to complete.

The Formation of a New Joint Ad Hoc Subcommittee

To develop a new set of rules on party, attorney, and justice partner access to records, the formation of a new joint ad hoc subcommittee for this purpose is desirable. Under the leadership of ITAC, the new subcommittee would be able to draw on the expertise of members of the various committees and coordinate their suggestions and comments. In this manner, a comprehensive and effective set of rules on access should be able to be developed in the next 18 months or so.

The new joint ad hoc subcommittee would be comprised of approximately 10-12 members from the advisory bodies whose agendas would be amended pursuant to this request. The members would provide input to ITAC on the development of the rules, standards and guidelines for justice partner access to records. In some instances, if contributing committees become substantially involved in specific rules proposals, they might become co-sponsors with ITAC in the final recommendations to the Judicial Council.

The subcommittee would draw not only on the expertise of its own members, but also consult with courts, justice partners, attorneys and other stakeholders. ITAC has noted that, under some of the recently awarded Innovations Grants, pilot courts plan to provide increased remote access to records for justice partners; it is important to learn from the experiences of these pilot courts. Likewise, a number of courts are in the midst of creating technologies and developing contractual agreements with their justice partners providing for access to court records; it is important to receive input from these courts about the working relationships that they are establishing.

Staffing will be provided chiefly by Legal Services and Information Technology, with the assistance of staff from the advisory committees who have the subject matter expertise necessary to draft rules and guidelines relating to particular types of records.

The joint ad hoc subcommittee would not hold any in-person meetings. All its meetings would be held by either telephone conferences or videoconferences. The subcommittee would remain in existence until the proposed rules and guidelines are developed. It is anticipated that the main set of rules would be completed and become effective by January 1, 2019.

Links to Report and Annual Agendas

1. Judicial Branch Administration: *Tactical Plan for Technology, 2017–2018* (https://jcc.legistar.com/View.ashx?M=F&ID=5005031&GUID=D7C3E004-2F31-4762-94D6-3A3406601FCC)

2. Annual Agenda for the Information Technology Advisory Committee (ITAC)
(http://www.courts.ca.gov/documents/itac-annual.pdf)

3. Annual Agenda for the Appellate Advisory Committee (AAC)
(http://www.courts.ca.gov/documents/aac-annual.pdf)

4. Annual Agenda for the Civil and Small Claims Advisory Committee (CSCAC)
(http://www.courts.ca.gov/documents/cscac-annual.pdf)

5. Annual Agenda for the Criminal Law Advisory Committee (CLAC)
(http://www.courts.ca.gov/documents/clac-annual.pdf)

6. Annual Agenda for the Family and Juvenile Law Advisory Committee (Fam/Juv)
(http://www.courts.ca.gov/documents/famjuv-annual.pdf)

7. Annual Agenda for the Probate and Mental Health Advisory Committee (PMHAC)
(http://www.courts.ca.gov/documents/pmhac-annual.pdf)

8. Annual Agenda for the Traffic Advisory Committee (TAC)
(http://www.courts.ca.gov/documents/traffic-annual.pdf)