Advisory Committee on Civil Jury Instructions
Annual Agenda—2018
Approved by RUPRO: _____

I. COMMITTEE INFORMATION

Chair:	Hon. Martin J. Tangeman
Staff:	Bruce Greenlee, Legal Services

Committee's Charge: Make recommendations to the Judicial Council to update, revise, and add topics to the Judicial Council civil jury instructions (CACI) [Rule 10.58]

Committee Membership: 22 (see Rule 10.58);
5 appellate court justices (including the chair);
7 trial court judges;
9 attorneys whose primary area of practice is civil litigation;
1 law school professor whose primary area of expertise is civil law.

Subcommittees/Working Groups:
The committee has three subcommittees (referred to internally as working groups). Each working group reviews a third of the proposed meeting agenda before the full committee meeting and makes recommendations to the committee regarding each proposal.

Committee's Key Objectives for 2018:
1. Revise civil jury instructions (CACI) as required by developments in the law to ensure that they remain current at all times;
2. Respond to all queries, comments, and suggestions from the bench and bar with regard to CACI;
3. Propose new jury instructions to cover additional subject areas, including possible complete new series; and
4. Provide proposed technical or editorial corrections to the civil jury instructions.

II. COMMITTEE PROJECTS

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1.	**Maintenance—Case Law:** Review new case law affecting jury instructions to determine whether changes to any civil jury instructions are required.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.58 Resources: None Key Objective Supported: 1	Ongoing, with delivery of any changes requiring Judicial Council approval to the council at its May and November meetings; and delivery of any changes requiring only RUPRO approval to RUPRO every other month starting in January.[3]	Civil jury instructions
2.	**Maintenance—Legislation:** Review new legislation affecting jury instructions to determine whether changes to any civil jury instructions are required.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.58	Ongoing, with delivery of any changes requiring Judicial Council approval to the council at its May and November meetings; and delivery of any changes requiring only	Civil jury instructions

[1] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

[2] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

[3] 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 "(d) Changes to instruction text that are nonsubstantive and unlikely to create controversy; (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." Any such revocation would be presented to RUPRO in the month following the finality of the case or effective date of the statute making the instruction no longer good law.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Resources: None Key Objective Supported: 1	RUPRO approval to RUPRO in January[4]	
3.	**New Instructions and Expansion into New Areas:** Review suggestions received from jury instruction users, new legislation, and case law and propose new civil jury instructions as appropriate.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.58 Resources: None Key Objective Supported: 3	Ongoing, with delivery to Judicial Council at May and November meetings	Civil jury instructions
4.	**Maintenance—Sources and Authority** Add excerpts from new cases and statutes to Sources and Authority sections as appropriate once source is final.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.58 Resources: None Key Objective Supported: 1	Ongoing, with delivery to RUPRO every other month[5]	Civil jury instructions

[4] See footnote 3.

[5] 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 "(a) Additions of cases and statutes to the Sources and Authority."

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
5.	**Maintenance—Comments From Users:** Review comments received from bench and bar jury instruction users and propose any necessary changes and improvements.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.58 Resources: None Key Objective Supported: 2	Ongoing, with delivery to Judicial Council at May and November meetings	Civil jury instructions
6.	**Technical Corrections:** Make any necessary corrections or editing changes to the jury instructions.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.58 Resources: None Key Objective Supported: 4	Ongoing, with delivery to RUPRO every other month	Civil jury instructions

III. STATUS OF 2017 PROJECTS:

[List each of the projects that were included in the 2017 Annual Agenda and provide the status for the project.]

#	Project	Completion Date/Status
	Maintenance—Case Law and Legislation: Review case law and new legislation affecting jury instructions to determine whether changes to the civil jury instructions are required.	Ongoing. Releases presented to Judicial Council for approval on May 19, 2017 and November 17, 2017.
	Maintenance—Comments From Users: Review comments received from jury instruction users and propose any necessary changes and improvements.	Ongoing. Releases presented to Judicial Council for approval on May 19, 2017 and November 17, 2017.
	New Instructions and Expansion into New Areas: Review new legislation and case law and suggestions received from jury instruction users and propose new civil jury instructions as appropriate.	Ongoing. Releases presented to Judicial Council for approval on May 19, 2017 and November 17, 2017.
	Technical Corrections: Make any necessary corrections or editing changes to the jury instructions.	Ongoing. Releases presented to Judicial Council for approval on May 19, 2017 and November 17, 2017.

IV Subcommittees/Working Groups - Detail

Subcommittees/Working Groups:

Subcommittee or working group name: **Working Group 12**

Purpose of subcommittee or working group: **Review one-third of proposed agenda for full committee meeting and make recommendations to the full committee as to whether to approve or reject each agenda item**

Number of advisory group members: **7**

Number and description of additional members (not on this advisory group): **None**

Date formed: **September 2003**

Number of meetings or how often the group meets: **Twice a year in June and December**

Ongoing or date work is expected to be completed: **Ongoing**

Subcommittee or working group name: **Working Group 34**

Purpose of subcommittee or working group: **Review one-third of proposed agenda for full committee meeting and make recommendations to the full committee as to whether to approve or reject each agenda item**

Number of advisory group members: **7**

Number and description of additional members (not on this advisory group): **None**

Date formed: **September 2003**

Number of meetings or how often the group meets: **Twice a year in June and December**

Ongoing or date work is expected to be completed: **Ongoing**

Subcommittee or working group name: **Working Group 56**

Purpose of subcommittee or working group: **Review one-third of proposed agenda for full committee meeting and make recommendations to the full committee as to whether to approve or reject each agenda item**

Number of advisory group members: **7**

Number and description of additional members (not on this advisory group): **None**

Date formed: **September 2003**

Number of meetings or how often the group meets: **Twice a year in June and December**

Ongoing or date work is expected to be completed: **Ongoing**

Item number: 02

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: October 24, 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:
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 31 is the second CACI release for 2017. Release 30 was approved by the Judicial Council on May 19, 2017.

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 22 new, revised, revoked, and renumbered CACI instructions and verdict forms to the council, the advisory committee also requests that RUPRO give final approval to 71 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

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on November 16–17, 2017

Title
Jury Instructions: New, Revised, Renumbered, and Revoked Civil Jury Instructions and Verdict Forms

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

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

Agenda Item Type
Action Required

Effective Date
November 17, 2017

Date of Report
October 5, 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, renumbered, and revoked 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 November 17, 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 2018 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

A table of contents and the proposed new, revised, and renumbered civil jury instructions and verdict forms are attached at pages 10–74.

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 approved the *CACI* instructions under what is now rule 2.1050 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI.*

This is the 31st release of *CACI*. The council approved *CACI* release 30 at its May 19, 2017 meeting.

Rationale for Recommendation

The committee recommends proposed revisions to the following seven instructions and verdict forms: CACI Nos. 556, 1010, 1802, 1803, VF-1803, 2031, and 4207. The committee further recommends renumbering four instructions—CACI Nos. 1709 (to be renumbered from 1722), 1722 (renumbered from 1724), 3724 (renumbered from 3726), and 3726 (renumbered from 3724) [2]—as explained below. The committee further recommends the addition of six new instructions: CACI Nos. 117, 1724, 2805, 3053, 3727, and 4111; and a new series on the California Consumers Legal Remedies Act (CACI Nos. 4700, 4701, 4702, and 4710). Finally, the committee recommends revoking CACI No. 4606.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 71 additional instructions under a delegation of authority from the council to RUPRO.[3]

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 series: Consumers Legal Remedies Act (CLRA)

Over time, the committee has received several requests for instructions on the California Consumers Legal Remedies Act (the Act), which makes actionable certain unfair methods of

[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] CACI No. 3726 also has additions to the Directions for Use and Sources and Authority.

[3] 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.

competition and unfair or deceptive acts or practices in a transaction that is intended to result or that results in the sale or lease of consumer goods or services.[4] On initial consideration, there were some barriers encountered to developing a CLRA series. First, the Act prohibits 27 different acts or practices, most of which are expressed in a single clause, but several of which involve multiple subdivisions. It did not seem advisable to draft 27 different instructions in which only one element would be different. Yet it was impossible to create a comprehensible element with 27 different options, some of which would be quite complex. Second, apart from the prohibited acts or practices, the Act does not present many issues of fact for which instructions would be needed. The committee's decision at that time was essentially to table the proposal to see what future developments might bring.

But in an August 2016 unpublished case,[5] the court held that the plaintiffs forfeited their right to a jury trial on their CLRA claim when they failed to propose correct instructions on that claim. While the committee does not cite unpublished cases of course, it does consider situations in an unpublished case in which a jury instructions issue has arisen in a trial. This was one of those situations.

The committee decided to reconsider the request for CLRA instructions. The committee decided that the complexity of addressing 27 different prohibited acts or practices could be solved by just leaving the statutory violation open for the user to insert the act(s) or practice(s) at issue in the case.[6] And the committee decided that it could glean three other possible instructions from the Act to supplement the essential factual elements instruction.

Thus the committee now proposes this new series consisting of four instructions:
- CACI No. 4700, *Consumers Legal Remedies Act—Essential Factual Elements*
- CACI No. 4701, *Consumers Legal Remedies Act—Notice Requirement for Damages*
- CACI No. 4702, *Consumers Legal Remedies Act—Statutory Damages—Senior or Disabled Plaintiff*
- CACI No. 4710, *Consumers Legal Remedies Act—Affirmative Defense—Bona Fide Error and Correction*

New instructions

CACI No. 117*, Wealth of Parties.* A trial judge committee member suggested a new instruction that would expressly advise the jury that it was not to consider the financial impact of any judgment on any party. The committee liked the suggestion and now proposes this new instruction. In the next release cycle, the committee may consider whether to expand this

[4] Civ. Code, § 1770(a).

[5] *David v. Winn Auto., Inc.* 2016 Cal. App. Unpub. LEXIS 6433.

[6] See element 2 of CACI No. 4700, *Consumers Legal Remedies Act—Essential Factual Elements*.

instruction, or perhaps propose a new instruction, to warn against considering the impact of other nonevidentiary matters.

CACI No. 1724, *Fair and True Reporting Privilege.* In the recent case of *Argentieri v. Zuckerberg*[7] the court considered the privilege to potentially defamatory statements of Civil Code section 47(d) for "a fair and true report in, or a communication to, a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued." Proposed new CACI No. 1724 presents this privilege.[8]

CACI No. 1723 presents the common interest privilege of Civil Code section 47(c). The committee would like this new instruction to be next in order after 1724 to group the two privilege instructions together. To achieve this end, current CACI No. 1722, *Retraction: News Publication or Broadcast,* would be renumbered to CACI No. 1709, and current CACI No. 1724, *Affirmative Defense—Statute of Limitations—Defamation,* would be renumbered to CACI No. 1722. Numbers 1725–1729 would be available for additional privileges should the committee elect to add them in the future.

CACI No. 2805, *Employee Not Within Course of Employment—Employer Conduct Unrelated to Employment.* In another recent case, *Lee v. West Kern Water Dist.*,[9] the trial court gave an instruction on the so-called *Fermino*[10] exception to the exclusive remedy of workers' compensation for injury to an employee. Under this exception, the focus on the scope of employment is switched from what the employee was doing to what the employer was doing that caused the injury. Workers' compensation does not bar a civil suit if the employer caused the injury by engaging in conduct that was unrelated to the employment. The Court of Appeal approved the *Fermino* instruction given by the trial court. The committee proposes adding this *Fermino* instruction to CACI.

CACI No. 3053, *Retaliation for Exercise of Free Speech Rights—Essential Factual Elements.* There have been a number of recent civil rights cases involving a public employee's claim of employer retaliation for speech that is alleged to be protected by the First Amendment.[11] The

[7] (2017) 8 Cal.App.5th 768.

[8] Cases hold that the defendant bears the burden of proving that the privilege applies. (See, e.g., *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 396.) However, an element of a defamation claim is that the plaintiff must prove that the statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118.) Therefore, despite the cases to the contrary, there is an argument that the plaintiff must disprove that the privilege applies. For this reason the committee has elected not to call this instruction an affirmative defense.

[9] (2016) 5 Cal.App.5th 606, 625.

[10] *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701.

[11] See, e.g., *Brandon v. Maricopa County* (9th Cir. 2017) 849 F.3d 837; *Moonin v. Tice* (9th Cir. 2017) 868 F.3d 853.

claim arises from the landmark U.S. Supreme Court decision in *Pickering v. Board of Education,*[12] as later refined and limited in *Garcetti v. Ceballos.*[13] The committee now proposes this new federal civil rights instruction for use for such a claim.

CACI No. 3727*, Going-and-Coming Rule—Compensated Travel Time Exception.* The "going-and-coming" rule makes an employee's commute time generally outside of the scope of employment.[14] There are, however, a number of exceptions, including one if the employee is paid for his or her time traveling to the workplace.[15] This exception was previously mentioned only in the Sources and Authority to CACI No. 3725, *Going-and-Coming Rule—Vehicle-Use Exception*. The committee now proposes this new separate instruction on this exception.

The committee would like to group all of the going-and-coming exception instructions together. To achieve this end, current CACI No. 3724, *Going-and-Coming Rule—Business-Errand Exception*, and CACI No. 3726, *Social or Recreational Activities*, would exchange numbers, allowing the three going-and-coming instructions to be grouped together as numbers 3725, 3726, and 3727. Number 3728 et seq. would then be available for additional going-and-coming exceptions should the committee elect to add them in the future.

CACI No. 4111, *Constructive Fraud.* Another subject that has been on the committee's agenda before is the species of breach of fiduciary duty that is labeled "constructive fraud." The committee has considered on several occasions whether an instruction on constructive fraud should be added to CACI's Breach of Fiduciary Duty series. The committee has hesitated because of a perceived lack of clarity in the law as to what the elements of the claim should be, particularly any intent element.

Civil Code section 1573 defines constructive fraud in part as "any breach of duty which, *without an actually fraudulent intent*, gains an advantage to the person in fault, or anyone claiming under him, by misleading another to his prejudice, or to the prejudice of anyone claiming under him." Hence, under this statute, no intent to deceive need be shown; only the result that the plaintiff has been misled by some incorrect, incomplete, or undisclosed information.

Nevertheless, there are cases that set forth the elements of constructive fraud as "(1) a fiduciary or confidential relationship; (2) nondisclosure (breach of fiduciary duty); (3) *intent to deceive,* and (4) reliance and resulting injury (causation)."[16] It would seem that the statute and the cases cannot be harmonized over whether an intent to deceive is required.

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[12] (1968) 391 U.S. 563.

[13] (2006) 547 U.S. 410; see also *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1070–1072.

[14] *Jeewarat v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435.

[15] *Hinman v. Westinghouse Elec. Co.* (1970) 2 Cal.3d 956, 962

[16] See, e.g., *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131 (italics added); see also *Younan v. Equifax Inc.* (1980) 111 Cal.App.3d 498, 516, fn. 14.

The committee has now elected to propose this instruction based on the statute, while noting the conflicting case law in the Directions for Use. In support of its preference for the statute, the committee finds little to differentiate constructive fraud from actual fraud if an intent to deceive is required.[17]

Revised Instructions

CACI No. 556, ***Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit.*** In the recent case of *Drexler v. Petersen*,[18] the court addressed the statute of limitations with regard to a medical malpractice plaintiff's claim of misdiagnosis or failure to diagnose. The court held that the cause of action accrues when the plaintiff first experiences "appreciable harm" as a result of the defendant's diagnosis error. Appreciable harm occurs when the plaintiff first becomes aware, or reasonably should have become aware, that a preexisting disease or condition has developed into a more serious one.[19]

The committee elected not to attempt to draft an instruction based on *Drexler* for diagnosis errors and appreciable harm. However, the committee felt that it was important to point out an important aspect of the *Drexler* holding. Appreciable harm is not a matter of delayed discovery; rather it is the trigger for when the cause of action accrues. As such, the three-year limitations period of Code of Civil Procedure section 340.5 does not begin to run until appreciable harm occurs. This point has now been made in the Directions for Use to CACI No. 556.

CACI No. 1010, ***Affirmative Defense—Recreation Immunity—Exceptions.*** 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. One exception is if the injured person paid a fee for permission to enter and use the property. Previously, CACI No. 1010 required that the fee be paid to the defendant.

A court recently held that if the property owner loses immunity because a fee was charged for entry, the loss of immunity extends to a nonowner who has created a dangerous condition on the property.[20] In the case, injury was caused by a fallen tree on the property that was maintained by a public utility. The utility received no fee or other consideration from the plaintiff, but the court held that this fact was irrelevant. Because the plaintiff had paid a fee to the owner for permission to enter and use the property, the utility had no immunity either.

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[17] In addition to the conflict over intent, there would appear to be a second conflict between the statute and the elements as set forth in the cases. The cases require nondisclosure, while the statute is not limited to nondisclosure; it extends to information that is disclosed, but misleading.

[18] (2016) 4 Cal.App.5th 1181.

[19] *Id.* at pp. 1183–1184, 1194.

[20] *Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 566.

The committee proposes changes to the instruction to indicate that a charge or fee need not be paid to the defendant. If the fee was paid to the owner, there is no immunity for any party that causes injury.

As pointed out by a commenter, the instruction currently equates loss of immunity with liability. This, of course, is not correct. If there is no immunity, the jury must still evaluate liability under the elements of the underlying claim. This error has been addressed by changing "is still responsible" to "may still be responsible" in the opening paragraph.

CACI No. 2031, *Damages for Annoyance and Discomfort—Trespass or Nuisance.* The Directions for Use to CACI No. 2031 currently suggest that the damages for annoyance and discomfort due to trespass or nuisance are distinct from the general tort measure of general damages for mental or emotional distress.[21] A recent case cited a long line of California authority to the contrary, including holdings of the California Supreme Court, that damages for annoyance and discomfort do include general damages for emotional distress or mental anguish.[22] The committee finds the authority cited in the case to be dispositive. The committee proposes revising the instruction to clarify that damages for emotional distress and mental anguish are included in the damages for annoyance and discomfort that are recoverable for trespass or nuisance.

CACI No. 4207, *Affirmative Defense—Good Faith.* Under the Uniform Voidable Transactions Act,[23] there is an affirmative defense to voiding the transaction if the transferee received the property in good faith and for reasonably equivalent value.[24] "Good faith" means essentially that the transferee did not know about, nor participate in, the transferor's fraudulent scheme.[25]

In the recent case of *Nautilus, Inc. v. Yang (Nautilus),*[26] the court held that inquiry notice was not sufficient to defeat good faith. The transferee must know actual facts showing the transferor's fraudulent intent.[27] That the transferee perhaps should have known about it from available information was not sufficient. The committee proposes revisions to the instruction to make this clear.

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[21] See *Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 456.

[22] See *Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th 1337, 1348–1349; see also *Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1094 [workability of distinction between damages for annoyance and discomfort and general damages "may be questioned"].

[23] Civ. Code, § 3439 et seq.

[24] Civ. Code, § 3439.08(a), (f)(1).

[25] *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299.

[26] (2017) 11 Cal.App.5th 33.

[27] *Id.* at p. 37.

The Legislative Committee Comments—Assembly to Civil Code section 3439.08(a) provide that the transferee's knowledge of the transferor's fraudulent intent may, *in combination with other facts*, be relevant on the issue of the transferee's good faith. However, the court in *Nautilus* held that if the transferee knew facts showing that the transferor had a fraudulent intent, there cannot be a finding of good faith regardless of any combination of facts.[28] It did not consider whether there might be any other facts against which to balance knowledge of fraudulent intent. Whether or not the court should have addressed this apparent conflict with the legislative history, the committee believes that *Nautilus* presents the better rule.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from July 31 through September 1, 2017. Comments were received from 10 different commenters.[29] No particular instruction garnered any unusual attention or opposition.

The committee evaluated all comments and, as a result, revised some of the instructions. A chart summarizing the comments received and the committee's responses is attached at pages 75–105.

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. There are no policy implications.

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 2018 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.

[28] *Id.* at p. 46.

[29] One of the ten, the Association of Southern California Defense Counsel, sent in separate comments in separate letters signed by different members.

Attachments

1. Full text of *CACI* instructions, at pages 10–74
2. Summary of responses to public comments, at pages 75–105

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TABLE OF CONTENTS

Release 31: November 2017

117. Wealth of Parties

In reaching a verdict, you may not consider the wealth or poverty of any party. The parties' wealth or poverty is not relevant to any of the issues that you must decide.

New November 2017

Directions for Use

This instruction may be given unless liability and punitive damages are to be decided in a nonbifurcated trial. The defendant's wealth is relevant to punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 108 [284 Cal.Rptr. 318, 813 P.2d 1348].) Otherwise, the wealth or lack of it is not relevant. (*Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552–553 [55 Cal.Rptr. 417, 421 P.2d 425].) If this instruction is given in a nonbifurcated trial, it should be modified to clarify that the prohibition on considering wealth applies only to liability and compensatory damages, and not to punitive damages. For discussion of the role of a defendant's financial condition with regard to punitive damages, see the punitive damages instructions in the Damages series, CACI Nos. 3940–3949.

Sources and Authority

- "Justice is to be accorded to rich and poor alike, and a deliberate attempt by counsel to appeal to social or economic prejudices of the jury, including the wealth or poverty of the litigants, is misconduct where the asserted wealth or poverty is not relevant to the issues of the case. The possibility, even if true, that a judgment for plaintiffs would mean that defendant would have to go to the Laguna Honda Home, had no relevance to the issues of the case, and the argument of defense counsel was clearly a transparent attempt to appeal to the sympathies of the jury on the basis of the claimed lack of wealth of the defendant. As such, it was clearly misconduct." (*Hoffman, supra*, 65 Cal.2d at pp. 552–553, internal citations omitted.)

- "[W]here liability and punitive damages are tried in a single proceeding, evidence of wealth is admissible. '[W]hile in the ordinary action for damages information regarding the adversary's financial status is *inadmissible*, this is not so in an action for punitive damages. In such a case evidence of defendant's financial condition is admissible at the trial for the purpose of determining the amount that it is proper to award [citations]. The relevancy of such evidence lies in the fact that punitive damages are not awarded for the purpose of rewarding the plaintiff but to punish the defendant. Obviously, the trier of fact cannot measure the 'punishment' without knowledge of defendant's ability to respond to a given award.' " (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1243 [1 Cal.Rptr.2d 301], original italics.)

- "In an action for damages, a showing of poverty of the plaintiff is highly prejudicial; if such evidence is deliberately introduced, it may constitute reversible error." (*Hart v. Wielt* (1970) 4 Cal.App.3d 224, 234 [84 Cal.Rptr. 220].)

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, §§ 215, 216

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.24 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.51[14] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.141 et seq. (Matthew Bender)

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, Revised November 2017

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.

If the claim involves a diagnosis error, the cause of action accrues when the plaintiff first experiences "appreciable harm" as a result of the defendant's diagnosis error. Appreciable harm occurs when the plaintiff first becomes aware, or reasonably should have become 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, 1194 [209 Cal.Rptr.3d 332].) When this has occurred is a question of fact for the jury unless the facts are undisputed. (*Id.* at p. 1197.) Appreciable harm determines when the injury occurred to complete the cause of action; it is not a question of delayed discovery. Therefore, appreciable harm is required to trigger the three-year limitation period of Code of Civil Procedure section 340.5. (*Steingart v. White* (1988) 198 Cal.App.3d 406, 414–417 [243 Cal.Rptr. 678].)

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) 2 Cal.App.5th 1, 8 [205 Cal.Rptr.3d 719], 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*, *supra*, 4 Cal.App.5th 1181, 1183–1184 [209 Cal.Rptr.3d 332].)

- "Applying the well-settled definition of injury set forth in the cases cited *ante* to the facts here, it must be concluded [plaintiff] suffered no damaging affect or appreciable harm from [defendant]'s asserted neglect until [doctor] discovered her cancer in April 1985. Her complaint was therefore timely with respect to the three-year limit." (*Steingart*, *supra*, 198 Cal.App.3d at p. 414.)

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)

1010. Affirmative Defense—Recreation Immunity—Exceptions (Civ. Code, § 846)

[*Name of defendant***] is not responsible for [***name of plaintiff***]'s harm if [***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~~ may be 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*/the owner**] for permission to enter~~to use~~ the property for a recreational purpose.]**

[**or**]

[[*name of defendant***] expressly invited [***name of plaintiff***] to enter the property for the recreational purpose.]**

If you find that [*name of plaintiff***] has proven one or more of these three exceptions to immunity, then you must still decide whether [***name of defendant***] is liable in light of the other instructions that I will give you.**

New September 2003; Revised October 2008, December 2014, May 2017, November 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].)

For the second exception involving payment of a fee, insert the name of the defendant if the defendant is the landowner. If the defendant is someone who is alleged to have created a dangerous condition on the property other than the landowner, select "the owner." (See *Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal.App.5th 563, 566 [216 Cal.Rptr.3d 426].)

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].)

- "We conclude that the consideration exception to recreational use immunity does apply to [defendant] even though [plaintiff]'s fee for recreational access to the campground was not paid to it … . We hold that the payment of consideration in exchange for permission to enter a premises for a recreational purpose abrogates the section 846 immunity of any nonpossessory interest holder who is potentially responsible for the plaintiff's injuries, including a licensee or easement holder who possesses only a limited right to enter and use a premises on specified terms but no right to control third party access to the premises. The contrary interpretation urged by [defendant], making immunity contingent not on payment of consideration but its receipt, is supported neither by the statutory text nor the Legislature's purpose in enacting section 846, which was to encourage free public access to property for recreational use. It also would lead to troubling, anomalous results we do not think the Legislature intended. At bottom, construing this exception as applying only to defendants who receive or benefit from the consideration paid loses sight of the fact that recreational immunity is merely a tool. It is the Legislature's chosen means, not an end unto itself." (*Pacific Gas & Electric Co., supra*, 10 Cal.App.5th at p. 566.)

- "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~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1103~~1245 ~~1111~~1253

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)

~~1722~~1709. 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; Renumbered from CACI No. 1722 November 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)

~~1724~~1722. Affirmative Defense—Statute of Limitations—Defamation

[*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 [he/she/it] first communicated the alleged defamatory statement to a person other than [***name of plaintiff***] before [***insert date one year before date of filing***]. [For statements made in a publication, the claimed harm occurred when the publication was first generally distributed to the public.]**

[If, however, [*name of plaintiff***] proves that on [***insert date one year before date of filing***] [he/she/it] had not discovered the facts constituting the defamation, and with reasonable diligence could not have discovered those facts, the lawsuit was filed on time.]**

New April 2009; Renumbered from CACI No. 1724 November 2017

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable one-year limitation period for defamation. (See Code Civ. Proc., § 340(c).)

If the defamation was published in a publication such as a book, newspaper, or magazine, include the last sentence of the first paragraph, and do not include the second paragraph. The delayed-discovery rule does not apply to these statements. (*Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1250–1251 [7 Cal.Rptr.3d 576, 80 P.3d 676].) Otherwise, include the second paragraph if the plaintiff alleges that the delayed-discovery rule avoids the limitation defense.

The plaintiff bears the burden of pleading and proving delayed discovery. (See *McKelvey v. Boeing North Am. Inc.* (1999) 74 Cal.App.4th 151, 160 [86 Cal.Rptr.2d 645].) See also the Sources and Authority to CACI No. 455, *Statute of Limitations—Delayed Discovery*.

The delayed discovery rule can apply to matters published in an inherently secretive manner. (*Hebrew Academy of San Francisco v. Goldman* (2007) 42 Cal.4th 883, 894 [70 Cal.Rptr.3d 178, 173 P.3d 1004]. Modify the instruction if inherent secrecy is at issue and depends on disputed facts. It is not clear whether the plaintiff has the burden of proving inherent secrecy or the defendant has the burden of proving its absence.

Sources and Authority

- One-Year Statute of Limitations. Code of Civil Procedure section 340.
- "In a claim for defamation, as with other tort claims, the period of limitations commences when the cause of action accrues. … [A] cause of action for defamation accrues at the time the defamatory statement is 'published' (using the term 'published' in its technical sense). [¶] [I]n defamation actions the general rule is that publication occurs when the defendant communicates the defamatory statement to a person other than the person being defamed. As also has been noted, with respect to books and newspapers, publication occurs (and the cause of action accrues)

when the book or newspaper is first generally distributed to the public." (*Shively, supra,* 31 Cal.4th at pp. 1246–1247, internal citations omitted.)

- "This court and other courts in California and elsewhere have recognized that in certain circumstances it may be appropriate to apply the discovery rule to delay the accrual of a cause of action for defamation or to impose an equitable estoppel against defendants who assert the defense after the limitations period has expired." (*Shively, supra,* 31 Cal.4th at pp. 1248–1249.)

- "[A]pplication of the discovery rule to statements contained in books and newspapers would undermine the single-publication rule and reinstate the indefinite tolling of the statute of limitations intended to be cured by the adoption of the single-publication rule. If we were to recognize delayed accrual of a cause of action based upon the allegedly defamatory statement contained in the book … on the basis that plaintiff did not happen to come across the statement until some time after the book was first generally distributed to the public, we would be adopting a rule subjecting publishers and authors to potential liability during the entire period in which a single copy of the book or newspaper might exist and fall into the hands of the subject of a defamatory remark. Inquiry into whether delay in discovering the publication was reasonable has not been permitted for publications governed by the single-publication rule. Nor is adoption of the rule proposed by plaintiff appropriate simply because the originator of a privately communicated defamatory statement may, together with the author and the publisher of a book, be liable for the defamation contained in the book. Under the rationale for the single-publication rule, the originator, who is jointly responsible along with the author and the publisher, should not be liable for millions of causes of action for a single edition of the book. Similarly, consistent with that rationale, the originator, like the author or the publisher, should not be subject to suit many years after the edition is published." (*Shively, supra,* 31 Cal.4th at p. 1251.)

- "The single-publication rule as described in our opinion in *Shively* and as codified in Civil Code section 3425.3 applies without limitation to all publications." (*Hebrew Academy of San Francisco, supra,* 42 Cal.4th at p. 893.)

- "[T]he single-publication rule applies not only to books and newspapers that are published with general circulation (as we addressed in *Shively*), but also to publications like that in the present case that are given only limited circulation and, thus, are not generally distributed to the public. Further, the discovery rule, which we held in *Shively* does not apply when a book or newspaper is generally distributed to the public, does not apply even when, as in the present case, a publication is given only limited distribution." (*Hebrew Academy of San Francisco, supra,* 42 Cal.4th at p. 890.)

- " '… [C]ourts uniformly have *rejected* the application of the discovery rule to libels published in books, magazines, and newspapers,' stating that 'although application of the discovery rule may be justified when the defamation was communicated in confidence, that is, "in an inherently secretive manner," the justification does not apply when the defamation occurred by means of a book, magazine, or newspaper that was distributed to the public. [Citation.]' " (*Hebrew Academy of San Francisco, supra,* 42 Cal.4th at p. 894, original italics, internal citations omitted.)

Secondary Sources

Haning et al., California Practice Guide: Personal Injury (The Rutter Group) ¶ 5:176.10

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.21 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.290 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.56 (Matthew Bender)

1724. Fair and True Reporting Privilege (Civ. Code, § 47(d))

[*Name of plaintiff***] cannot recover damages from [***name of defendant***] if [***name of defendant***] proves all of the following:**

1. That [*name of defendant***]'s statement(s) [was/were] [reported in/communicated to] [***specify public journal in which statement(s) appeared***];**

2. The [report/communication] was of [*select the applicable statutory context***]**

[a judicial, legislative, or other public official proceeding;]

[something said in the course of a judicial, legislative, or other public official proceeding;]

[a verified charge or complaint made by any person to a public official on which a warrant was issued;]

and

3. The [report/communication] was both fair and true.

New November 2017

Directions for Use

This instruction involves what is referred to as the "fair and true reporting privilege" of Civil Code section 47(d). This statute grants an absolute privilege against defamation for a fair and true report in, or a communication to, a public journal, of a judicial, legislative, or other public official proceeding; or for anything said in the course of the proceeding; or for a verified charge or complaint made by any person to a public official, on which complaint a warrant has been issued.

An element of defamation is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) That would seem to suggest that the plaintiff must prove that a privilege does not apply. Nevertheless, courts have held that it is the defendant's burden to prove that the statement is within the scope of the privilege, including that it was fair and true. (*Burrill v. Nair* (2013), 217 Cal.App.4th 357, 396 [158 Cal.Rptr.3d 332], disapproved on another ground in *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396, fn. 11 [205 Cal.Rptr.3d 475, 376 P.3d 604].)

Sources and Authority

- Fair and True Reporting Privilege. Civil Code section 47(d).
- "Under section 47, subdivision (d), the fair and true reporting privilege protects a 'fair and true report in, or a communication to, a public journal, of … a judicial … proceeding, or … anything

said in the course thereof.' It too is an absolute privilege—that is, it applies regardless of the defendants' motive for making the report—and forecloses a plaintiff from showing a probability of prevailing on the merits." (*Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 787 [214 Cal.Rptr.3d 358].)

- "The purpose of this privilege is to ensure the public interest is served by the dissemination of information about events occurring in official proceedings and with respect to verified charges or complaints resulting in the issuance of a warrant." (*Burrill, supra,* 217 Cal.App.4th at p. 397.)

- "Prior to 1997 subdivision (d) applied only to a fair and true report *in a* public journal. Senate Bill No. 1540 (1995–1996 Reg. Sess.), sponsored by the California Newspapers Publishers Association, amended the provision, effective January 1, 1997, to add 'or a communication to,' so the privilege would extend, as it does now, to both a fair and true report in and a communication to a public journal concerning judicial, legislative or other public proceedings." (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97 [201 Cal.Rptr.3d 782], original italics.)

- "The privilege applies if the substance of the publication or broadcast captures the gist or sting of the statements made in the official proceedings." (*Burrill, supra,* 217 Cal.App.4th at p. 397.)

- "The defendant is entitled to a certain degree of ' "flexibility/literary license" ' in this regard, such that the privilege will apply even if there is a slight inaccuracy in details—one that does not lead the reader to be affected differently by the report than he or she would be by the actual truth." (*Argentieri, supra,* 8 Cal.App.5th at pp. 787–788.)

- "[Plaintiff] further contends it was for a jury, not the trial court, to decide whether [defendant]'s Statement was a fair and true report. Courts have stated that the fairness and truth of a report is an issue of fact for the jury, *if* there is any material factual dispute on the issue." (*Argentieri, supra,* 8 Cal.App.5th at p. 791, original italics.)

- " '[W]hether or not a privileged occasion exists is for the court to decide, while the effect produced by the particular words used in an article [or broadcast] and the fairness of the report is a question of fact for the jury [citation].' '[T]he publication is to be measured by the natural and probable effect it would have on the mind of the average reader [citations]. The standard of interpretation to be used in testing alleged defamatory language is how those in the community where the matter was published would reasonably understand it [citation]. In determining whether the report was fair and true, the article [or broadcast] must be regarded from the standpoint of persons whose function is to give the public a fair report of what has taken place. The report is not to be judged by the standard of accuracy that would be adopted if it were the report of a professional law reporter or a trained lawyer [citation].' " (*Burrill, supra,* 217 Cal.App.4th at p. 398, internal citation omitted.)

- "At the very least, the difference between these accusations presents a question of fact with respect to whether the average listener would understand the broadcast to capture the gist or sting of the citizen's complaint, or whether the charge made in the broadcast would affect the listener differently than that made in the citizen's complaint." (*Burrill, supra,* 217 Cal.App.4th at p. 398.)

- "In evaluating the effect a publication has on the average reader, the challenged language must be viewed in context to determine whether, applying a 'totality of the circumstances' test, it is reasonably susceptible to the defamatory meaning alleged by the plaintiff: ' "[A] defamatory meaning must be found, if at all, in a reading of the publication as a whole." [Citation.] "This is a rule of reason. Defamation actions cannot be based on snippets taken out of context." ' (*J-M Manufacturing Co., Inc., supra,* 247 Cal.App.4th at p. 97, internal citations omitted.)

- "[Defendant] bears the burden of proving the privilege applies." (*Burrill, supra,* 217 Cal.App.4th at p. 396.)

- " 'A report of a judicial proceeding implies that some official action has been taken by the officer or body whose proceedings are thus reported. The publication, therefore, of the contents of preliminary pleadings such as a complaint or petition, before any judicial action has been taken is not within the rule stated in this Section. An important reason for this position has been to prevent implementation of a scheme to file a complaint for the purpose of establishing a privilege to publicize its content and then dropping the action. (See Comment c). It is not necessary, however, that a final disposition be made of the matter in question; it is enough that some judicial action has been taken so that, in the normal progress of the proceeding, a final decision will be rendered.' " (*Burrill, supra,* at p. 397, quoting Restatement 2d of Torts, § 611, comment e.)

Secondary Sources

9 Witkin, Summary of California Law (10th ed. 2005) Torts, § 586

4 Levy et al., California Torts, Ch. 45, *Intentional Torts and Other Theories of Recovery*, § 45.11 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.64 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander*, § 142.51 (Matthew Bender)

1802. False Light

[*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***] publicized information or material that showed [***name of plaintiff***] in a false light;**

2. **That the false light created by the publication would be highly offensive to a reasonable person in [***name of plaintiff***]'s position;**

3. **[That there is clear and convincing evidence that [***name of defendant***] knew the publication would create a false impression about [***name of plaintiff***] or acted with reckless disregard for the truth;]**

   [*or*]

   [That [*name of defendant***] was negligent in determining the truth of the information or whether a false impression would be created by its publication;]**

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

   [*or*]

   [That [*name of plaintiff***] sustained harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and]**

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

[In deciding whether [*name of defendant***] publicized the information or material, you should determine whether it was made public either by communicating it to the public at large or to so many people that the information or material was substantially certain to become public knowledge.]**

New September 2003; Revised November 2017

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.

~~The bracketed options for element 3 should be used in the alternative, depending on whether the conduct~~

~~involves a matter of public concern.~~

~~Comment (a) to Restatement Second of Torts, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." This point has been placed in brackets because it may not be an issue in every case.~~

~~As reflected in the citations below, f~~False light claims are subject to the same constitutional protections that apply to defamation claims. (*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543 [93 Cal.Rptr. 866, 483 P.2d 34] [false light claim should meet the same requirements of a libel claim, including proof of malice when required].) Thus, a knowing violation of or reckless disregard for the plaintiff's rights is required ~~where~~ if the plaintiff is a public figure or the subject matter of the communication is a matter of public concern. Give the first option for element 3 if the publication involves a public figure or a matter of public concern. Otherwise, give the second option. ~~If a false light claim is combined with a defamation or libel claim, the standard applied in the instructions should be equivalent.~~

If the jury will also be instructed on defamation, the~~If plaintiff has combined a false light claim with a claim of defamation or libel, the~~ court should consider whether an instruction on false light would be superfluous and therefore need not be given.~~separate instructions on each claim should be given in light of~~ (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, fn. 13 [88 Cal.Rptr.2d 802] ; see also~~and~~ *Briscoe*, *supra*, 4 Cal.3d at p. 543.)~~*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543 [93 Cal.Rptr. 866, 483 P.2d 34].~~

Comment (a) to Restatement Second of Torts, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." The final paragraph addressing this point has been placed in brackets because it may not be an issue in every case.

Sources and Authority

- " 'False light is a species of invasion of privacy, based on publicity that places a plaintiff before the public in a false light that would be highly offensive to a reasonable person, and where the defendant knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the plaintiff would be placed." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1264 [217 Cal.Rptr.3d 234].)
- ~~Restatement Second of Torts, section 652E provides:~~

> ~~One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if~~
>
> ~~(a) the false light in which the other was placed would be highly offensive to a reasonable person, and~~
>
> ~~(b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.~~

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)

- "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a reasonable person. Although it is not necessary that the plaintiff be defamed, publicity placing one in a highly offensive false light will in most cases be defamatory as well." (*Fellows v. National Enquirer* (1986) 42 Cal.3d 234, 238-239 [228 Cal.Rptr. 215, 721 P.2d 97], internal citation omitted.)

- "When a false light claim is coupled with a defamation claim, the false light claim is essentially superfluous, and stands or falls on whether it meets the same requirements as the defamation cause of action." (*Eisenberg, supra,* 74 Cal.App.4th at p. 1385, fn. 13, internal citations omitted.)

- "[A] 'false light' cause of action 'is in substance equivalent to ... [a] libel claim, and should meet the same requirements of the libel claim ... including proof of malice and fulfillment of the requirements of [the retraction statute] section 48a [of the Civil Code]".' " (*Briscoe, supra,* 4 Cal.3d at p. 543, internal citation omitted.)

- "The *New York Times* decision defined a zone of constitutional protection within which one could publish concerning a public figure without fear of liability. That constitutional protection does not depend on the label given the stated cause of action; it bars not only actions for defamation, but also claims for invasion of privacy." (*Reader's Digest Assn., Inc. v. Superior Court* (1984) 37 Cal.3d 244, 265 [208 Cal.Rptr. 137, 690 P.2d 610], internal citations omitted.)

- In *Time, Inc. v. Hill* (1967) 385 U.S. 374 [87 S.Ct. 534, 17 L.Ed.2d 456], the Court held that the *New York Times v. Sullivan* malice standard applied to a privacy action that was based on a "false light" statute where the matter involved a public figure. Given the similarities between defamation and false light actions, it appears likely that the negligence standard for private figure defamation plaintiffs announced in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [94 S.Ct. 2997, 41 L.Ed.2d 789] should apply to private figure false light plaintiffs.

- ~~Plaintiffs must comply with the retraction statute (Civ. Code, § 48a) to recover more than special damages in a false light cause of action. (*Briscoe, supra,* 4 Cal.3d at p. 543.)~~

- "We hold that whenever a claim for false light invasion of privacy is based on language that is defamatory within the meaning of section 45a, pleading and proof of special damages are required." (*Fellows, supra,* 42 Cal.3d at p. 251.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~673~~784 – ~~675~~786

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.04 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.33 (Matthew Bender)

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

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 20:12–20:15 (Thomson Reuters)

1803. Appropriation of Name or Likeness—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] right to privacy. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used [***name of plaintiff***]'s name, likeness, or identity ~~without [his/her] permission~~;**

2. **That [***name of plaintiff***] did not consent to this use;**

~~2~~3. **That [***name of defendant***] gained a commercial benefit [or some other advantage] by using [***name of plaintiff***]'s name, likeness, or identity;**

~~3~~4. **That [***name of plaintiff***] was harmed; and**

~~4~~5. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2014, November 2017

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

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

If suing under both the common law and Civil Code section 3344, the judge may need to explain that a person's voice, for example, may qualify as "identity" if the voice is sufficient to cause listeners to identify the plaintiff. The two causes of action overlap, and the same conduct should be covered by both.

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

in this sport, plaintiffs can only prevail if they demonstrate a substantial competing interest."].)

Sources and Authority

- "A common law misappropriation claim is pleaded by 'alleging: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury. [Citations.]" [Citation.]' " (*Maxwell v. Dolezal* (2014) 231 Cal.App.4th 93, 97 [179 Cal.Rptr.3d 807].)

- " '[T]he right of publicity has come to be recognized as distinct from the right of privacy'. 'What may have originated as a concern for the right to be left alone has become a tool to control the commercial use and, thus, protect the economic value of one's name, voice, signature, photograph, or likeness.' 'What the right of publicity holder possesses is … a right to prevent others from misappropriating the economic value generated … through the merchandising of the 'name, voice, signature, photograph, or likeness' of the [holder].' " (*Timed Out, LLC v. Youabian, Inc.* (2014) 229 Cal.App.4th 1001, 1006 [177 Cal.Rptr.3d 773], internal citations omitted.)

- "The common law cause of action may be stated by pleading the defendant's unauthorized use of the plaintiff's identity; the appropriation of the plaintiff's name, voice, likeness, signature, or photograph to the defendant's advantage, commercially or otherwise; and resulting injury." (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 684−685 [166 Cal.Rptr.3d 359].)

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)

- "Consent to the use of a name or likeness is determined by traditional principles of contract interpretation." (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 8 [206 Cal.Rptr.3d 884].)

- "[T]he appearance of an 'endorsement' is not the *sine qua non* of a claim for commercial appropriation." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 419 [198 Cal.Rptr. 342].)

- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)

- "The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278-279 [239 P.2d 630].)

- "Even if each of these elements is established, however, the common law right does not provide relief

for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409-410, internal citations and footnote omitted.)

- "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)

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

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~676~~784 ~~678~~786

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

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

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

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

VF-1803. Privacy—Appropriation of Name or Likeness

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] use [***name of plaintiff***]'s name, likeness, or identity ~~without [*name of plaintiff*]'s permission~~?**
____ Yes ____ No

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

2. Did [*name of plaintiff***] consent to the use of [his/her] name, likeness, or identity?**

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.

~~2~~3. **Did [***name of defendant***] gain a commercial benefit [or some other advantage] by using [***name of plaintiff***]'s name, likeness, or identity?**
____ Yes ____ No

If your answer to question ~~2~~ 3 is yes, then answer question ~~3~~4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

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

~~4~~5. **What are [***name of plaintiff***]'s damages?**

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

[b. Future economic loss
[lost earnings $ _____]

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010, December 2016, November 2017

Directions for Use

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

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

If specificity is not required, users do not have to itemize all the damages listed in question ~~4~~ 5 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

If the jury is 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.

2031. Damages for Annoyance and Discomfort—Trespass or Nuisance

If you decide that [*name of plaintiff*] has proved that [*name of defendant*] committed a [trespass/nuisance], [*name of plaintiff*] may recover damages that would reasonably compensate [him/her] for the annoyance and discomfort, including emotional distress or mental anguish, caused by the injury to [his/her] peaceful enjoyment of the property that [he/she] occupied.

New December 2010; Revised November 2017

Directions for Use

Give this instruction if the plaintiff claims damages for annoyance and discomfort resulting from a trespass or nuisance, including emotional distress or mental anguish proximately caused by the trespass or nuisance. (*Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th 1337, 1348-1349 [213 Cal.Rptr.3d 803]; but see ~~. These damages are distinct from general damages for mental or emotional distress. (~~*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 456 [102 Cal.Rptr.3d 32] [damages for annoyance and discomfort are distinct from general damages for mental or emotional distress]; see also *Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1094 [214 Cal.Rptr.3d 193 [workability of distinction between damages for annoyance and discomfort and general damages "may be questioned"].)

There may also be a split of authority as to whether the plaintiff must have been in immediate possession of the property in order to recover for annoyance and discomfort. (Compare *Hensley, supra,* 7 Cal.App.5th at pp. 1352–1355 [no limitation] with *Kelly, supra*, 179 Cal.App.4th at p. 458 [plaintiff must be in immediate possession of the property]; see also *Vieira Enterprises, Inc., supra*, 8 Cal.App.5th at p. 1094 [not necessary that the plaintiff be present at the moment of a tortious invasion of the property].)

Sources and Authority

- "Once a cause of action for trespass or nuisance is established, an occupant of land may recover damages for annoyance and discomfort that would naturally ensue therefrom." (*Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 272 [288 P.2d 507].)

- "[T]he restrictions on emotional distress damages involved in breach of contract or negligence cases do not apply when a plaintiff's emotional distress is the result of the defendant's commission of a tort arising from an invasion of a property interest." (*Hensley, supra,* 7 Cal.App.5th at pp. 1356–1357.)

- "[O]nce a cause of action for trespass or nuisance is established, a landowner may recover for annoyance and discomfort, *including emotional distress or mental anguish*, proximately caused by the trespass or nuisance. … [¶] This is so even where the trespass or nuisance involves solely property damage." (*Hensley, supra*, 7 Cal.App.5th at pp. 1348–1349, original italics.)

- "[Plaintiff]'s fear, stress and anxiety suffered as a direct and proximate result of the fire and its attendant damage, loss of use and enjoyment are compensable as damages for annoyance and

discomfort." (*Hensley, supra*, 7 Cal.App.5th at p. 1351.)

- "We reject [defendant]'s contention that in order for emotional distress damages to 'naturally ensue' from a trespass or nuisance, the owner or occupant must be personally or physically present on the invaded property during the trespass or nuisance." (*Hensley, supra,* 7 Cal.App.5th at p. 1352.)

- "We do not question that a nonresident property owner may suffer mental or emotional distress from damage to his or her property. But annoyance and discomfort damages are distinct from general damages for mental and emotional distress. Annoyance and discomfort damages are intended to compensate a plaintiff for the loss of his or her peaceful occupation and enjoyment of the property. … 'We recognize that annoyance and discomfort by their very nature include a mental or emotional component, and that some dictionary definitions of these terms include the concept of distress. Nevertheless, the "annoyance and discomfort" for which damages may be recovered on nuisance and trespass claims generally refers to distress arising out of physical discomfort, irritation, or inconvenience caused by odors, pests, noise, and the like. Our cases have permitted recovery for annoyance and discomfort damages on nuisance and trespass claims while at the same time precluding recovery for "pure" emotional distress.' " (*Kelly, supra,* 179 Cal.App.4th at p. 456, internal citations omitted.)

- "California cases upholding an award of annoyance and discomfort damages have involved a plaintiff who was in immediate possession of the property as a resident or commercial tenant. We are aware of no California case upholding an award of annoyance and discomfort damages to a plaintiff who was not personally in immediate possession of the property." (*Kelly, supra,* 179 Cal.App.4th at p. 458, internal citations omitted.)

- "*Kelly* stands only for the proposition that legal occupancy is required to recover damages for annoyance and discomfort in a trespass case, and that standard requires immediate and personal possession, as a resident or commercial tenant would have. Here, there is no dispute the [plaintiffs] both owned and resided on their property, and they meet the legal standard of occupancy necessary to claim damages for annoyance, discomfort, inconvenience or mental anguish proximately caused by the trespass, as the jury was instructed without controversy in *Kelly. Kelly* does not hold that an occupant must be personally or physically present *at the time of the harmful invasion* to deem emotional distress damages "naturally ensuing" therefrom." (*Hensley, supra*, 7 Cal.App.5th at p. 1354, original italics, internal citation omitted.)

- "[I]t is not necessary that the plaintiff be present at the moment of a tortious invasion of the property. But it is necessary that the annoyance and discomfort arise from and relate to some personal effect of the *interference with use and enjoyment* which lies at the heart of the tort of trespass." (*Vieira Enterprises, Inc., supra*, 8 Cal.App.5th at p. 1094, original italics.)

- "[A] plaintiff may recover damages for annoyance and discomfort proximately caused by tortious injuries to trees on her property if she was in immediate and personal possession of the property at the time of the trespass." *(Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1313 [212 Cal.Rptr.3d 920], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § ~~1730~~1915

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.23 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.21 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.145 (Matthew Bender)

2805. Employee Not Within Course of Employment—Employer Conduct Unrelated to Employment

A claim is not barred by workers' compensation if the employer engages in conduct unrelated to the employment or steps outside of its proper role.

New November 2017

Directions for Use

This instruction presents the so-called *Fermino* exception to the exclusivity of workers' compensation. (See *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701 [30 Cal.Rptr.2d 18, 872 P.2d 559].) Its purpose is to rebut element 3 of CACI No. 2800, *Employer's Affirmative Defense—Injury Covered by Workers' Compensation.* Per element 3, the injury falls within the exclusive remedy of workers' compensation if it occurred while the employee was performing the work that he or she was required to do. The *Fermino* exception changes the focus from what the employee was doing when injured to what the employer was doing that may have caused the injury. The exclusive remedy does not apply if the employer caused the injury through conduct unrelated to the work. (*Id.* 7 Cal.4th at p. 717.)

Sources and Authority

- "[N]ormal employer actions causing injury would not fall outside the scope of the exclusivity rule merely by attributing to the employer a sinister intention. Conversely, … actions by employers that have no proper place in the employment relationship may not be made into a 'normal' part of the employment relationship merely by means of artful terminology. Indeed, virtually any action by an employer can be characterized as a 'normal part of employment' if raised to the proper level of abstraction." (*Fermino, supra,* 7 Cal.4th at p. 717. [30 Cal.Rptr.2d 18, 872 P.2d 559].)

- "[C]ertain types of injurious employer misconduct remain outside this bargain. There are some instances in which, although the injury arose in the course of employment, the employer engaging in that conduct ' "stepped out of [its] proper role[]" ' or engaged in conduct of ' "questionable relationship to the employment." ' " (*Fermino, supra,* 7 Cal.App.4th at p. 708.)

- "[CACI No. 2800] was correctly given, however, because the evidence was able to support a finding that the work was not a contributing cause of the injury. [¶] The jury could properly make this finding 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. If the jury found that carrying out the mock robbery was not within the employer's proper role, it could also find that unwittingly participating in the mock robbery as a victim was not part of the employee's work." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 628–629 [210 Cal.Rptr.3d 362].)

- "The jury could properly find the injury did not arise out of the employee's work because it was caused by such employer action and therefore the conditions of compensation did not exist. To

> hold that the jury must first find the injury to be within the conditions of compensation and then find it also to be within the *Fermino* exception, instead of simply finding that the conditions of compensation were not met in the first place in light of *Fermino,* would be elevating form over substance." (*Lee, supra,* 5 Cal.App.5th at p. 629.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, § 56

Chin, et al., California Practice Guide: Employment Litigation, Ch. 15-F, *Preemption Defenses*, ¶ 15:526 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 20, Workers' Compensation, § 20.13 (Matthew Bender)

Hanna, California Law of Employee Injuries and Workers Compensation, Ch. 11, Actions Against the Employer Under State Law and Third-Party Tort Actions, § 11.05 (Matthew Bender)

California Workers' Compensation Law and Practice, Ch. 2, Jurisdiction, § 2:122 (James Publishing)

52 California Forms of Pleading and Practice, Ch. 577, Workers' Compensation, § 577.315 (Matthew Bender)

20 California Points and Authorities, Ch. 239, Workers' Compensation Exclusive Remedy Doctrine, § 239.39 (Matthew Bender)

3053. Retaliation for Exercise of Free Speech Rights—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] because [he/she] exercised [his/her] right to speak as a private citizen about a matter of public concern. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of plaintiff***] was speaking as a private citizen and not as a public employee when [he/she] [***describe speech alleged to be protected by the First Amendment, e.g., criticized the mayor at a city council meeting***];]**

2. **That [***name of defendant***] [***specify retaliatory acts, e.g., terminated plaintiff's employment***];**

3. **That [***name of plaintiff***]'s [***e.g., speech to the city council***] was a substantial motivating reason for [***name of defendant***]'s decision to [***e.g., terminate plaintiff's employment***];**

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

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

If [*name of plaintiff***] proves all of the above, [***name of defendant***] is not liable if [he/she/it] proves either of the following:**

6. **That [***name of defendant***] had an adequate employment-based justification for treating [***name of plaintiff***] differently from any other member of the general public; or**

7. **That [***name of defendant***] would have [***specify adverse action, e.g., terminated plaintiff's employment***] anyway for other legitimate reasons, even if [he/she/it] also retaliated based on [***name of plaintiff***]'s protected conduct.**

In deciding whether [*name of plaintiff***] was speaking as a public citizen or a public employee (element 1), you should consider whether [his/her] [***e.g., speech***] was within [his/her] job responsibilities. [However, the listing of a given task in an employee's written job description is neither necessary nor sufficient alone to demonstrate that conducting the task is part of the employee's professional duties.]**

New November 2017

Directions for Use

This instruction is for use in a claim by a public employee who alleges that he or she suffered an adverse employment action in retaliation for his or her private speech on an issue of public concern. Speech made by public employees in their official capacity is not insulated from employer discipline by the First

Amendment but speech made in one's private capacity as a citizen is. (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 421 [126 S. Ct. 1951, 164 L. Ed. 2d 689].)

Element 1, whether the employee was speaking as a private citizen or as a public employee, and element 6, whether the public employer had an adequate justification for the adverse action, are ultimately determined as a matter of law, but may involve disputed facts. (*Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1071.) If there are no disputed facts, these elements should not be given. They may be modified to express the particular factual issues that the jury must resolve.

Give the bracketed optional sentence in the last paragraph if the defendant has placed the plaintiff's formal written job description in evidence. (See *Garcetti, supra,* 547 U.S. at p. 424.)

Note that there are two causation elements. The protected speech must have caused the employer's adverse action (element 3); and the adverse action must have caused the employee harm (element 5). This second causation element will rarely be disputed in a termination case. For optional language if the employer claims that there was no adverse action, see CACI No. 2505, *Retaliation—Essential Factual Elements* (under California's Fair Employment and Housing Act). See also CACI No. 2509, *"Adverse Employment Action" Explained* (under FEHA).

Sources and Authority

- " '[C]itizens do not surrender their First Amendment rights by accepting public employment.' Moreover, '[t]here is considerable value . . . in encouraging, rather than inhibiting, speech by public employees,' because 'government employees are often in the best position to know what ails the agencies for which they work.' At the same time, '[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions.' Accordingly, government employees may be subject to some restraints on their speech 'that would be unconstitutional if applied to the general public.' " (*Moonin v. Tice* (9th Cir. 2017) -- F.3d --, --, internal citations omitted.) 2017 U.S. App. LEXIS 15956

- "First Amendment retaliation claims are governed by the framework in *Eng.* See 552 F.3d at 1070-72. [Plaintiff] must show that (1) he spoke on a matter of public concern, (2) he spoke as a private citizen rather than a public employee, and (3) the relevant speech was a substantial or motivating factor in the adverse employment action. Upon that showing, the State must demonstrate that (4) it had an adequate justification for treating [plaintiff] differently from other members of the general public, or (5) it would have taken the adverse employment action even absent the protected speech. '[A]ll the factors are necessary, in the sense that failure to meet any one of them is fatal to the plaintiff's case.' " (*Kennedy v. Bremerton Sch. Dist.* (9th Cir. 2017) -- F.3d --, --, internal citations omitted.) 2017 U.S. App. LEXIS 16106

  "*Pickering* [*Pickering v. Bd. of Educ.* (1968) 391 U.S. 563 [88 S.Ct. 1731, 20 L.Ed.2d 811]] and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes

whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations. (*Garcetti, supra,* 547 U.S. at p. 418, internal citations omitted.)

- "In the forty years since *Pickering,* First Amendment retaliation law has evolved dramatically, if sometimes inconsistently. Unraveling *Pickering's* tangled history reveals a sequential five-step series of questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech. Analysis of these questions, further complicated by restraints on our interlocutory appellate jurisdiction, involves a complex array of factual and legal inquiries requiring detailed explanation." (*Eng, supra,* 552 F.3d at p. 1070.)

- "The public concern inquiry is purely a question of law … ." (*Eng, supra,* 552 F.3d at p. 1071.)

- "While 'the question of the scope and content of a plaintiff's job responsibilities is a question of fact,' the 'ultimate constitutional significance of the facts as found' is a question of law." (*Eng, supra,* 552 F.3d at p. 1071.)

- "[T]he parties in this case do not dispute that [plaintiff] wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." (*Garcetti, supra,* 547 U.S. at p. 424.)

- "[I]n synthesizing relevant Ninth Circuit precedent since *Garcetti,* an en banc panel of this Court in *Dahlia v. Rodriguez,* 735 F.3d 1060, 1074-76 (9th Cir. 2013), announced three guiding principles for undertaking the practical factual inquiry of whether an employee's speech is insulated from employer discipline under the First Amendment. … The guiding principles are: [¶] 1. 'First, particularly in a highly hierarchical employment setting such as law enforcement, whether or not the employee confined his communications to his chain of command is a relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties. When a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his duties.' [¶] 2. 'Second, the subject matter of the communication is also of course highly relevant to the ultimate determination whether the speech is protected by the First Amendment … When an employee prepares a routine report, pursuant to normal departmental procedure, about a particular incident or occurrence, the employee's preparation of that report is typically within his job duties. . . By contrast, if a public

employee raises within the department broad concerns about corruption or systemic abuse, it is unlikely that such complaints can reasonably be classified as being within the job duties of an average public employee, except when the employee's regular job duties involve investigating such conduct.' [¶] 3. 'Third, we conclude that when a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties. Indeed, the fact that an employee is threatened or harassed by his superiors for engaging in a particular type of speech provides strong evidence that the act of speech was not, as a 'practical' matter, within the employee's job duties notwithstanding any suggestions to the contrary in the employee's formal job description.' " (*Brandon v. Maricopa County* (9th Cir. 2017) 849 F.3d 837, 843–844, internal citations omitted.)

- "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' - or, to put it in other words, that it was a 'motivating factor' in the [defendant]'s decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the [defendant] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." (*Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle* (1977) 429 U.S. 274, 287 [97 S.Ct. 568, 50 L.Ed.2d 471].)

- "Although the *Pickering* balancing inquiry is ultimately a legal question, like the private citizen inquiry, its resolution often entails underlying factual disputes. Thus we must once again assume any underlying disputes will be resolved in favor of the plaintiff to determine, as a matter of law, whether the state has 'adequate justification' to restrict the employee's speech. If the allegations, viewed in light most favorable to the plaintiff, indicate adequate justification, qualified immunity should be granted." (*Eng, supra*, 552 F.3d at pp. 1071–1072, internal citations omitted.)

- "Although the *Pickering* framework is most often applied in the retaliation context, a similar analysis is used when assessing prospective restrictions on government employee speech. Where a 'wholesale deterrent to a broad category of expression' rather than 'a post hoc analysis of one employee's speech and its impact on that employee's public responsibilities' is at issue, the Court weighs the impact of the ban as a whole—both on the employees whose speech may be curtailed and on the public interested in what they might say—against the restricted speech's ' "necessary impact on the actual operation" of the Government,' '[U]nlike an adverse action taken in response to actual speech,' a prospective restriction 'chills potential speech before it happens.' The government therefore must shoulder a heavier burden when it seeks to justify an ex ante speech restriction as opposed to 'an isolated disciplinary action.' " (*Moonin, supra,* -- F.3d at p. --, internal citations omitted.)

Secondary Sources

7 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 563

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law §§ 894, 895

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03 (Matthew Bender)

~~3726~~3724. Social or Recreational Activities

Social or recreational activities that occur after work hours are within the scope of employment if:

(a) They are carried out with the employer's stated or implied permission; and

(b) They either provide a benefit to the employer or have become customary.

New September 2003; Renumbered From CACI No. 3726 November 2017

Sources and Authority

- This aspect of the scope-of-employment analysis was expressly adopted for use in respondeat superior cases in *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 620 [124 Cal.Rptr. 143], and reiterated in *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, 804 [235 Cal.Rptr. 641]. It is derived from the workers' compensation case of *McCarty v. Workmen's Compensation Appeals Bd.* (1974) 12 Cal.3d 677, 681-683 [117 Cal.Rptr. 65, 527 P.2d 617].)

- "[W]here social or recreational pursuits on the employer's premises after hours are endorsed by the express or implied permission of the employer and are 'conceivably' of some benefit to the employer or, even in the absence of proof of benefit, if such activities have become 'a customary incident of the employment relationship,' an employee engaged in such pursuits after hours is still acting within the scope of his employment." (*Rodgers, supra*, 50 Cal.App.3d at 620.)

- *McCarty* has been overruled by statute in the context of workers' compensation (see Lab. Code, § 3600(a)(9)). However, courts have acknowledged that "it has been adopted as a test in establishing liability under respondeat superior." (*West American Insurance Co. v. California Mutual Insurance Co.* (1987) 195 Cal.App.3d 314, 322 [240 Cal.Rptr. 540].)

Secondary Sources

3 Witkin, Summary of California Law (~~10th ed. 2005~~11th ed. 2017) Agency and Employment, §§ ~~182~~193, ~~185~~196, ~~190~~ 201

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[3][c] (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* (Matthew Bender)

~~3724~~3726. 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, Revised and Renumbered from CACI No. 3724 November 2017

Directions for Use

This instruction sets forth the business errand exception to the going-and-coming rule, sometimes called the "special errand" or "special mission" exception. (*Sumrall v. Modern Alloys, Inc.* (2017) 10 Cal.App.5th. 961, 968, fn. 1 [216 Cal.Rptr.3d 848]; s~~S~~ee *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.)

- "The term 'special errand' is something of a misnomer because it implies that the employer must make a specific request for a particular errand. However, the 'special errand' can also be part of the employee's regular duties. Thus, we have chosen to use the term 'business errand' throughout this opinion, as it is more precise and descriptive." (*Sumrall, supra,* 10 Cal.App.5th at p. 968, internal citation omitted.)

- "[T]he jury's instruction on the business errand exception explains it concisely: … ." (*Sumrall, supra,* 10 Cal.App.5th at p. 969, quoting this instruction.)

- "[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~~11th ed. 2017) Agency ~~and Employment~~, §§ ~~181~~192–~~184~~195

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)

3727. Going-and-Coming Rule—Compensated Travel Time Exception

If an employer has agreed to compensate an employee for his or her commuting time, then the employee's conduct is within the scope of his or her employment as long as the employee is going to the workplace or returning home.

New November 2017

Directions for Use

This instruction sets forth the compensated travel time exception to the going-and-coming rule. It may be given with CACI No. 3720, *Scope of Employment.* CACI No. 3723, *Substantial Deviation,* may also be given if the employee did not go directly from home to work or work to home.

Under the going-and-coming rule, commute time is generally not within the scope of employment. (*Jeewarat v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].) However, commute time is within the scope of employment if the employer compensates the employee for the time spent commuting. (*Lynn v. Tatitlek Support Services, Inc.* (2017) 8 Cal.App.5th 1096, 1111 [214 Cal.Rptr.3d 449].)

Sources and Authority

- "[T]he employer may agree, either expressly or impliedly, that the relationship shall continue during the period of 'going and coming,' in which case the employee is entitled to the protection of the act during that period. Such an agreement may be inferred from the fact that the employer furnishes transportation to and from work as an incident of the employment. 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." (*Kobe v. Industrial Acci. Com.* (1950) 35 Cal.2d 33, 35 [215 P.2d 736], internal citations omitted.)

- "There is a substantial benefit to an employer in one area to be permitted to reach out to a labor market in another area or to enlarge the available labor market by providing travel expenses and payment for travel time. It cannot be denied that the employer's reaching out to the distant or larger labor market increases the risk of injury in transportation. In other words, the employer, having found it desirable in the interests of his enterprise to pay for travel time and for travel expenses and to go beyond the normal labor market or to have located his enterprise at a place remote from the labor market, should be required to pay for the risks inherent in his decision." (*Hinman v. Westinghouse Electric Co.* (1970) 2 Cal.3d 956, 962 [88 Cal.Rptr. 188, 471 P.2d 988].)

- "We are satisfied that, where, as here, the employer and employee have made the travel time part of the working day by their contract, the [employee] should be treated as such during the travel time, and it follows that so long as the employee is using the time for the designated purpose, to return home, the doctrine of *respondeat superior* is applicable." (*Hinman, supra,* 2 Cal.3d at pp. 962–963.)

- "[C]ourts have excepted from the going and coming rule those cases in which the employer and

employee have entered into an employment contract in which the employer agrees to pay the employee for travel time and expenses associated with commuting, thus making 'the travel time part of the working day by their contract.' " (*Lynn, supra,* 8 Cal.App.5th at p. 1111.)

- "[T]he mere payment of a travel allowance as shown in the present case does not reflect a sufficient benefit to defendant so that it should bear responsibility for plaintiff's injuries." (*Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, 1042 [222 Cal.Rptr. 494].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency, § 194

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.42[3][c] (Matthew Bender)

2 Wilcox, 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 Liablity for Employee's Torts*, § 248.16[4] (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.28 et seq. (Matthew Bender)

4111. Constructive Fraud (Civ. Code, § 1573)

[*Name of plaintiff***] claims that [he/she] was harmed because [***name of defendant***] misled [him/her] by failing to provide [***name of plaintiff***] with complete and accurate information. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]];**

2. **That [***name of defendant***] acted on [***name of plaintiff***]'s behalf for purposes of [***insert description of transaction, e.g., purchasing a residential property***];**

3. **That [***name of defendant***] knew, or should have known, that [***specify information at issue***];**

4. **That [***name of defendant***] misled [***name of plaintiff***] by [failing to disclose this information/providing [***name of plaintiff***] with information that was inaccurate or incomplete];**

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

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

New November 2017

Directions for Use

Give this instruction for a claim of constructive fraud under Civil Code section 1573. Under the statute, constructive fraud is a particular kind of breach of fiduciary duty in which the defendant has misled the plaintiff to the plaintiff's prejudice or detriment. Constructive fraud differs from actual fraud (see CACI Nos. 1900−1903 on different claims involving actual fraud) in that no fraudulent intent is required. (Civ. Code, § 1573(1).) Thus, if one who is under a fiduciary duty to provide complete and accurate information to the plaintiff fails to do so and the plaintiff is misled to his or her prejudice, there is a claim for constructive fraud despite the lack of any intent to mislead or deceive.

In element 4, choose the first option if it was the defendant's failure to disclose information that misled the plaintiff. Choose the second option if the defendant provided information to the plaintiff, but the plaintiff was misled because the information was inaccurate or incomplete.

In a fiduciary relationship, there is a rebuttable presumption of reasonable reliance. The defendant bears the burden of rebutting the presumption by proving by substantial evidence that the plaintiff could not have reasonably relied on the misleading information or omission. (*Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1301–1302 [20 Cal.Rptr.2d 701].)

There are cases that set forth the elements of constructive fraud as "(1) a fiduciary or confidential relationship; (2) nondisclosure (breach of fiduciary duty); (3) intent to deceive, and (4) reliance and resulting injury (causation)." (See, e.g., *Younan v. Equifax Inc.* (1980) 111 Cal. App. 3d 498, 516 fn. 14 [169 Cal.Rptr. 478]; see also *Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131 [167 Cal.Rptr.3d 832].) However, these elements conflict with the statute in at least two ways. First, the statute clearly states that no fraudulent intent (or intent to deceive) is required. Second, the statute is not limited to nondisclosure; it extends to information that is disclosed, but misleading.

For discussion of the statute of limitations for constructive fraud, see CACI No. 4120, *Affirmative Defense—Statute of Limitations*.

Sources and Authority

- Constructive Fraud. Civil Code section 1573.

- "A fiduciary must tell its principal of all information it possesses that is material to the principal's interests. A fiduciary's failure to share material information with the principal is constructive fraud, a term of art obviating actual fraudulent intent." (*Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 762 [67 Cal.Rptr.3d 797], internal citations omitted.)

- "In its generic sense, constructive fraud comprises all acts, omissions and concealments involving a breach of legal or equitable duty, trust, or confidence, and resulting in damages to another. [Citations.] Constructive fraud exists in cases in which conduct, although not actually fraudulent, ought to be so treated—that is, in which such conduct is a constructive or quasi fraud, having all the actual consequences and all the legal effects of actual fraud." (*Prakashpalan, supra,* 223 Cal.App.4th at p. 1131.)

- "The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. Also, a careless misstatement may constitute constructive fraud even though there is no fraudulent intent." (*Assilzadeh v. Cal. Fed. Bank* (2000) 82 Cal.App.4th 399, 415 [98 Cal.Rptr.2d 176].)

- "[A] representation in the context of a trust or fiduciary relationship creates a rebuttable presumption of reasonable reliance subject to being overcome by substantial evidence to the contrary." (*Edmunds, supra,* 16 Cal.App.4th at p. 1302.)

- "This rebuttable presumption implements the long recognized public policy of imposing fiduciary duties upon partners in their relationship to one another. Indeed, this policy is lodged in the statutory and case law of this state. It is more than the simple shifting of the burden of proof to facilitate the determination of a particular action. Consequently, [defendant] had the burden of proving by substantial evidence that [plaintiff] did not rely on the alleged false statement." (*Edmunds, supra,* 16 Cal.App.4th at p. 1302.)

- "Confidential and fiduciary relations are in law, synonymous and may be said to exist whenever trust and confidence is reposed by one person in another." (*Barrett v. Bank of Am.* (1986) 183

Cal.App.3d 1362, 1369 [229 Cal.Rptr. 16].)

Secondary Sources

5 Witkin, California Procedure (5th ed. 2008) Pleading § 717

1 Witkin, Summary of California Law (11th ed. 2017) Contracts § 295

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Businesss Torts*, § 40.01 (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Fraud, Menace, Undue Influence, and Mistake*, § 215.130 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.101 et seq. (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Fraud, Menace, Undue Influence, and Mistake*, § 92.44 et seq. (Matthew Bender)

27 California Legal Forms—Transaction Guide, Ch. 77, *Discharge of Obligations*, § 77.125 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence*, 17.19

4207. Affirmative Defense—Good Faith (Civ. Code, § 3439.08(a), (f)(1))

[*Name of defendant***] is not liable to [***name of plaintiff***] [on the claim for actual fraud] if [***name of defendant***] proves both of the following:**

[*Use one of the following two sets of elements:***]**

[1. That [*name of defendant***] took the property from [***name of debtor***] in good faith; and**

2. That [he/she/it] took the property for a reasonably equivalent value.]

[*or***]**

[1. That [*name of defendant***] received the property from [***name of third party***], who had taken the property from [***name of debtor***] in good faith; and**

2. That [*name of third party***] had taken the property for a reasonably equivalent value.]**

"Good faith" means that [*name of defendant/third party***] acted without actual fraudulent intent and that [he/she/it] did not ~~conspire~~ collude with [***name of debtor***] or otherwise actively participate in any fraudulent scheme. If you decide that ~~[***name of debtor***] had fraudulent intent and that~~ [***name of defendant/third party***] knew facts showing that [***name of debtor***] had a fraudulent intent, ~~knew it, then you may consider [his/her/its] knowledge in combination with other facts in deciding the question of~~ [***name of defendant/third party***]~~'s~~ cannot have taken the property in good faith.**

New June 2006; Revised June 2016, November 2017

Directions for Use

This instruction presents a defense that is available to a good-faith transferee for value in cases involving allegations of actual fraud under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act). (See Civ. Code, § 3439.08(a), (f)(1).) Include the bracketed language in the first sentence if the plaintiff is bringing claims for both actual fraud and constructive fraud.

The Legislative Committee Comments—Assembly to Civil Code section 3439.08(a) provides that the transferee's knowledge of the transferor's fraudulent intent may, *in combination with other facts*, be relevant on the issue of the transferee's good faith. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924], emphasis added.) However, another sentence of the same comment provides "knowledge of facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee." This language indicates that if the transferee knew facts showing that the transferor had a fraudulent intent, there cannot be a finding of good faith regardless of any combination of facts; and one court has so held. (See *Nautilus, Inc. v. Yang* (2017) 11 Cal.App.5th 33, 46 [217 Cal.Rptr.3d 458].) The committee believes that *Nautilus* presents the better rule.

Sources and Authority

- Transaction Not Voidable as to Good-Faith Transferee for Reasonable Value. Civil Code section 3439.08(a).

- Transferee's Burden of Proving Good Faith and Reasonable Value. Civil Code section 3439.08(f)(1).

- When Value is Given. Civil Code section 3439.03.

- "If a transferee or obligee took in good faith and for a reasonably equivalent value, however, the transfer or obligation is not voidable. Whether a transfer is made with fraudulent intent and whether a transferee acted in good faith and gave reasonably equivalent value within the meaning of section 3439.08, subdivision (a), are questions of fact." *(Nautilus Inc., supra*, 11 Cal.App.5th at p. 40, internal citation and footnote omitted.)

- "The Legislative Committee comment to Civil Code section 3439.08, subdivision (a), provides that 'good faith,' within the meaning of the provision, 'means that the transferee acted without actual fraudulent intent and that he or she did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor. The transferee's knowledge of the transferor's fraudulent intent may, in combination with other facts, be relevant on the issue of the transferee's good faith … .' " (*Annod Corp.*, *supra*, ~~*v. Hamilton & Samuels* (2002)~~ 100 Cal.App.4th at p.~~1286,~~ 1299 ~~[123 Cal.Rptr.2d 924]~~, internal citations omitted.)

- " 'Fraudulent intent,' 'collusion,' 'active participation,' 'fraudulent scheme'--this is the language of *deliberate wrongful conduct*. It belies any notion that one can become a fraudulent transferee by accident, or even negligently. It certainly belies the notion that guilty knowledge can be created by the fiction of constructive notice." (*Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1859 [37 Cal.Rptr.2d 63], original italics.)

- "We read *Brincko* [*v. Rio Props.* (D.Nev., Jan. 14, 2013, No. 2:10-CV-00930-PMP-PAL) 2013 U.S.Dist. Lexis 5986, pp. *51–*52] as requiring actual knowledge by the transferee of a fraudulent intent on the part of the transferor—not merely *constructive* knowledge or inquiry notice. To that extent, we agree with *Brincko's* construction of the proper test for application of the good faith defense. However, our formulation of the test (1) does not use the words 'suggest to a reasonable person' because that phrase might imply inquiry notice—a concept rejected in *Lewis* and *Brincko*—and (2) avoids use of the words 'voidable' and 'fraudulent transfer' because those concepts are inconsistent with the Legislative Committee comment to section 3439.08. Accordingly, we hold that a transferee does not take in good faith if the transferee had actual knowledge of facts showing the transferor had fraudulent intent." (*Nautilus, Inc., supra*, 11 Cal.App.5th at p. 46, original italics.)

- "[T]he trial court erred in placing the burden of proof on [plaintiff] to prove the good faith defense did not apply." (*Nautilus, Inc., supra*, 11 Cal.App.5th at p. 41.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection*—

Prelawsuit Considerations, ¶ 3:324. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-C, *Fraud--Fraudulent Transfers—Particular Defenses*, ¶ 5:580 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[2], 270.44[1], 270.47[2], [3] (Matthew Bender)

4606. Whistleblower Protection—Unsafe Patient Care and Conditions—Essential Factual Elements (Health & Saf. Code, § 1278.5)

Revoked November 2017

See *Shaw v. Superior Court* (2017) 2 Cal.5th 983 [216 Cal.Rptr.3d 643, 393 P.3d 98].

[*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.)

- "[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)~~

4700. Consumers Legal Remedies Act—Essential Factual Elements (Civ. Code, § 1770)

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unfair methods of competition and unfair or deceptive acts or practices in a transaction that resulted, or was intended to result, in the sale or lease of goods or services to a consumer, and that [***name of plaintiff***] was harmed by [***name of defendant***]'s violation. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] acquired, or sought to acquire, by purchase or lease, [***specify product or service***] for personal, family, or household purposes;**

2. **That [***name of defendant***] [***specify one or more prohibited practices from Civ. Code, § 1770(a), e.g., represented that [product or service] had characteristics, uses, or benefits that it did not have***];**

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

4. **That [***name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct.**

[[*Name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct if [***name of plaintiff***] relied on [***name of defendant***]'s representation. To prove reliance, [***name of plaintiff***] need only prove that the representation was a substantial factor in [his/her] decision. [He/She] does not need to prove that it was the primary factor or the only factor in the decision.**

If [*name of defendant***]'s representation of fact was material, reliance may be inferred. A fact is material if a reasonable consumer would consider it important in deciding whether to buy or lease the [goods/services.]**

New November 2017

Directions for Use

Give this instruction for a claim under the Consumers Legal Remedies Act (CLRA).

The CLRA prohibits 27 distinct unfair methods of competition and unfair or deceptive acts or practices with regard to consumer transactions. (See Civ. Code, § 1770(a).) In element 2, insert the prohibited practice or practices at issue in the case.

The last two optional paragraphs address the plaintiff's reliance on the defendant's conduct. Give these paragraphs in a case sounding in fraud. CLRA claims not sounding in fraud do not require reliance. (See, e.g., Civ. Code, § 1770(a)(19) [inserting an unconscionable provision in a contract].)

Many of the prohibited practices involve a misrepresentation made by the defendant. (See, e.g., Civ. Code, § 1770(a)(4) [using deceptive representations or designations of geographic origin in connection with goods or services].) In a misrepresentation claim, the plaintiff must have relied on the information given. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022 [112 Cal.Rptr.3d 607],

disapproved of on other grounds in *Raceway Ford Cases* (2016) 2 Cal.5th 161, 180 [211 Cal.Rptr.3d 244, 385 P.3d 397].) An element of reliance is that the information must have been material (or important). (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 256 [134 Cal.Rptr.3d 588].)

Other prohibited practices involve a failure to disclose information. (See, e.g., Civ. Code, § 1770(a)(9) [advertising goods or services with intent not to sell them as advertised]; see *Jones v. Credit Auto Center, Inc.* (2015) 237 Cal.App.4th Supp. 1, 11 [188 Cal.Rptr.3d 578].) Reliance in concealment cases is best expressed in terms that the plaintiff would have behaved differently had the true facts been known. (See *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].) The next-to-last paragraph may be modified to express reliance in this manner. (See CACI No. 1907, *Reliance*.)

The CLRA provides for class actions. (See Civ. Code, § 1781.) In a class action, this instruction should be modified to state that only the named plaintiff's reliance on the defendant's representation must be proved. Class-wide reliance does not require a showing of actual reliance on the part of every class member. Rather, if all class members have been exposed to the same material misrepresentations, class-wide reliance will be inferred, unless rebutted by the defendant. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814–815 [94 Cal.Rptr. 796, 484 P.2d 964]; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 362–363 [134 Cal.Rptr. 388, 556 P.2d 750]; *Massachusetts Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1293 [119 Cal.Rptr. 2d 190].) In class cases then, exposure and materiality are the only facts that need to be established to justify class-wide relief. Those determinations are a part of the class certification analysis and will, therefore, be within the purview of the court.

Sources and Authority

- Consumers Legal Remedies Act: Prohibited Practices. Civil Code section 1770(a).

- Consumers Legal Remedies Act: Private Cause of Action. Civil Code section 1780(a).

- " 'The CLRA makes unlawful, in Civil Code section 1770, subdivision (a) … various "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." ' The CLRA proscribes 27 specific acts or practices." (*Rubenstein v. The Gap, Inc.* (2017) -- Cal.App.5th -- [-- Cal.Rptr.3d --], internal citation omitted.) 2017 Cal. App. LEXIS 734

- "The CLRA is set forth in Civil Code section 1750 et seq. … [U]nder the CLRA a consumer may recover actual damages, punitive damages and attorney fees. However, relief under the CLRA is limited to '[a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice' unlawful under the act. As [defendant] argues, this limitation on relief requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm." (*Massachusetts Mutual Life Ins. Co., supra*, 97 Cal.App.4th at p. 1292, original italics, internal citations omitted.)

- "[T]he CLRA does not require lost injury or property, but does require damage and causation. 'Under Civil Code section 1780, subdivision (a), CLRA actions may be brought "only by a consumer 'who suffers any damage as a result of the use or employment' of a proscribed method,

act, or practice. … Accordingly, 'plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm." ' " (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 916, fn. 3 [211 Cal.Rptr.3d 769].)

- "This language does not create an automatic award of statutory damages upon proof of an unlawful act." (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1152 [208 Cal.Rptr.3d 303].)

- "[Civil Code section 1761(e)] provides a broad definition of 'transaction' as 'an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.' " (*Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 869 [118 Cal.Rptr.2d 770].)

- " 'While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. " 'It is not … necessary that [the plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. … It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' [Citation.]" ' In other words, it is enough if a plaintiff shows that ' "in [the] absence [of the misrepresentation] the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct.' [Citation.]' " (*Veera, supra,* 6 Cal.App.5th at p. 919, internal citations omitted.)

- "Under the CLRA, plaintiffs must show actual reliance on the misrepresentation and harm." (*Nelson, supra,* 186 Cal.App.4th at p. 1022.)

- "A ' "misrepresentation is material for a plaintiff only if there is reliance—that is, ' " 'without the misrepresentation, the plaintiff would not have acted as he did' " ' … ." [Citation.]' " (*Moran, supra,* 3 Cal.App.5th at p. 1152.)

- "In the CLRA context, a fact is deemed 'material,' and obligates an exclusively knowledgeable defendant to disclose it, if a ' "reasonable [consumer]" ' would deem it important in determining how to act in the transaction at issue." (*Collins, supra,* 202 Cal.App.4th at p. 256.)

- "If the undisclosed assessment was material, an inference of reliance as to the entire class would arise, subject to any rebuttal evidence [defendant] might offer." (*Massachusetts Mutual Life Ins. Co., supra,* 97 Cal.App.4th at p. 1295.)

- "[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer." (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360 [8 Cal.Rptr.3d 22].)

- "[A]lthough a claim may be stated under the CLRA in terms constituting fraudulent omissions, to be actionable the omission must be contrary to a representation actually made by the defendant, or an omission of a fact the defendant was obliged to disclose." (*Daugherty v. American Honda Motor Co., Inc.* (2006) 144 Cal.App.4th 824, 835 [51 Cal.Rptr.3d 118].)

- "Under the CLRA, even if representations and advertisements are true, they may still be deceptive because ' "[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable." [Citation.]' " (*Jones, supra,* 237 Cal.App.4th Supp. at p. 11.)

- "Defendants next allege that plaintiffs cannot sue them for violating the CLRA because their debt collection efforts do not involve 'goods or services.' The CLRA prohibits 'unfair methods of competition and unfair or deceptive acts or practices.' This includes the inaccurate 'represent[ation] that a transaction confers or involves rights, remedies, or obligations which it does not have or involve … .' However, this proscription only applies with respect to 'transaction[s] intended to result or which result[] in the sale or lease of goods or services to [a] consumer … .' The CLRA defines 'goods' as 'tangible chattels bought or leased for use primarily for personal, family, or household purposes', and 'services' as 'work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.' " (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 39−40 [185 Cal.Rptr.3d 84], internal citations omitted [mortgage loan is neither a good nor a service].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales § 298 et seq.

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-B, *Consumers Legal Remedies Act—Elements of Claim*, ¶ 14:315 et seq. (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, California's Consumer Legal Remedies Act, § 4.01 et seq. (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.12 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33

4701. Consumers Legal Remedies Act—Notice Requirement for Damages (Civ. Code, § 1782)

To recover actual damages in this case, [*name of plaintiff***] must prove that, 30 days or more before filing a claim for damages, [he/she] gave notice to [***name of defendant***] that did all of the following:**

1. **Informed [***name of defendant***] of the particular violations for which the lawsuit was brought;**

2. **Demanded that [***name of defendant***] correct, repair, replace, or otherwise fix the problem with [***specify product or service***]; and**

3. **Provided the notice to the defendants in writing and by certified or registered mail, return receipt requested, to the place where the transaction occurred or to [***name of defendant***]'s principal place of business within California.**

[*Name of plaintiff***] must have complied exactly with these notice requirements and procedures.**

New November 2017

Directions for Use

Give this instruction if it is disputed whether the plaintiff gave the defendant the prefiling notice required by Civil Code section 1782(a).

Sources and Authority

- Consumers Legal Remedies Act: Notice Requirement. Civil Code section 1782.

- "[T]he CLRA includes a prefiling notice requirement on actions seeking damages. At least 30 days before filing a claim for damages under the CLRA, 'the consumer must notify the prospective defendant of the alleged violations of [the CLRA] and "[d]emand that such person correct, repair, replace or otherwise rectify the goods or services alleged to be in violation' thereof. If, within this 30-day period, the prospective defendant corrects the alleged wrongs, or indicates that it will make such corrections within a reasonable time, no cause of action for damages will lie.' " (*Morgan v. AT&T Wireless Services, Inc.* (2009) 177 Cal. App. 4th 1235, 1259−1260 [99 Cal.Rptr.3d 768], internal citations omitted.)

- "The purpose of the notice requirement of section 1782 is to give the manufacturer or vendor sufficient notice of alleged defects to permit appropriate corrections or replacements. The notice requirement commences the running of certain time constraints upon the manufacturer or vendor within which to comply with the corrective provisions. The clear intent of the act is to provide and facilitate precomplaint settlements of consumer actions wherever possible and to establish a limited period during which such settlement may be accomplished. This clear purpose may only be accomplished by a literal application of the notice provisions." (*Outboard Marine Corp. v. Superior Court* (1975) 52 Cal.App.3d 30, 40−41 [124 Cal.Rptr. 852], footnote omitted.)

- "Once a prospective defendant has received notice of alleged violations of section 1770, the extent of its ameliorative responsibilities differs considerably depending on whether the notification sets forth an individual or class grievance. Section 1782, subdivision (b) provides that "[except] as provided in subdivision (c)," an individual consumer cannot maintain an action for damages under section 1780 if, within 30 days after receipt of such notice, an appropriate remedy is given, or agreed to be given within a reasonable time, to the individual consumer. In contrast, subdivision (c) of section 1782 provides that a class action for damages may be maintained under section 1781 unless the prospective defendant shows that it has satisfied all of the following requirements: (1) identified or made a reasonable effort to identify all similarly situated consumers; (2) notified such consumers that upon their request it will provide them with an appropriate remedy; (3) provided, or within a reasonable time will provide, such relief; and (4) demonstrated that it has ceased, or within a reasonable time will cease, from engaging in the challenged conduct. [¶] Thus, unlike the relatively simple resolution of individual grievances under section 1782, subdivision (b), subdivision (c) places extensive affirmative obligations on prospective defendants to identify and make whole the entire class of similarly situated consumers." (*Kagan v. Gibraltar Sav. & Loan Assn.* (1984) 35 Cal.3d 582, 590−591 [200 Cal. Rptr. 38; 676 P.2d 1060], disapproved on other grounds in *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 643 fn. 3 [88 Cal. Rptr. 3d 859, 200 P.3d 295].)

- "[Plaintiff] argues that substantial compliance only is required by section 1782, that petitioners had actual notice of the defects, and that a technicality of form should not be a bar to the action. He asserts that inasmuch as the act mandates a liberal construction, substantial compliance with notification procedures should suffice. In the face of the clear, unambiguous, and unequivocal language of the statute, his contention must fail." (*Outboard Marine Corp., supra,* 52 Cal.App.3d at p. 40 [however, defendant may waive strict compliance].)

- "Filing a complaint *before* the response period expired was [plaintiff]'s (really his lawyers') decision. Instituting the lawsuit could easily have waited until after [defendant] made its correction offer. The fact that the lawsuit was filed before [plaintiff] heard back from [defendant] strongly suggests that the correction offer, unless it was truly extravagant, would have had no effect on [plaintiff]'s (really his lawyers') plan to sue." (*Benson v. Southern California Auto Sales, Inc.* (2015) 239 Cal.App.4th 1198, 1209 [192 Cal.Rptr.3d 67], original italics.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales § 298 et seq.

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-B, *Consumers Legal Remedies Act—Elements of Claim*, ¶ 14:321 to 14:325 (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, California's Consumer Legal Remedies Act, § 4.01 et seq. (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.13 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable*

Law, 1.33

4702. Consumers Legal Remedies Act—Statutory Damages—Senior or Disabled Plaintiff (Civ. Code, § 1780(b)

If you decide that [*name of plaintiff***] has proven [his/her] claim against [***name of defendant***], in addition to any actual damages that you award, you may award [***name of plaintiff***] additional damages up to $5,000 if you find all of the following:**

1. That [*name of plaintiff***] has suffered substantial physical, emotional, or economic damage because of [***name of defendant***]'s conduct;**

2. One or more of the following factors:

(a) [*Name of defendant***] knew or should have known that [his/her/its] conduct was directed to one or more senior citizens or disabled persons;**

(b) [*Name of defendant***]'s conduct caused one or more senior citizens or disabled persons to suffer:**

(1) loss or encumbrance of a primary residence, principal employment, or source of income;

(2) substantial loss of property set aside for retirement, or for personal or family care and maintenance; or

(3) substantial loss of payments received under a pension or retirement plan or a government benefits program, or assets essential to the health or welfare of the senior citizen or disabled person;

or

(c) One or more senior citizens or disabled persons are substantially more vulnerable than other members of the public to [*name of defendant***]'s conduct because of age, poor health or infirmity, impaired understanding, restricted mobility, or disability, and actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct;**

and

3. That an additional award is appropriate.

New November 2017

Directions for Use

Give this instruction if the plaintiff is a senior citizen or disabled person seeking to obtain $5,000 in statutory damages. (See Civ. Code, § 1780(b).)

Sources and Authority

- Consumers Legal Remedies Act: Additional Remedy for Senior Citizens and Disabled Persons. Civil Code section 1780(b).

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales § 298 et seq.

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-B, *Consumers Legal Remedies Act—Elements of Claim*, ¶ 14:435 (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, California's Consumer Legal Remedies Act, § 4.02 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.13 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33

4710. Consumers Legal Remedies Act—Affirmative Defense—Bona Fide Error and Correction (Civ. Code, § 1784)

[*Name of defendant***] is not responsible for damages to [***name of plaintiff***] if [***name of defendant***] proves both of the following:**

1. **The violation[s] alleged by [***name of plaintiff***] [was/were] not intentional and resulted from a bona fide error even though [***name of defendant***] used reasonable procedures adopted to avoid any such error; and**

2. **Within 30 days of receiving [***name of plaintiff***]'s notice of violation, [***name of defendant***] made, or agreed to make within a reasonable time, an appropriate correction, repair, replacement, or other remedy of the [***specify product or service***].**

New November 2017

Directions for Use

Different correction requirements apply to class actions. (See Civ. Code, § 1782(c).)

Sources and Authority

- Consumers Legal Remedies Act: Defenses. Civil Code section 1784.
- "Damages are not awardable under the CLRA if the defendant proves its violation was not intentional and resulted from a bona fide error despite reasonable procedures to avoid such an error, and remedies the violating goods or services." (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 471 [178 Cal.Rptr.3d 784].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales § 298 et seq.

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch.1 4(II)-C, *Consumers Legal Remedies Act—Particular Defenses*, ¶ 14:321 to 14:505 (The Rutter Group)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.40 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.37 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 10, *Seeking or Opposing Statutory Remedies in Contract Actions*, 10.05

Instruction	Commentator	Comment	Committee Response
117, *Wealth of Parties*	Association of Southern California Defense Counsel, by Steven S. Fleischman Co-Chair, Amicus Committee	ASCDC urges that the Judicial Council adopt proposed CACI No. 117. Cases should be decided on their merits regardless of parties' respective wealth. Indeed, cases have held that that it is attorney misconduct to base arguments on the purported wealth of the parties. (See, e.g., *Stone v. Foster* (1980) 106 Cal.App.3d 334, 335 [misconduct to appeal to the defendant's perceived ability to pay any judgment with ease]; *Hart v. Wielt* (1970) 4 Cal.App.3d 224, 234 [plaintiff's counsel's argument plaintiff would be a "a burden on the taxpayers" lest jury find in her favor was attorney misconduct].) Proposed CACI No. 117, if adopted, would properly instruct the jury that these matters should not be considered.	The committee appreciates the commentator's support for this new instruction.
		[I]nclude *Stone* and *Hart* in the Sources and Authority to provide attorneys and courts with readily available authority on this point. In addition, the Committee may wish to consider citation to the following authority: "The Constitution protects everyone, the poor, the wealthy, the weak, the powerful, the guilty and the innocent." (*Manufactured Home Communities, Inc. v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, 708.) While the decision does not bear directly on the language to be used in jury instructions, the sentiment expressed in this case certainly supports the impetus behind the proposed instruction.	There is an excerpt from *Hart* that is appropriate for the Sources and Authority, and the committee has added it. But there is no similarly appropriate excerpt from *Stone,* which has no real discussion of the wealth of the parties. The proposed quote from *Manufactured Home Communities* is too remotely connected to the instruction.
		We propose that that Directions for Use be modified to state: In a trial that is bifurcated under Code of Civil Procedure section 3294, courts should give CACI No. 117 only in the	The first paragraph is unnecessarily long to make the point that the instruction may not apply if punitive damages are sought and the trial is not bifurcated.

Instruction	Commentator	Comment	Committee Response
		first phase of trial, because the defendant's wealth is relevant to the second phase in which the amount of punitive damages is assessed. (See *Adams v. Murakami* (1991) 54 Cal.3d 105, 111 [purpose of requirement of defendant's financial net worth is to determine excessiveness of award relative to the defendant's ability to pay]; cf. *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 427 ["The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award"].)" "Where liability and punitive damages are to be decided in a non-bifurcated trial, courts should give modified version of this instruction: "In reaching a verdict on questions of liability and compensatory damages, you may not consider the wealth or poverty of any party. The parties' wealth or poverty is not relevant to those issues. You may consider a party's financial condition only in determining the amount of punitive damages, if any, that is reasonably necessary to punish and deter the conduct that harmed the plaintiff."	The second paragraph makes a valid point in that in a nonbifurcated trial, some modification of the instruction will be needed. The committee has added a sentence to the Directions for Use to make this point. But the committee does not believe that any language on the point should be placed in the instruction itself. To do so would make the instruction more about punitive damages than about the wealth of the parties.
	Hon. Elizabeth A Baron, Associate Justice, California Court of Appeal (Ret.)	I think the proposed CACI 117 is needed. It was a huge issue in one of the cases in our 2017-2018 CACI Companion Handbook which will be published in September. The issue led to a lengthy Attorney's Comment about the manner in which the judge handled (or refused to handle) the issue.	The committee appreciates the commentator's support for this new instruction.
		However, I do not think it should be placed in the Pretrial Section of the CACI. It refers to damages and I think it makes sense to place it in the Damages Series. One of the problems I see when reviewing courts' files across the State is that the Pretrial Instructions frequently are not scanned into the courts' online files.	The committee disagrees. This instruction is similar to CACI No. 105, Insurance, which advises the jury not to consider whether any of the parties has insurance. It is only tangentially relevant to damages.

Instruction	Commentator	Comment	Committee Response
		When I contact the attorneys in cases, the pretrial instructions are not in their files either. This leads me to the worrisome conclusion that written pretrial instructions are not always given to the jury for their use during deliberations. By placing proposed 117 in the Damages section, it will always be included in the written packet of instructions given to the jurors when the wealth or poverty of a party is an issue in the nonpunitive damages phase of a trial.	
	Civil Justice Association of California, by Brittany A. Sitzer	We respectfully disagree with the way this new Instruction is drafted. We urge the Judicial Council to examine and revise CACI 117 in harmony with the decision in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408 to clarify that the wealth of a party is an irrelevant factor in calculating punitive damages; however, wealth may be considered when compensatory damages are high and must adhere to a 1:1 ratio. The holding in *State Farm* presents authority that wealth may not be a relevant factor in punitive damages calculation. *State Farm* also established the proportionality rule for when wealth can be considered: when compensatory damages are particularly large, punitive damages should not exceed upwards from single-digit ratios.	This instruction is not about punitive damages; it is an admonition to the jury not to consider the financial condition of any party in deliberations. There is a narrow exception for punitive damages in a nonbifurcated trial. But *Adams v. Murakami* and its progeny are adequately presented in the 3940–3949 punitive damages group. The committee has, however, added a cross reference to the punitive damages instructions in the Directions for Use.
	Hon. Elizabeth R. Feffer, Judge of the Superior Court, Los Angeles County	I do not support this proposed language. I instead propose that this instruction use the language found in Civil Code § 3295(a)(1) (which relates to punitive damages), of the "financial condition" of the parties. This language would be consistent with the statute, as well as with the language of the existing CACI	The committee agrees that "financial condition" is a more precise term than "wealth," but believes that it might raise complexities that do not need to be raised. The instruction is written to be a simple admonition to the jury to not consider how rich or poor a party may be. The committee believes that "wealth" adequately and simply makes this point.

Instruction	Commentator	Comment	Committee Response
		instructions regarding punitive damages. CACI 3940, 3942, 3943, 3945, 3947, and 3949 all use the term "financial condition." In assessing punitive damages, a jury is tasked with assessing the defendant's financial condition. This involves delving into a defendant's income, expenses, debt, assets, profits, and the like. In addition, the terms "wealth" and "poverty" are subjective, and relative. Each individual juror may have his or her own criteria for assessing "wealth" and "poverty." Is the assessment solely income-based, or is debt also a factor? If a corporation has high gross income numbers but is operating at a net loss, is it "rich" or "poor"? What about a litigant whose sole asset is an expensive home located in a "wealthy" neighborhood, but the house is "under water" because the encumbrances exceed the equity? Likewise, what is "poverty"? What is the jury to do with someone who, in the jury's opinion, is neither rich nor poor, but solidly in the middle? As these subjective terms may create confusion, and to be consistent with the same language used elsewhere in CACI, I propose that the instruction use the term "financial condition" instead of "wealth or poverty."	The inquiry into financial condition for purposes of awarding punitive damages is a far more complex issue.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	We agree with the instruction.	The committee appreciates the commentator's support for this new instruction.
		The Directions for Use state categorically that apart from the defendant's wealth with respect to punitive damages, a party's wealth or poverty is not relevant. We believe this statement is overbroad and unnecessary. The plaintiff's financial vulnerability is a factor to consider in determining the degree of	As noted above, there is no need to discuss wealth in the context of punitive damages in this instruction.

Instruction	Commentator	Comment	Committee Response
		reprehensibility of the defendant's conduct for purposes of evaluating the constitutional reasonableness of a punitive damages award. (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419.) The plaintiff's financial vulnerability in this context means his or her wealth or poverty. (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 5 Cal.App.5th 1, 18.) We suggest revising the Directions for Use as follows: "This instruction may be given unless liability and punitive damages are to be decided in the same trial. The defendant's wealth is relevant to punitive damages. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 108.) <u>The plaintiff's wealth or poverty may be relevant to the constitutional reasonableness of a punitive damages award. (*State Farm Mut. Automobile Ins. Co. v. Campbell* (2003) 538 U.S. 408, 419; *Nickerson v. Stonebridge Life Ins. Co.* (2016) 5 Cal.App.5th 1, 18.) Otherwise, a</u> party's wealth or lack of it <u>ordinarily</u> is not relevant. (*Hoffman v. Brandt* (1966) 65 Cal.2d 549, 552-553.)"	
556. *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*	Association of Southern California Defense Counsel, by Lisa Perrochet, Amicus Committee	We commend the Committee for addressing the effect of the recent *Drexler* opinion, but we are concerned that *Drexler* is at odds with the statement in the new paragraph that "When this [appreciable harm] has occurred is a question of fact for the jury. (*Drexler, supra,* 4 Cal.App.5th at p. 1197.)" This statement suggests that the question of appreciable harm is necessarily a question of fact that can never be resolved as a matter of law. *Drexler*, however, made clear that its holding—reversing summary judgment—was specific to the facts of that case: "*[B]ecause the evidence was not undisputed* that Drexler discovered his injury more than	The committee agrees that the issue may not always be one of fact and has revised the Directions for Use to note this point.

Instruction	Commentator	Comment	Committee Response
		one year before he filed this action, Dr. Petersen and Dr. German were not entitled to summary judgment under section 340.5." (*Id*., emphasis added.) The court elsewhere explained that the issue of appreciable harm is "*often* a factual issue." (*Id.* at p. 1195, emphasis added.)	
		We are also concerned that the new paragraph does not fully reflect an important aspect of *Drexler,* which followed settled authority in holding that the injury that triggers the statute of limitations "is not necessarily the ultimate harm suffered, but instead occurs at 'the point at which "appreciable harm" [is] first manifested.' (*Brown v. Bleiberg* (1982) 32 Cal.3d [426,] 437, fn. 8; see *Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 762 [199 Cal.Rptr. 816] (*Hills*) ['appreciable harm' may become apparent before the ultimate harm or diagnosis].)" (*Drexler, supra,* 4 Cal.App.5th at pp. 1190-1191; see also *Id.* at p. 1191 ["When a patient experiences appreciable harm before the ultimate harm, that appreciable harm will start the limitations period"].) Without any reference to this legal principle, a jury may confuse the manifestation of "appreciable harm" with the later (in some cases) manifestation of the ultimate medical condition for which plaintiff is seeking damages.	The new paragraph is about diagnosis error. The committee sees no need to expand it to include the general point being made in the comment. Also, the paragraph does say that: "Appreciable harm determines when the injury occurred to complete the cause of action; it is not a question of delayed discovery." That would seem to address the concern of the comment.
		We further note that *Drexler* concerns specifically a claim of "failure to diagnose a preexisting, latent condition," as indicated by the heading on page 1192 of the opinion and the specific focus of the rest of the court's analysis on state and federal cases arising in that narrow context. Different considerations may come into play for a general "diagnosis error" (as phrased in the proposed new paragraph) in misinterpreting patent symptoms that a patient may present. The language	The court in *Drexler* says: "We hold that, when 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

Instruction	Commentator	Comment	Committee Response
		quoted in the proposed Directions for Use regarding a patient's awareness "that his/her symptoms have developed into a more serious disease or condition" has little bearing outside the context of failure to diagnose a latent condition.	condition has developed into a more serious one." (*Drexler, supra,* 4 Cal.App.5th at pp. 1183-1184.) The committee does see that there may be different considerations if the doctor gets it wrong (misdiagnosis) in contrast to missing it entirely (failure to diagnose). But the reason for this addition to the Directions for Use is to flag the issue that what is involved is the accrual of the cause of action, not delayed discovery. That is an important consideration with regard to the three-year statute of this instruction. There is no need to distinguish between misdiagnosis and failure to diagnose to make this point.
		It is important to take heed of *Drexler's* discussion of an objective as well as a subjective component to manifestation of appreciable harm. The court explained, "With the worsening of the plaintiff's condition, or an increase in or appearance of significant new symptoms, the plaintiff with a preexisting condition either actually (subjectively) discovers, *or reasonably (objectively)* should be aware of, the physical manifestation of his or her injury." (*Id.* at p. 1194, emphasis added; see also *id.* p. 1195 ["whether measured subjectively or objectively, when a plaintiff discovers that a preexisting condition has developed into a more serious condition is often a factual issue," emphasis added]; id at p. 1197 [question is "whether Drexler actually discovered, *or reasonably should have discovered,* his injury more than a year before he filed his malpractice claim," emphasis added].)	The committee agrees with the comment and has added ", or reasonably should have become aware," to the second sentence.
		We therefore propose that the new paragraph in the Directions for Use be revised in the following ways:	In conformity to the responses to the various points of this commentator addressed above, the committee did not make the first two proposed

Instruction	Commentator	Comment	Committee Response
		If the claim involves a ~~diagnosis error~~ failure to diagnose a preexisting, latent condition, the cause of action accrues when the plaintiff first experiences "appreciable harm" as a result of the defendant's diagnosis error. "When a patient experiences appreciable harm before the ultimate harm, that appreciable harm will start the limitations period." (*Id.* at p. 1191, citing *Hills v. Aronsohn* (1984) 152 Cal.App.3d 753, 762 [199 Cal.Rptr. 816].) Appreciable harm occurs when the plaintiff first becomes aware, or reasonably should have become aware, that his/her symptoms have developed into a more serious disease or condition. (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184, 1194-1195, 1197 [209 Cal.Rptr.3d 332].) When this has occurred is a question of fact for the jury if the material facts are disputed. (*Id.*, at p. 1197.) Appreciable harm determines when the injury occurred to complete the cause of action; it is not a question of delayed discovery. Therefore, appreciable harm is required to trigger the three-year statute of Code of Civil Procedure section 340.5. (*Steingart v. White* (1988) 198 Cal.App.3d 406, 414–417 [243 Cal.Rptr. 678].)	revisions, but did make the last two on the objective standard and disputed facts.
	Civil Justice Association of California, by Brittany A. Sitzer	We believe the addition of "appreciable harm" in the Directions for Use would cause confusion for a jury determining the definition of "appreciable harm" and when it has occurred. The Code of Civil Procedure §340.5 uses the term "injury" which is more clear and supported by cases of general application. We recommend eliminating the "appreciable harm" language and citation to *Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, and *Steingart v. White* (1988) 198 Cal.App.3d 406 because these cases are distinguishable on their narrow set of facts.	The committee believes that *Drexler* and *Steingart* make a very important point regarding the three-year limitation period and should not be ignored.

Instruction	Commentator	Comment	Committee Response
		We suggest the elimination of the last two paragraphs in the Sources and Authority, or in the alternative, insert "a damaging affect or" after "…the plaintiff first experiences."	As noted above, the committee thinks that Drexler and Steingart are important and that these excerpts are very helpful to CACI users. Also, the committee does not alter the text of case excerpts; they are reproduced exactly as the court states in the opinion.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181 refers to the plaintiff's discovery of the exacerbation of "a preexisting disease or condition." (*Id.* at pp. 1184.) We find the reference to worsening "symptoms" in the fourth paragraph in the Directions for Use somewhat imprecise in light of the language in the opinion and therefore would substitute "preexisting disease or condition has developed" for "symptoms have developed."	The committee agrees with the comment and has made the change suggested. While the word "symptoms" appears many times in the opinion, it is not used in the summary of the court's holding in the opening paragraph, which is what is cited in the Directions for Use.
1010, *Affirmative Defense—Recreation Immunity—Exceptions*	Association of Southern California Defense Counsel, by Robert H. Wright	ASDCD requests that the Committee not adopt the proposed revision to CACI No. 1010 for two independent reasons. First, the *Rowe* Court of Appeal expressed "no opinion" regarding whether its analysis would apply to holders of possessory interests in real property. (*Rowe, supra,* 10 Cal.App.5th at p. 575, fn. 10 ["We express no opinion concerning application of the consideration exception to multiple holders of possessory interests, such as joint tenants"].) However, the proposed revision to CACI No. 1010 does not reflect this limitation on the *Rowe* opinion and instead puts its thumb on the scale in favor of abrogating one joint tenant's immunity based on payment of consideration to a co-tenant.	The committee does not agree that it is putting its "thumb-on-the scale." The revision removes the requirement that the consideration be paid to the defendant. That is a clear holding of the case since the court holds that the abrogation of immunity extends to PG&E, who did not receive any consideration. Therefore, "paid to the defendant" must be removed. The possibility that the rule might be different to "multiple holders of possessory interests, such as joint tenants" is for another day.
		Second, even as to the holding regarding nonpossessory interest holders, *Rowe's* withdrawal of immunity for such defendants so long as the landowners accepted an entrance fee conflicts with earlier decisions interpreting	The committee sees no conflict. In *Wang*, the defendant was the property owner who received the consideration. The issue was whether the immunity protected the landowner from injuries to

Instruction	Commentator	Comment	Committee Response
		the consideration exception to the statutory immunity.. (*Wang v. Nibbelink* (2016) 4 Cal.App.5th 1, 31 (*Wang*) [" 'consideration' in the context of section 846 must be for 'permission to enter' (§ 846, ¶ 4), i.e., payment of an entry fee to use the land or other benefit that gives the *landowner* an immediate and reasonably direct advantage" (emphasis added)]; *Mansion v. U.S.* (9th Cir. 1991) 945 F.2d 1115, 1118 (*Mansion*) ["When a *landowner* grants permission to enter property for consideration, recreational use immunity does not apply" (emphasis added)].) Until this conflict is resolved, the issue here is far from settled. The ASCDC is aware of a pending writ petition addressing this conflict in which the Court of Appeal has granted leave for the filing of an amicus curiae letter in support of the petition and requested an informal response from the real parties in interest. (*Pacific Gas & Electric Co. v. Superior Court (Valenzuela)* Case No. F076045.) The Committee should follow the better-reasoned analysis of *Wang* and *Mansion* that the consideration exception requires payment to the defendant	one who was not on the property for recreational purposes. The sentence cited in the comment in no way establishes a conflict with *PG&E* (aka *Rowe*). *Mansion* could be ignored simply because it's not binding authority. But it raises no conflict. The holding is about what constitutes consideration; not about to whom it was paid. And finally, the sentence cited in the comment is simply an accurate statement of the statute. It in no way conflicts with a holding that when a landowner grants permission to enter property for consideration, recreational immunity does not apply to a utility whose negligence causes injury on the property.
		If the Committee is nonetheless inclined to adopt the proposed revision, ASCDC respectfully requests that the Committee add to the Directions for Use a comment explaining that, "Some authorities indicate that the consideration exception to recreational use immunity applies only to defendants who themselves accepted consideration for use of the property. [Insert citations and parentheticals from the paragraph above.]" At present, the use notes cite *Wang* but not for the concept stated above, and do not cite *Mansion* at all. Additional discussion of these authorities in the Directions for Use could help trial courts and litigants	As noted above, there is no conflict.

Instruction	Commentator	Comment	Committee Response
		determine the appropriate use of CACI No. 1010 in a particular case.	
	Civil Justice Association of California, by Brittany A. Sitzer	We believe that proposed revision to CACI 1010 oversimplifies the holding in *Pacific Gas and Electric Company v. Superior Court* (2017) 10 Cal.App.5th 563, expanding the consideration exception to recreational immunity (Civ. Code §846) beyond the case and departing from the statute's intended purpose. While *Pacific Gas and Electric* construed Civil Code section 846 in a case presenting an admitted issue of first impression under California law, the court's interpretation effectively diminishes the purpose of the statute by undermining the immunity and protection of private landowners. If an injured plaintiff must merely show they paid consideration to someone or some entity in order to enter property, without showing that the landowner approved of such fees or agreed to permit access, the result, as in *Pacific Gas and Electric*, is that the innocent landowner, who neither charged nor received any fee from the injured plaintiff for use of the property, is deprived of the statutory immunity. The Legislature's passage of section 846 was motivated, at least in part, by a desire to permit whitewater river rafters to recreate along rivers of the state, like the American River, where private landowners had property along the river's edge. The Legislature wanted to encourage these landowners to permit such recreational users to cross or use their private property without having to face liability should the users injures themselves in the process. The *Pacific Gas and Electric* court's interpretation would effectively frustrate the	The comment misstates the holding of *PG&E*. The court does not hold that a landowner loses immunity if a fee is paid to a nonlandowner. The court holds that a nonlandowner has no immunity if the landowner has no immunity through the consideration exception. However: the committee does see that simply deleting the requirement that the consideration be paid *to the defendant* could allow for the scenario that the commentator postulates. But the statute states that the consideration would have to be "for permission to enter," which can only be granted by the landowner. In recognition of this point, the committee has made two changes. The recipient of the consideration has been limited to either the defendant or the owner. And "to use" had been changed to "for permission to enter."

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		statute's intended protection in the rafting example, because practically every rafter who goes down the American River pays a fee to the rafting company and guides in order to enjoy the trip. None of these fees are shared with the private landowners along the river, who arguably now lose the immunity section 846 granted them and under the precise circumstances which helped bring about the statute's passage originally. In short, the court's interpretation of the statute is too broad to the extent it goes directly against the statute's intended purpose. The Legislature drafted the statute specifically and the unnecessary expansion by this instruction is unwarranted.	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	We agree with the proposed revision.	The committee appreciates the commentator's support for the revisions to this instruction.
		The latter part of the instruction sets forth alternative grounds negating the affirmative defense. These are exceptions to the exception to liability. But we believe the language, "However, [*name of defendant]* is still responsible for [*name of plaintiff*]'s harm if [*name of plaintiff*] proves that" could be misconstrued to mean that the defendant is liable if the plaintiff proves any of the three alternative grounds without having to also prove the elements of the claim. We suggest modifying this language as follows: "However, [*name of defendant*] ~~is~~ may still be responsible for [name of plaintiff]'s harm if [*name of plaintiff*] proves that"	Even though the comment is outside of the scope of the proposed change that was posted for comments, the committee agrees with the point and believes that it should be addressed at this time. A finding of abrogation of immunity does not require a finding of liability. Therefore, the committee has made the change from "is" to "may be" as proposed. The committee has also added a sentence to the instruction that emphasizes the point and tells the jury if it abrogates immunity, it still must find liability based on the other instructions, as done in CACI No. 418, *Presumption of Negligence per se.*
1709, *Retraction: News Publication*	State Bar of California,	Agree	The committee appreciates the commentator's support for the renumbering of this instruction in

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or Broadcast (renumbered only)	Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair		order to place the new privilege instruction next to the current one, CACI No. 1723, *Comment Interest Privilege—Malice.*.
1722, Affirmative *Defense—Statute of Limitations—Defamation* (renumbered only)	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Agree	The committee appreciates the commentator's support for the renumbering of this instruction in order to place the new privilege instruction next to the current one, CACI No. 1723, *Comment Interest Privilege—Malice.*.
1724, *Fair and True Reporting Privilege*	Orange County Bar Association, by Michael Baroni, President	The proposed new instruction accurately reflects the statutory language of Civil Code section 47(d). It does not, however, reflect the important case law interpretation of Section 47(d). Specifically, as written, element 3 requires that the report or communication was both "fair and true." From this, a jury easily might conclude that the report or communication must be wholly accurate and not deviate in any regard from what was true. This is, however, not the standard of accuracy. Cases such as *Burrill* and *Argentieri* have allowed a limited degree of flexibility or literary license where the effect of the words used is no different from that of the truth, so that the privilege will apply even if there is some inaccuracy in the details of the subject statement. In that *Burrill* speaks about the "substance" of the subject statement, it is suggested that element 3 be	The committee considered whether language from the opinion should be added to guide the jury on what it means for a report to be "fair and true." It was proposed that the following language from the cases be added: "The fairness and truth of a [report/communication] depends on whether the average reader or listener in the community where it was published would understand that the [report/communication] captured the gist or sting of the [e.g., hearing], or whether the [report/communication] made in the [e.g., broadcast] would affect the listener differently than what was communicated in the [e.g., hearing]." The committee decided that this language would not be helpful to a jury. The crucial words "gist or sting" are too ambiguous to be helpful. Also, what

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		modified to read, "[t]he [report/communication] was both fair and substantially true." Without some modification to the proposed instruction or a new companion instruction addressing this interpretation, the jury might go uninformed of the allowance which the law makes. In addition, it is suggested some consideration be given to including language as to the measure of deviation from the truth to be allowed in connection with concepts of flexibility or literary license.	it means to "affect the listener differently than what was communicated" would not be clear. The committee decided to leave it to counsel's arguments to further guide the jury on what it means to be both fair and true. The committee does not think that just adding "substantially" to modify "true" captures the concept the court is attempting to articulate with "gist or sting."
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	As stated in the instruction, the fair and true reporting privilege (Civ. Code, § 47(d)) is a complete defense to defamation, and the defendant has the burden to establish the privilege. Thus, the privilege is an affirmative defense, and this instruction should be labeled "Affirmative Defense—Fair and True Reporting Privilege."	Though cases do give the burden to prove the privilege to the defense, the committee is hesitant to label this instruction as an affirmative defense. An element of a defamation claim is that the plaintiff must prove that the slur is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118.) Therefore, despite the cases to the contrary, there is an argument that the plaintiff must disprove that the privilege applies.
		We would modify the second alternative in element 2 to more accurately reflect the statutory requirement that the report or communication to a public journal be of a "judicial," "legislative," or "other public official proceeding," or of anything said in the course of a "judicial," "legislative," "or other public official proceeding" (Civ Code, § 47, subd. (d)(1)):	The committee agreed to add "public official" between "other" and "proceeding" in the second alternative as it appears in the first alternative.
1802, *False Light*	Orange County Bar Association, by Michael Baroni, President	For clarity and consistent with what remains accurate language of the existing instruction, in Directions for Use, at the fourth item, the second to the last sentence as now proposed be modified to read, "[g]ive the first bracketed option for element 3 if the publication involves a public figure or a matter of public concern."	The committee does not think that the word "bracketed" is needed if the word "option" is there.

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		For accuracy as to what is being referred by use of the word "it" and consistent with what remains accurate language of the existing instruction, in Directions for Use, at the sixth item, the last sentence as now proposed be modified to read, "[t]he final paragraph addressing this point has been placed in brackets because it may not be an issue in every case."	The committee agreed and has made this revision.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543, and *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, footnote 13, support the proposition that a false light claim and a defamation claim based on the same facts may be duplicative. We believe that the Directions for Use should state this more clearly and should suggest that consideration be given to not instructing on false light if the court will instruct on defamation. The proposed language, "the standard applied in the instructions should be the same" may suggest that the CACI instructions should be modified in some manner if both defamation and false light instructions are given to ensure that the "standards" are the same, and the proposed language "[t]he court should consider whether separate instructions on each claim should be given" may suggest that the instructions should be combined into a single instruction. However, we believe the lesson from *Briscoe* and *Eisenberg* is to consider not instructing on false light if the court will instruct on defamation, as stated. We would modify the penultimate paragraph in the Directions for Use as follows:	The committee agreed and has revised this paragraph as suggested.

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		"If ~~a false light claim is combined with a~~ the jury is instructed on defamation ~~claim~~, the ~~standard applied in the instructions should be the same. The~~ court should consider whether an ~~separate~~ instruction~~s~~ on ~~each claim~~ false light would be superfluous and therefore should not be given~~. in light of~~ (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, fn. 13; and *Briscoe, supra,* 4 Cal.3d at p. 543.)"	
1803, *Appropriation of Name or Likeness–Essential Factual Elements* (and VF-1803)	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Agree	No response is necessary.
2021, *Private Nuisance—Essential Factual Elements*	Association of Southern California Defense Counsel, by Lisa Perrochet, Amicus Committee	The instruction does not incorporate the required conduct from the Restatement and *Lussier* and instead allows a jury to impose liability in the case of an invasion that, for example, is intentional but reasonable or is entirely accidental—directly contrary to *Lussier*. (See *Lussier, supra,* at p. 102 ["a nuisance requires some sort of conduct, i.e. intentional and unreasonable, reckless, negligent, or ultrahazardous, that unreasonably interferes with another's use and enjoyment of his property"].) To more accurately reflect the law, we suggest that the instruction be revised to add an additional element as element 3: 3. That the defendant's conduct was [*insert one or more of the following*] intentional and unreasonable [or] negligent or reckless [or] an abnormally dangerous activity;	The committee agreed that there are questions about whether to include an element on the required kind of conduct to constitute a nuisance, and if so, how best to express that element. Therefore, the committee is removing this instruction from the release and will consider the question further in the next release cycle. Other comments received on this instruction will therefore not be addressed here, but will be considered for the next release.

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2031, *Damages for Annoyance and Discomfort—Trespass or Nuisance*	Civil Justice Association of California, by Brittany A. Sitzer	We oppose inserting "emotional distress or mental anguish" in the Instruction. We believe that with the conflict in current law a change such as this is at best premature. If going forward with a revision, due to the conflict between the holding in *Hensley* and the holding in *Kelly*, we suggest alternative instructions offered so that the trial court can make a choice based on which line of conflicting authority it believes it should follow. (See *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315 (When there is a conflict between decisions of different districts of the court of appeal, a superior court ordinarily will follow the appellate opinion from its own district even though it is not bound to do so.)	The committee is confident that there is no real conflict and that *Kelly* is an outlier. This language appears in *Hensley* (7 Cal.App.5th at p. 1349): "SDG&E does not dispute that emotional distress damages are recoverable in trespass and nuisance cases. That proposition is indeed settled: Our high court and lower courts have long held that once a cause of action for trespass or nuisance is established, a landowner may recover for annoyance and discomfort, including emotional distress or mental anguish, proximately caused by the trespass or nuisance. (*Acadia, California, Limited v. Herbert* (1960) [54 Cal.2d 328, 337].)" Eight cases are string cited in support of this paragraph..
	Orange County Bar Association, by Michael Baroni, President	The added discussion based on the new authority is important, but can be presented with more clarity by consolidating the discussion. Suggest moving the third case excerpt in the Sources and Authority to be included within the first discussion of the *Hensley* case under "Directions for Use." Similarly, the case excerpt at the top of page 37 again referring to the *Hensley* case, should be moved to the first paragraph where the *Hensley* case is first discussed. As such, the parenthetical in the first paragraph under "Directions for Use" should be revised to read as follows: (*Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App. 5th 1337, 1348-1349 [213 Cal.Rptr.3d 203] [holding "once a cause of action for trespass or nuisance is established, a landowner may recover for annoyance and discomfort, including emotional distress or mental anguish,	The long parentheticals suggested by the commentator are best left in the Sources and Authority.

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		proximately caused by the trespass or nuisance. This is so even when the trespass or nuisance involves solely property damage."]; and p. 1352 ["We reject [defendant's] contention that in order for emotional distress damages to 'naturally ensue' from a trespass or nuisance, the owner or occupant must be personally or physically present on the invaded property during the trespass or nuisance."].)	
		The bracketed language within the first reference to the *Kelly v. CB&I Constructors, Inc.* case, should be expanded to be more descriptive of the distinction being raised by the court, and replaced with the following quotation: ["damages for annoyance and discomfort may be recovered on nuisance and trespass claims if the distress arises out of physical discomfort, irritation, or inconvenience, caused by odors, pests, noise and the like."]	This expansion would not make the point, which is that the court in *Kelly* thinks that damages for annoyance and discomfort are something less than general damages for emotional distress. This view is what makes *Kelly* a "but see" to *Hensley*.
		The bracketed addition to the first reference to the *Vieira Enterprises, Inc. v. McCoy* case should be deleted and replaced with the following: [court found workability of distinction between annoyance and discomfort damages, versus "pure emotional distress" damages "may be questioned," but held it was relevant "to the purpose of the limitation to occupants."].	The committee finds the proposed revision to be more words than are needed to make the point that the court in *Viera* is not convinced that there is a distinction between "annoyance and discomfort" and general damages.
		The bracketed portion to the *Vieira Enterprises* case in the second paragraph under "Directions for Use" should be expanded to read as follows in its entirety: [It is "not necessary that the plaintiff be present at the moment of a tortuous invasion of the property. But it is necessary that the annoyance and discomfort arise from and relate to some personal effect of the interference with the use and enjoyment which lies at the heart of the tort of trespass."]	Parentheticals should be short and to the point. They are not the place to set forth the law.

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		The excerpt in the Sources and Authority to the *Fulle v. Kanani* case should be revised to include the full quote of the case as follows: "Together, *Kornoff* [*Kornoff v. Kinsberg* Cotton Oil Co. (1955) 45Cal.2d 265] and *Kelley* stand for the proposition that a plaintiff may recover damages for annoyance and discomfort proximately caused by tortuous injuries to trees on her property if she was in immediate and personal possession of the property at the time of the trespass."	The committee does not think that it is necessary to set forth the origin of language excerpted in the Sources and Authority. The court in *Fulle* is not questioning the proposition that damages for annoyance and discomfort can be recovered for injury to trees; therefore, there is no need to cite the cases that establish the point.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Agree	No response is necessary.
2334, *Bad Faith (Third Party)—Refusal to Accept Reasonable Settlement Within Liability Policy Limits—Essential Factual Elements*	Civil Justice Association of California, by Brittany A. Sitzer Sheppard, Mullin, Richter, & Hampton, by John T. Brooks makes the same point	This proposed revision of the instruction raises conflict with the California Supreme Court's holding in *Hamilton v. Maryland Cas. Co.* (2002) 27 Cal. 4th 718, 730 (2002): "A defending insurer cannot be bound by a settlement made without its participation and without any actual commitment on its insured's part to pay the judgment, even where the settlement has been found to be in good faith for purposes of section 877.6." The Supreme Court went on to hold: "Where, as here, the insured, without the insurer's agreement, stipulates to a judgment against it in excess of both the policy limits and the previously rejected settlement offer, and the stipulated judgment is coupled	*Hamilton* is a refusal to accept policy limits offer case. The Supreme Court did hold that the insurer is not bound by a settlement reached between the insured and the injured person because of the possible collusive nature of such a settlement. Therefore, the committee is removing this instruction from the release, and *Ace American* will not be considered further. Other comments received on this instruction will therefore not be addressed.

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		with a covenant not to execute, the agreed judgment cannot fairly be attributed to the insurer's conduct, even if the insurer's refusal to settle within the policy limits was unreasonable." (*Id.* at 731.) Accordingly, even a settlement coupled with a stipulated judgment is unavailing.	
	Sheppard, Mullin, Richter, & Hampton, by John T. Brooks	More generally, CACI 2334 by focusing solely on the reasonableness of the settlement demand continues to inappropriately invite juries to hold insurers strictly liable for failing to accept a reasonable settlement demand, regardless of other circumstances.	This point is outside of the scope of changes posted for public comment. It was the subject of a long and arduous process in 2015, at the end of which the committee concluded that the issue remains unresolved. At that time, the committee made some major changes to the Directions for Use to present the position of the commentator, but made no change to the instruction. The committee will not revisit this decision until such time as there is a clear resolution from the courts.
2805, *Employee Not Within Course of Employment—Employer Conduct Unrelated to Employment*	Civil Justice Association of California, by Brittany A. Sitzer	This new instruction raises concerns that this remedy could only be considered when and if workers compensation coverage is deemed inapplicable and the employer's activity is the source of the plaintiff/employee's injury. We believe this Instruction will create confusion instead of clarity in determining when the *Fermino* exception to the exclusivity of workers compensation applies and respectfully request the Judicial Council to revise.	The commentator's argument would seem to be circular. The rule of the instruction takes the claim out of the workers compensation system. "This remedy could only be considered when and if workers compensation coverage is deemed inapplicable." So if "the employer's activity is the source of the plaintiff/employee's injury," then workers compensation is inapplicable.
	State Bar of California, Litigation Section, Jury Instructions	Agree	No response is necessary.

Instruction	Commentator	Comment	Committee Response
	Committee, by Reuben A. Ginsburg, Chair		
3053, *Retaliation for Exercise of Free Speech Rights—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Element 2 of CACI No. 2505, *Retaliation—Essential Factual Elements* (Gov. Code, § 12940(h)), on which this instruction seems to be patterned, includes alternative language to use if the parties dispute whether the alleged retaliatory act constituted an adverse employment action. An adverse employment action is required for this section 1983 cause of action as well, as noted in the Directions for Use and in *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1071. We suggest modifying the Directions for Use for this instruction to state that element 2 should be modified if the parties dispute whether the alleged retaliatory act constituted an adverse employment action, with a cross-reference to No. 2505.	The committee agreed to make the suggested additions to the Directions for Use.
		We would strike the language "even if [he/she/it] also retaliated based on [*name of plaintiff*]'s protected conduct" at the end of element 7. The introductory sentence before element 6 already states that if the plaintiff proves elements 1 through 5, the defendant is not liable if element 6 or 7 is true. There is no need to repeat this in element 7	While the comment is technically correct, that there is a redundancy here, the committee believes that it is one that is helpful. By specifically pointing out in element 7 that there may be two motives, the mixed motive point is made more clearly. If all that is said is to go on if 1-5 were proved, the mixed motive issue is not really presented as clearly as it could be.
		This language seems to equate a substantial factor with "based on," which may confuse or mislead the jury.	The committee sees no potential for confusion.
		We suggest adding a cross-reference to CACI No. 430, *Causation: Substantial Factor.*	The committee believes that is speculative to conclude that CACI No. 430 applies under federal law in a 1983 case.
3724, *Social or Recreational*	State Bar of California, Litigation	Agree	No response is necessary.

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Activities (renumbered only)	Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair		
3726, *Going-and-Coming Rule—Business-Errand Exception* (renumbered only)	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	We agree with this proposed new instruction, except that we would add the words "part of the employment relationship" at the end of (b) to make it clear that social or recreational activities must be a customary part of the employment relationship, rather than just "customary."	This is not a proposed new instruction; it is only being renumbered in order to group the going and coming instructions together. Other changes to the instruction are not under consideration at this time. The comment may be addressed in the next release cycle.
3727, *Going-and-Coming Rule—Compensated Travel Time Exception*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	We would add the following language at the end of the Directions for Use to emphasize the important point that reimbursement of travel expenses is insufficient to make the employee's commuting time within the scope of employment: "The mere reimbursement of the employee's travel expenses is not sufficient to bring the employee's commute time into the scope of employment. (*Caldwell v. A.R.B., Inc.* (1986) 176 Cal.App.3d 1028, 1042.)"	This suggestion would move the *Caldwell* excerpt from the Sources and Authority to the Directions for Use. The committee sees no reason to do that.
4111, *Constructive Fraud*	Civil Justice Association of California, by Brittany A. Sitzer	We recommend clarifying the first element to accurately capture when a real estate broker or salesperson has a fiduciary duty under California Civil Code §2079. For example, as described in section 2079, a listing broker or salesperson who only represents the seller has a "fiduciary duty of utmost care, integrity, honesty, and loyalty" to the seller; in comparison, that listing broker or salesperson has a more limited duty of "honest and fair dealing and good faith" to the buyer. It is crucial to clarify that a real estate broker or salesperson defendant	This is an instruction on constructive fraud, not on the duties of real estate professionals. There are several CACI instructions on the fiduciary duties of real estate professionals. CACI No. 4108 addresses CC 2079.

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		does not necessarily have a fiduciary duty to all parties involved in the real estate transaction.	
		We also recommend clarifying the fourth element to eliminate the implication that there is constructive fraud if any fact is inaccurate within the scope of real estate transactions. We suggest revising the Instruction to be consistent with case law regarding the real estate licensee's duty to disclose "known material facts that affect the value or desirability of the property." *Easton v. Strassburger* (1984) 152 Cal.App.3d 90.	The committee does not believe that element 4 implies anything about the scope of real estate transactions.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Element 5 expresses the reasonableness of the plaintiff's reliance in a way that may be difficult for the jury to understand. *Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239, stated: "Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction." Accordingly, we would modify element 5 as follows for greater clarity: "5. That had [name of defendant] disclosed complete and accurate information, [*name of plaintiff*] ~~reasonably~~ would ~~have~~, <u>in all reasonable probability,</u> have behaved differently."	Per the response to the comment below, Element 5 has been deleted. (The proposed revision is not a correct statement of the law. It is not the reasonable probability of reliance; it is whether it was reasonable for the plaintiff to have relied.)
		Actual and reasonable reliance are presumed when the defendant is a fiduciary. The presumption is rebuttable. (*Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th	*Edmunds* holds that there is a rebuttable presumption of reliance in a fiduciary relationship. However, the presumption shifts the burden of proof to the defense to prove that there was no

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		1290, 1302; *Estate of Gump* (1991) 1 Cal.App.4th 582, 601.) In light of the rebuttable presumption of reliance, we believe that element 5 should be made optional and should be given (together with CACI Nos. 1907 and 1908) only if the defendant presented evidence that there was no reliance. The Directions for Use should explain this, and *Edmunds* and *Gump* should be added to the Sources and Authority.	reliance. Therefore, under *Edmunds*, the proposed revision is wrong because there should be no reliance element. The committee has removed element 5. The Directions for Use now explain that reliance is presumed in a fiduciary relationship, and that the defendant has the burden to disprove reliance. *Edmunds* has been added to the Sources and Authority.
		The final sentence in the third paragraph in the Directions for Use is difficult to understand. Perhaps the point is that the plaintiff, acting reasonably, would have behaved differently had all correct information been disclosed.	The third paragraph was completely revised in light of the comment above.
4207, *Affirmative Defense—Good Faith*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	The meaning of "collude" may be unclear to jurors. We would modify the first sentence in the last paragraph of the instruction as follows: " 'Good faith' means that [*name of defendant/third party*] acted without actual fraudulent intent and that [he/she/it] did not ~~collude with [*name of debtor*]~~ know of or otherwise actively participate in any fraudulent scheme."	The committee does not find "collude" to be an unclear word. Nor does the proposed rewrite fully capture the meaning of "collude." With the disjunctive "or" between "know of" and "otherwise actively participate," just knowing of the scheme would be enough to defeat the defense. But it is not; one has to "collude" with the debtor; that is, be actively involved in the fraud.
4606, *Whistleblower Protection—Unsafe Patient Care and Conditions—Essential Factual Elements*	Traci M. Hinden, Attorney at Law, San Francisco	Revoking whistleblower protection 4606 pursuant to the *Shaw* case is wrong. The case says you can't have a right to jury on that claim alone. However, if you have other claims and you are going to a jury trial, the Jury will still need instruction on that claim and revoking it entirely will leave them with no instruction and force the parties to squabble over that issue. You can limit the instruction with that statement.	The court in *Shaw* holds that the plaintiff may have a jury trial on her *Tameny* claim. The commentator apparently thinks that if there's going to be a jury on a related claim, the jury can try the 1278.5 claim also. But the committee disagrees. Under *Shaw*, the jury tries the *Tameny* action first. The court in then deciding any equitable issues under the statute

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			must accept the jury's findings under the *Tameny* claim. Nothing in the case suggests that the jury decides the 1278.5 claim.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Agree	No response is necessary.
4700, *Consumers Legal Remedies Act—Essential Factual Elements*	Civil Justice Association of California, by Brittany A. Sitzer	We oppose the addition of a new series because CLRA cases involve a wide range of prohibited practices and are not susceptible to such a broad instruction. Instead, special instructions that address particular issues in a case or class action are preferable to adopting a broad, entirely new CACI instruction.	The commentator's point did deter the committee from adding this series for several years. But in an unpublished case, *David v. Winn Auto.,* 2016 Cal. App. Unpub. LEXIS 6433, the court held that plaintiffs forfeited their right to a jury trial on their CLRA claim when they failed to propose correct instructions on that claim. While the committee does not cite unpublished cases of course, it does consider situations in which a jury instructions issue has created a procedural problem in the trial. The committee believes that the complexity of addressing 27 different prohibited practices is ameliorated in element 2 by just leaving the statutory violation open for the user to insert the act(s) at issue.
	Orange County Bar Association, by Michael Baroni, President	Under the fourth paragraph of Directions for Use, recommend clarifying the *Nelson* cite as follows: *Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022 [112 Cal.Rptr.3d 607], disapproved of on other	The committee has added the notation that the case was disapproved on other grounds.

Instruction	Commentator	Comment	Committee Response
		grounds in *Raceway Ford Cases* (2016) 2 Cal.5th 161 [211 Cal.Rptr.3d 244]	
4701, *Consumers Legal Remedies Act—Notice Requirement for Damages*	Association of Southern California Defense Counsel, by Allison W. Meredith	The courts have yet to decide whether the "appropriateness" of a defendant's correction is a discretionary question for the court or a question of fact for the jury. To date, most CLRA litigation resulting in published appellate opinions has been in the class action context, which involves notice requirements different from those addressed here. (See Civ. Code, § 1782, subds. (c) & (d).) As a result, there is little published guidance for trial courts on how to address a defendant's offer to correct an issue raised in a pre-filing notice letter. In *Benson v. Southern California Auto Sales, Inc.* (2015) 239 Cal.App.4th 1198, the Court of Appeal held that the trial court did not abuse its discretion by deciding that the defendant's offer of correction was appropriate within the meaning of Civil Code section 1782(b), "thereby negating [plaintiff's] ability to maintain a cause of action for damages." (*Id.* at p. 1209.) The Court of Appeal explained, "Determining whether a correction offer was appropriate is a matter California law wisely leaves *to the trial court's discretion*." (*Id.* at 1203, emphasis added.) However, in the experience of the ASCDC's members, many trial courts decline to decide whether a defendant's offer was appropriate, and instead present the issue to the jury.	The comment is presenting a somewhat different question from that presented in the instruction. The instruction assumes that the plaintiff must prove that the statutorily required notice was given. The comment is concerned with the appropriateness of the defendant's response to the notice; whether it is a sufficient cure to avoid liability. Regardless of the commentator's anecdotal evidence that courts are making this a jury issue, the committee believes that it must follow *Benson* and assume that the adequacy of the defendant's cure is a question of law.
		ASCDC requests the following revisions to the proposed CACI 4701: To recover actual damages in this case, [*name of plaintiff*] must prove ~~that, 30 days or more before filing a~~	Per the response above, a new element 5, that there was no appropriate correction from the defendant cannot be added because of *Benson*. And without element 5, the committee sees no

Instruction	Commentator	Comment	Committee Response
		~~claim for actual damages, [he/she] gave notice to [*name of defendant*] that did~~ all of the following: 1. ~~Informed [*name of defendant*] of the particular violations for which the lawsuit was brought~~ **That 30 days or more before filing a claim for damages under the CLRA, [he/she] gave notice to [*name of defendant*] of the particular violations for which the lawsuit was brought**; **2. That the notice was in writing;** ~~2~~**3**. **That the notice d**~~D~~emanded that [*name of defendant*] correct, repair, replace, or otherwise fix the problem with [*specify product or service*]; **4.** ~~Provided the notice to the defendants in writing and~~ **That the notice was sent** by certified or registered mail, return receipt requested, to the place where the transaction occurred or to [*name of defendant*]'s principal place of business within California[**; and].** **[5. That within 30 days of the receipt of the notice, [*name of defendant*] failed to give, or failed to agree to give within a reasonable time, an appropriate correction, repair, replacement, or other remedy to [*name of plaintiff*].]** [*Name of plaintiff*] must have complied exactly with these notice requirements and procedures. First, the proposed revisions present the requirements of the 30-day notice requirement of Civil Code section	need to reorganize the instruction in the manner proposed.

		1782(a) as a series of straightforward elements. The current proposed draft breaks up the statutory requirements, by listing them in both the preamble and the numbered paragraphs, which makes it more likely that the jurors will be confused as to which facts they must find. The proposed revisions move all of the elements down into the numbered paragraphs, making it clearer to the jurors that the plaintiff must satisfy all of the Civil Code section 1782(a) requirements. Second, the proposed revisions more accurately follow the Legislature's restrictions on damages under the CLRA, by including an optional element setting forth the requirement that the defendant failed to respond appropriately to the notice with an offer to cure the alleged violation. (Civ. Code, § 1782, subd. (b).) This requirement is foundational: if a plaintiff chooses to reject a fair offer from the defendant, that plaintiff cannot recover damages under the CLRA. (*Kagan v. Gibraltar Savings & Loan Assn.* (1984) 35 Cal.3d 582, 590; *Meyer v. Sprint Spectrum, L.P.* (2009) 45 Cal.4th 634, 642.) Finally, the proposed use note and optional "appropriateness" element reflect the current ambiguity as to whether the appropriateness of a defendant's response is a discretionary question for the court or a question of fact for the jury. Given the undecided state of the law, CACI 4101 should not present one approach at the exclusion of the other—either by omitting the Civil Code section 1782(b) requirement entirely, suggesting that the question is one of law for the court, or by adding the Civil Code section 1782(b) element as a necessary one, suggesting that the question is always a question of fact for the jury. The proposed revisions	

Instruction	Commentator	Comment	Committee Response
		acknowledge the ambiguity and will enable the court to instruct the jury properly under either approach.	
		ASCDC also requests the Committee add a note to the Directions for Use relating to the bracketed fifth element: "The court may in its discretion resolve the appropriateness of efforts to correct, repair, replace or otherwise remedy the problem identified by the plaintiff. (*Benson v. Southern California Auto Sales, Inc.* (2015) 239 Cal.App.4th 1198.) However, if the court presents the issue to the jury, the court should give the bracketed fifth element." (Civ. Code, § 1782, subd. (b).)	As noted above, there is no authority for the possibility that this is a jury issue.
	Civil Justice Association of California, by Brittany A. Sitzer	Proposes the same revisions for the same reasons as ASCDC.	See responses above
	Orange County Bar Association, by Michael Baroni, President	This instruction may be confusing to a jury due to the fact that notice may be given after the filing of a complaint. This is also an issue that is likely to have been resolved before trial.	The committee does not understand the point. First, the notice must be sent "thirty days or more prior to commencement of an action for damages." (CC 1782(a).) And it certainly is possible that the adequacy of the notice will have been resolved before trial. But if it was not, then this instruction will be helpful to the court and counsel.
		If instruction is to be adopted, recommend adding a third bullet point in the "Sources and Authority" section as follows: "Because plaintiffs in this case alleged that they sent the required notice [to defendant] more than 30 days before they filed the third amended complaint and that defendant failed to correct the alleged wrongs, the trial court erred by sustaining the demurrer for failure to comply with the CLRA notice requirements." (*Morgan, supra,* 177 Cal. App. 4th at 1261.)	The committee does not see that this excerpt adds anything that is not already said.

Instruction	Commentator	Comment	Committee Response
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	Agree	No response is necessary.
4702, *Consumers Legal Remedies Act—Statutory Damages—Senior or Disabled Plaintiff*	Civil Justice Association of California, by Brittany A. Sitzer	We oppose the addition of this instruction because Civ. Code §1780(b) and existing case law expressly and adequately provide a foundation for claims by a senior citizen or disabled person; a broad catch-all is unnecessary	The committee does not understand how the fact that there may be an adequate statutory and case law foundation for claims by a senior citizen or disabled person makes a jury instruction unnecessary. The purpose of CACI is to provide bench and bar with instructions that can be used for these claims.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	We agree with this instruction, but we would modify it to make it clear which items are listed in the conjunctive and which are listed in the disjunctive. There are several series or lists in this instruction: three elements (1, 2 & 3) listed in the conjunctive, three factors listed in the disjunctive (2(a), (b) & (c)), and three items listed in the disjunctive (2(b)(1), (2) & (3)). Following the usual convention of stating "and" or "or" only after the penultimate item in each series would make it necessary for jurors to refer to the penultimate item in each series, or to the introductory sentence preceding each series, to determine whether the jury must find each item in the series is true or need only find that one item in the series is true. Inserting "and" or "or," as appropriate, after each item would make it clear to the jury whether they must find all items are true or only one of them is true	The committee agrees that the instruction needs an "and" at the number level and an "or" at the letter level and has moved them accordingly.

Instruction	Commentator	Comment	Committee Response
4710, *Consumers Legal Remedies Act—Affirmative Defense—Bona Fide Error and Correction*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsburg, Chair	The statutory language "bona fide error" used in element 1 of this instruction may be difficult for jurors to understand. We would substitute the words "an honest mistake" for "a bona fide error."	The committee does not believe that the two terms are synonymous, It is the context that makes the difference. A bona fide error happens even though its maker used reasonable practices or procedures, a concept expressed in the statute. An honest mistake could happen whether or not the maker used reasonable practices or procedures, and so subtly downgrades that latter concept in the statute. Also, a jury is more likely to be sympathetic to somebody who made an honest mistake, as that person is honest, versus a person who made a bona fide error, which sounds like a real or serious error. The proposed change could tip the emotional scales in ways that the Legislature did not intend.
All Others	Orange County Bar Association, by Michael Baroni, President	Agree with all others not specified above	No response is necessary.

Item number: 03

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Approve**

RUPRO Meeting: October 24, 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:
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 31 is the second CACI release for 2017. Release 30 was approved on May 19, 2017.

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 71 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, revised, revoked, and renumbered CACI instructions and verdict forms.

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
September 26, 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 November 17, 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 71 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 November 17, 2017, approve for publication 71 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 2018 edition of the *Judicial Council of California Civil Jury Instructions*.

The 71 instructions presented for final RUPRO approval are attached at pages 6–301. The committee in a separate report requests that RUPRO recommend to the Judicial Council adoption of 23 new, revised, renumbered, and revoked instructions and verdict forms.

Previous Council Action

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

> 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;[3]
(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.[4]

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[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] The committee only presents nonsubstantive changes to the Directions for Use for RUPRO's final approval. Substantive changes are posted for public comment and presented to the council for approval.

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

Overview of updates

Of the 71 revised instructions that are presented for final RUPRO approval:

- 61 have revisions under category (a) above only (additional cases added to Sources and Authority);[5]
- 9 fall under both categories (a) and (c) (additions to Sources and Authority and additions or changes to the Directions for Use); and
- 1 (VF-3102) falls under category e, changes to the instruction required by subsequent developments.[6]

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.

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[5] In two instructions, the change is to remove, rather than add, case excerpts. In CACI No. 3001, *Local Government Liability—Policy or Custom—Essential Factual Elements*, an excerpt from *Lowry v. City of San Diego* (9th Cir. 2016) 818 F.3d 840, 855, has been removed because the opinion was superseded by a new opinion on rehearing en banc. In CACI No. 3725, *Going-and-Coming Rule—Vehicle-Use Exception*, two excerpts on compensated travel have been moved to new CACI No. 3727, *Going-and-Coming Rule—Compensated Travel Time Exception*.

[6] The change is to conform the verdict form to changes previously made and approved to the instruction CACI No. 3103, *Neglect—Essential Factual Elements*, revised January 2017. See *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148.

Nonfinal cases and incomplete citations

A motion for rehearing has been filed in *Parrish v. Latham & Watkins.*[7] An excerpt from *Parrish* has been added to CACI No. 1501, *Wrongful Use of Civil Proceedings*. The Supreme Court has extended time to grant or deny rehearing until November 8, 2017, which would be outside of the time frame by which all content must be final and ready for RUPRO's approval. However, the Supreme Court seldom takes all the time that it allows itself in ruling on motions for rehearing. But if the motion is still pending on the date of the RUPRO meeting to approve the release, CACI No. 1501 will be withdrawn.

All other cases proposed to be added to CACI in this release are final. Only the citation to *Parrish* is 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 2018 edition and pay royalties to the council. The official publisher will also make the new edition available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the council will register the copyright in this work and will continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the council will provide a broad public license for their noncommercial use and reproduction.

[7] *Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 776–777.

Attachments

1. Full text of 71 instructions for final RUPRO approval, at pages 6–301

CIVIL JURY INSTRUCTIONS
TABLE OF CONTENTS

314. Interpretation—Disputed Words

[*Name of plaintiff***] and [***name of defendant***] dispute the meaning of the following words in their contract: [***insert disputed language***].**

[*Name of plaintiff***] claims that the words mean [***insert plaintiff's interpretation***]. [***Name of defendant***] claims that the words mean [***insert defendant's interpretation***]. [***Name of plaintiff***] must prove that [his/her/its] interpretation is correct.**

In deciding what the words of a contract mean, you must decide what the parties intended at the time the contract was created. You may consider the usual and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract.

[The following instructions may also help you interpret the words of the contract:]

New September 2003; Revised December 2014

Directions for Use

Give this instruction if there is conflicting extrinsic evidence as to what the parties intended the language of their contract to mean. While interpretation of a contract can be a matter of law for the court (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839]), it is a question of fact for the jury if ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Read any of the instructions (as appropriate) on tools for interpretation (CACI Nos. 315 through 320) after reading the last bracketed sentence.

Sources and Authority

- Contract Interpretation: Intent. Civil Code section 1636.
- Contracts Explained by Circumstances. Civil Code section 1647.
- "Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. But when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." (*City of Hope National Medical Center, supra,* 43 Cal.4th at p. 395, footnote and internal citations omitted.)
- "This rule—that the jury may interpret an agreement when construction turns on the credibility of

extrinsic evidence—is well established in our case law. California's jury instructions reflect this (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 314) … , as do authoritative secondary sources." (*City of Hope National Medical Center, supra,* 43 Cal.4th at pp. 395−396, internal citations omitted.)

- "The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.' " (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710 [50 Cal.Rptr.2d 323].)

- "In interpreting a contract, the objective intent, as evidenced by the words of the contract is controlling. We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (*Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198 [32 Cal.Rptr.2d 144], internal citations omitted.)

- "Ordinarily, even in an integrated contract, extrinsic evidence can be admitted to explain the meaning of the contractual language at issue, although it cannot be used to contradict it or offer an inconsistent meaning. The language, in such a case, must be ' "reasonably susceptible" ' to the proposed meaning." (*Hot Rods, LLC v. Northrop Grumman Systems Corp.* (2015) 242 Cal.App.4th 1166, 1175–1176 [196 Cal.Rptr.3d 53].)

- "[I]t is indisputably the law that 'when ambiguous terms in a memorandum are disputed, extrinsic evidence is admissible to resolve the uncertainty.' The agreement must still provide the essential terms, and it is 'clear that extrinsic evidence cannot *supply* those required terms.' 'It can, however, be used to *explain* essential terms that were understood by the parties but would otherwise be unintelligible to others.' " (*Jacobs v. Locatelli* (2017) 8 Cal.App.5th 317, 325 [213 Cal.Rptr.3d 514], original italics, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 741–743

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.04[2][b], 21.14[2]

336. Affirmative Defense—Waiver

[*Name of defendant***] claims that [he/she/it] did not have to [***insert description of performance***] because [***name of plaintiff***] gave up [his/her/its] right to have [***name of defendant***] perform [this/these] obligation[s]. This is called a "waiver."**

To succeed, [*name of defendant***] must prove both of the following by clear and convincing evidence:**

1. **That [***name of plaintiff***] knew [***name of defendant***] was required to [***insert description of performance***]; and**

2. **That [***name of plaintiff***] freely and knowingly gave up [his/her/its] right to have [***name of defendant***] perform [this/these] obligation[s].**

A waiver may be oral or written or may arise from conduct that shows that [*name of plaintiff***] gave up that right.**

If [*name of defendant***] proves that [***name of plaintiff***] gave up [his/her/its] right to [***name of defendant***]'s performance of [***insert description of performance***], then [***name of defendant***] was not required to perform [this/these] obligation[s].**

New September 2003

Directions for Use

This issue is decided under the "clear and convincing" standard of proof. See CACI No. 201, ~~*More Likely True*~~*Highly Probable—Clear and Convincing Proof*.

Sources and Authority

- "Waiver is the intentional relinquishment of a known right after knowledge of the facts." (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 572 [150 P.2d 422].)

- " ' "The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right. [Citation.]" [Citation.] Thus, "California courts will find waiver when a party intentionally relinquishes a right or when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished." [Citation.]" [Citation.]' " (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 78 [215 Cal.Rptr.3d 835].)

- "~~[Waiver] may be implied through conduct manifesting an intention to waive.~~ Acceptance of benefits under a lease is conduct that supports a finding of waiver." (*Gould v. Corinthian Colleges, Inc.* (2011) 192 Cal.App.4th 1176, 1179 [120 Cal.Rptr.3d 943], internal citations omitted.)

- "Waiver is ordinarily a question for the trier of fact; '[h]owever, where there are no disputed facts and only one reasonable inference may be drawn, the issue can be determined as a matter of law.' " (*DuBeck v. California Physicians' Service* (2015) 234 Cal.App.4th 1254, 1265 [184 Cal.Rptr.3d 743].)

- When the injured party with knowledge of the breach continues to accept performance from the guilty party, such conduct may constitute a waiver of the breach. (*Kern Sunset Oil Co. v. Good Roads Oil Co*. (1931) 214 Cal. 435, 440-441 [6 P.2d 71].)

- There can be no waiver where the one against whom it is asserted has acted without full knowledge of the facts. It cannot be presumed, in the absence of such knowledge, that there was an intention to waive an existing right. (*Craig v. White* (1921) 187 Cal. 489, 498 [202 P. 648].)

- "[N]otwithstanding a provision in a written contract that expressly precludes oral modification, the parties may, by their words or conduct, waive the enforcement of a contract provision if the evidence shows that was their intent." (*Wind Dancer Production Group*, *supra*, 10 Cal.App.5th at p. 80.)

- "~~'Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts.'~~ The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver'." (*City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 107-108 [48 Cal.Rptr. 865, 410 P.2d 369]~~; *Florence Western Medical Clinic v. Bonta* (2000) 77 Cal.App.4th 493, 504 [91 Cal.Rptr.2d 609]~~.)

- "The trial court correctly instructed the jury that the waiver of a known right must be shown by clear and convincing ~~The "clear and convincing" standard applies "particularly" to rights favored in the law; however, it does not apply exclusively to such favored rights. It is proper to instruct a jury that waiver must be proved by this higher standard of~~ proof." *(DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61 [35 Cal.Rptr.2d 515].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed.) Contracts §§ 856, 857

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.57, 140.113, 140.136 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.40, 50.41, 50.110 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.08, 22.65, 22.68

400. Negligence—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of defendant***]'s negligence. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was negligent;**

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

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

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

Directions for Use

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph.

The word "harm" is used throughout these instructions, instead of terms like "loss," "injury," and "damage," because "harm" is all-purpose and suffices in their place.

Sources and Authority

- General Duty to Exercise Due Care. Civil Code section 1714(a).

- "Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112 [70 Cal.Rptr. 97, 443 P.2d 561].)

- " 'The elements of a cause of action for negligence are well established. They are "(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." ' " (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 [50 Cal.Rptr.2d 309, 911 P.2d 496].)

- "The first element, duty, 'may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship.' " (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1128 [214 Cal.Rptr.3d 552].)

- "[T]he existence of a duty is a question of law for the court." (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)

- “In the *Rowland* [*Rowland, supra,* 69 Cal.2d at p. 113] decision, this court identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714: ‘the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.’ As we have also explained, however, in the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where ‘clearly supported by public policy.’ ” (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 [122 Cal.Rptr.3d 313, 248 P.3d 1170], internal citations omitted.)

- “[T]he concept of foreseeability of risk of harm in determining whether a duty should be imposed is to be distinguished from the concept of ‘ “foreseeability” in two more focused, fact-specific settings’ to be resolved by a trier of fact. ‘First, the [trier of fact] may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the [trier of fact's] determination of whether the defendant’s negligence was a proximate or legal cause of the plaintiff's injury.’ ” (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 488, fn. 8 [93 Cal.Rptr.3d 130], internal citation omitted.)

- “By making exceptions to Civil Code section 1714’s general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make. … While the court deciding duty assesses the foreseeability of injury from ‘the category of negligent conduct at issue,’ if the defendant did owe the plaintiff a duty of ordinary care the jury ‘may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant’s conduct was negligent in the first place.’ An approach that instead focused the duty inquiry on case-specific facts would tend to ‘eliminate the role of the jury in negligence cases, transforming the question of whether a defendant breached the duty of care under the facts of a particular case into a legal issue to be decided by the court … .’ ” (*Cabral, supra,* 51 Cal.4th at pp. 772–773, original italics, internal citations omitted.)

- “[W]hile foreseeability with respect to duty is determined by focusing on the general character of the event and inquiring whether such event is ‘likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct’, foreseeability in evaluating negligence and causation requires a ‘more focused, fact-specific’ inquiry that takes into account a particular plaintiff's injuries and the particular defendant's conduct.” (*Laabs v. Southern California Edison Company* (2009) 175 Cal.App.4th 1260, 1273 [97 Cal.Rptr.3d 241], internal citation omitted.)

- “[Defendant] relies on the rule that a person has no general duty to safeguard another from harm or to rescue an injured person. But that rule has no application where the person has caused another to be put in a position of peril of a kind from which the injuries occurred.” (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 883 [174 Cal.Rptr.3d 339].)

- " 'Typically, in special relationships, "the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare. [Citation.]" [Citation.] A defendant who is found to have a "special relationship" with another may owe an affirmative duty to protect the other person from foreseeable harm, or to come to the aid of another in the face of ongoing harm or medical emergency.' " (*Carlsen, supra,* 227 Cal.App.4th at p. 893.)

- "A special relationship exists when 'the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare. [Citation.]' … 'Generally, a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger. [Citation.] Consequently, California courts have frequently recognized special relationships between children and their adult caregivers that give rise to a duty to prevent harms caused by the intentional or criminal conduct of third parties.' " (*Doe, supra,* 8 Cal.App.5th at p. 1129, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~831~~956 ~~–838~~964, ~~860~~988 ~~–862~~990, 993 ~~–996865, 866~~

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

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.10 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* §§ 165.10, 165.20 (Matthew Bender)

405. Comparative Fault of Plaintiff

[*Name of defendant***] claims that [***name of plaintiff***]'s own negligence contributed to [his/her] harm. To succeed on this claim, [***name of defendant***] must prove both of the following:**

1. **That [***name of plaintiff***] was negligent; and**

2. **That [***name of plaintiff***]'s negligence was a substantial factor in causing [his/her] harm.**

If [*name of defendant***] proves the above, [***name of plaintiff***]'s damages are reduced by your determination of the percentage of [***name of plaintiff***]'s responsibility. I will calculate the actual reduction.**

New September 2003; Revised December 2009

Directions for Use

This instruction should not be given absent substantial evidence that plaintiff was negligent. (*Drust v. Drust* (1980) 113 Cal.App.3d 1, 6 [169 Cal.Rptr. 750].)

If there are multiple defendants or alleged nondefendant torteasors, also give CACI No. 406, *Apportionment of Responsibility*.

Sources and Authority

- "[W]e conclude that: … The doctrine of comparative negligence is preferable to the 'all-or-nothing' doctrine of contributory negligence from the point of view of logic, practical experience, and fundamental justice; … ." (*Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 808 [119 Cal.Rptr. 858, 532 P.2d 1226].)

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

- "Where contributory negligence is asserted as a defense, and where there is 'some evidence of a substantial character' to support a finding that such negligence occurred, it is prejudicial error to refuse an instruction on this issue, since defendant is thereby denied a basic theory of his defense." (*Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548 [138 Cal.Rptr. 705, 564 P.2d 857].)

- "The use by the trial court of the phrase 'contributory negligence' in instructing' on the concept of

comparative negligence is innocuous. *Li v. Yellow Cab Co.* [citation] abolished the legal doctrine, but not the phrase or the concept of 'contributory negligence.' A claimant's negligence contributing causally to his own injury may be considered now not as a bar to his recovery, but merely as a factor to be considered in measuring the amount thereof." (*Bradfield v. Trans World Airlines, Inc.* (1979) 88 Cal.App.3d 681, 686 [152 Cal.Rptr. 172].)

- "Generally, a defendant has the burden of establishing that some nonzero percentage of fault is properly attributed to the plaintiff, other defendants, or nonparties to the action." (*Pfeifer, supra*, 220 Cal.App.4th at p. 1285.)

- [W]ithin the comparative fault system, when an employer is liable solely on a theory of respondeat superior, 'the employer's share of liability for the plaintiff's damages corresponds to the share of fault that the jury allocates to the employee.' " (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1261 [218 Cal.Rptr.3d 664].)

- "[P]retreatment negligence by the patient does not warrant a jury instruction on contributory or comparative negligence. This view is supported by comment m to section 7 of the Restatement Third of Torts: Apportionment of Liability, which states: '[I]n a case involving negligent rendition of a service, including medical services, a factfinder does not consider any plaintiff's conduct that created the condition the service was employed to remedy.' " (*Harb v. City of Bakersfield* (2015) 233 Cal.App.4th 606, 632 [183 Cal.Rptr.3d 59].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1003~~1138, ~~1295~~1450–~~1303~~1460

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.38-1.39

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

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.170 (Matthew Bender)

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

411. Reliance on Good Conduct of Others

Every person has a right to expect that every other person will use reasonable care [and will not violate the law], unless he or she knows, or should know, that the other person will not use reasonable care [or will violate the law].

New September 2003

Directions for Use

This instruction should not be used if the only other actor is the plaintiff and there is no evidence that the plaintiff acted unreasonably. (*Springer v. Reimers* (1970) 4 Cal.App.3d 325, 336 [84 Cal.Rptr. 486].)

Sources and Authority

- ~~The general rule is that~~ "~~e~~[E]very person has a right to presume that every other person will perform his duty and obey the law and in the absence of reasonable grounds to think otherwise, it is not negligence to assume that he is not exposed to danger which could come to him only from violation of law or duty by such other person." (*Celli v. Sports Car Club of America, Inc.* (1972) 29 Cal.App.3d 511, 523 [105 Cal.Rptr. 904].)

- "However, this rule does not extend to a person who is not exercising ordinary care, nor to one who knows or, by the exercise of such care, would know that the law is not being observed." (*Malone v. Perryman* (1964) 226 Cal.App.2d 227, 234 [37 Cal.Rptr. 864].)

- "[CACI No. 411] is a pattern jury instruction designed for use in civil negligence cases involving a plaintiff suing a defendant for failing to prevent harm caused by a third party. The principle it espouses is essentially that a defendant will not be liable for harm caused by a third party's negligent or criminal conduct, unless the third party's conduct was foreseeable … :" (*People v. Elder* (2017) 11 Cal.App.5th 123, 135 [217 Cal.Rptr.3d 493].)

- "[Defendant], if exercising ordinary care himself, was entitled to assume that plaintiff's employer had furnished to plaintiff a safe place within which to work and he could further assume that the plaintiff would reasonably use the protection afforded to him by the employer." ~~Defendants are entitled to rely on the reasonable conduct of third parties who owe a duty of care to the plaintiff.~~ (*Tucker v. Lombardo* (1956) 47 Cal.2d 457, 467 [303 P.2d 1041] [approved language in jury instruction].)

- "If there is evidence on both sides of the question as to whether the conduct of a third person is or is not foreseeable, the jury instruction is correct. Its application or effect will depend on the finding of the jury as to whether the act of the third person should have been anticipated or foreseen." ~~The central issue addressed by the instruction is whether or not the bad act of the third person was foreseeable by the defendant.~~ (*Whitton v. State of California* (1979) 98 Cal.App.3d 235, 244-246 [159 Cal.Rptr. 405].)

- "If the likelihood that a third person may act in a particular manner is the hazard or one of the hazards which makes the actor negligent, such an act whether innocent, negligent, intentionally tortious, or criminal does not prevent the actor from being liable for harm caused thereby." (~~Rest.2d Torts, § 449;~~ *Bigbee v. Pacific Telephone and Telegraph Co.* (1983) 34 Cal.3d 49, 58 [192 Cal.Rptr. 857, 665 P.2d 947]; see also Rest.2d Torts, § 449.)

- "Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court." ~~Many cases involving issues of third-party criminal conduct are analyzed as questions of law-i.e., existence of a duty, which may require analysis of foreseeability.~~ (~~See~~ *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678 [25 Cal.Rptr.2d 137, 863 P.2d 207], disapproved on other grounds in *Reid v. Google Inc.* (2010) 50 Cal.4th 512, 527 fn. 5 [113 Cal.App.3d 327, 235 P.3d 988]; ~~*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260]~~.)

- ~~In cases where a third party commits a criminal act, the defendant is generally not liable for failure to protect the plaintiff from the resulting harm. The exceptions are (1) where the defendant has a special relationship to the plaintiff, (2) where the defendant has undertaken an obligation to protect the plaintiff, or (3) where the defendant's conduct created or increased the risk of harm through the misconduct. (Rest.2d Torts, § 302B, com. e.)~~

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1311~~1468–~~1313~~1470

1 Levy et al., California Torts, Ch. 1, *Negligence*, § 1.02 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, §§ 90.88, 90.90 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.21 (Matthew Bender)

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

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

426. Negligent Hiring, Supervision, or Retention of Employee

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of employee***] and that [***name of employer defendant***] is responsible for that harm because [***name of employer defendant***] negligently [hired/ supervised/ [or] retained] [***name of employee***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of employer defendant***] hired [***name of employee***];]**

2. **That [***name of employee***] [[was/became] [unfit [or] incompetent] to perform the work for which [he/she] was hired/[***specify other particular risk***]];**

3. **That [***name of employer defendant***] knew or should have known that [***name of employee***] [[was/became] [unfit/ [or] incompetent]/[***other particular risk***]] and that this [unfitness [or] incompetence/ [***other particular risk***]] created a particular risk to others;**

4. **That [***name of employee***]'s [unfitness [or] incompetence/ [***other particular risk***]] harmed [***name of plaintiff***]; and**

5. **That [***name of employer defendant***]'s negligence in [hiring/ supervising/ [or] retaining] [***name of employee***] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2009; Revised December 2015, June 2016

Directions for Use

Give this instruction if the plaintiff alleges that the employer of an employee who caused harm was negligent in the hiring, supervision, or retention of the employee after actual or constructive notice that the employee created a particular risk or hazard to others. For instructions holding the employer vicariously liable (without fault) for the acts of the employee, see the Vicarious Responsibility series, CACI No. 3700 et seq.

Include optional question 1 if the employment relationship between the defendant and the negligent person is contested. (See *Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1185−1189 [183 Cal.Rptr.3d 394].) It appears that liability may also be imposed on the hirer of an independent contractor for the negligent selection of the contractor. (See *Noble v. Sears, Roebuck & Co.* (1973) 33 Cal.App.3d 654, 662–663 [109 Cal.Rptr. 269].) Therefore, it would not seem to be necessary to instruct on the test to determine whether the relationship is one of employer-employee or hirer-independent contractor. (See CACI No. 3704, *Existence of "Employee" Status Disputed*.)

Choose "became" in elements 2 and 3 in a claim for negligent retention.

In most cases, "unfitness" or "incompetence" (or both) will adequately describe the particular risk that

the employee represents. However, there may be cases in which neither word adequately describes the risk that the employer should have known about.

Sources and Authority

- "California case law recognizes the theory that an employer can be liable to a third person for negligently hiring, supervising, or retaining an unfit employee." (*Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054 [58 Cal.Rptr.2d 122].)

- "Negligence liability will be imposed on an employer if it 'knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes.' " (*Phillips v. TLC Plumbing, Inc.* (2009) 172 Cal.App.4th 1133, 1139 [91 Cal.Rptr.3d 864].)

- "[Plaintiff] brought several claims against [defendant employer], including negligent hiring, supervising, and retaining [employee], and failure to warn. To prevail on his negligent hiring/retention claim, [plaintiff] will be required to prove [employee] was [defendant employer]'s agent and [defendant employer] knew or had reason to believe [employee] was likely to engage in sexual abuse. On the negligent supervision and failure to warn claims, [plaintiff] will be required to show [defendant employer] knew or should have known of [employee]'s alleged misconduct and did not act in a reasonable manner when it allegedly recommended him to serve as [plaintiff]'s Bible instructor." (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 591 [-- Cal.Rptr.3d --], internal citations omitted.)

- "Liability for negligent supervision and/or retention of an employee is one of direct liability for negligence, not vicarious liability." (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 815 [52 Cal.Rptr.3d 376].)

- "Liability for negligent hiring and supervision is based upon the reasoning that if an enterprise hires individuals with characteristics which might pose a danger to customers or other employees, the enterprise should bear the loss caused by the wrongdoing of its incompetent or unfit employees. The tort has developed in California in factual settings where the plaintiff's injury occurred in the workplace, or the contact between the plaintiff and the employee was generated by the employment relationship." (*Mendoza v. City of Los Angeles* (1998) 66 Cal.App.4th 1333, 1339–1340 [78 Cal.Rptr.2d 525].)

- "To establish negligent supervision, a plaintiff must show that a person in a supervisorial position over the actor had prior knowledge of the actor's propensity to do the bad act." (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902 [189 Cal.Rptr.3d 570].)

- "Apparently, [defendant] had no actual knowledge of [the employee]'s past. But the evidence recounted above presents triable issues of material fact regarding whether the [defendant] had reason to believe [the employee] was unfit or whether the [defendant] failed to use reasonable care in investigating [the employee]." (*Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 843 [10 Cal.Rptr.2d 748]; cf. *Flores v. AutoZone West Inc.* (2008) 161 Cal.App.4th 373, 384–386 [74 Cal.Rptr.3d 178] [employer had no duty to investigate and discover that job applicant had a juvenile delinquency record].)

- "A claim that an employer was negligent in hiring or retaining an employee-driver rarely differs in substance from a claim that an employer was negligent in entrusting a vehicle to the employee. Awareness, constructive or actual, that a person is unfit or incompetent to drive underlies a claim that an employer was negligent in hiring or retaining that person as a driver. (See Judicial Council of Cal. Civ. Jury Instns. (2011) CACI No. 426.) That same awareness underlies a claim for negligent entrustment. (See CACI No. 724.) In a typical case, like this, the two claims are functionally identical." (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1157 [126 Cal.Rptr.3d 443, 253 P.3d 535].)

- "[I]f an employer admits vicarious liability for its employee's negligent driving in the scope of employment, 'the damages attributable to both employer and employee will be coextensive.' Thus, when a plaintiff alleges a negligent entrustment or hiring cause of action against the employer and the employer admits vicarious liability for its employee's negligent driving, the universe of defendants who can be held responsible for plaintiff's damages is reduced by one—the employer—for purposes of apportioning fault under Proposition 51. Consequently, the employer would not be mentioned on the special verdict form. The jury must divide fault for the accident among the listed tortfeasors, and the employer is liable only for whatever share of fault the jury assigns to the employee." (*Diaz, supra,* 41 Cal.4th at p. 1159, internal citations omitted.)

- "[W]hen an employer … admits vicarious liability, neither the complaint's allegations of employer misconduct relating to the recovery of punitive damages nor the evidence supporting those allegations are superfluous. Nothing in *Diaz* or *Armenta* suggests otherwise." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1264 [218 Cal.Rptr.3d 664].)

- "[A] public school district may be vicariously liable under [Government Code] section 815.2 for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 879 [138 Cal.Rptr.3d 1, 270 P.3d 699].)

- "[P]laintiff premises her direct negligence claim on the hospital's alleged failure to properly screen [doctor] before engaging her and to properly supervise her after engaging her. Since hiring and supervising medical personnel, as well as safeguarding incapacitated patients, are clearly within the scope of services for which the hospital is licensed, its alleged failure to do so necessarily states a claim for professional negligence. Accordingly, plaintiff cannot pursue a claim of direct negligence against the hospital." (*So v. Shin* (2013) 212 Cal.App.4th 652, 668 [151 Cal.Rptr.3d 257].)

- "[Asking] whether [defendant] hired [employee] was necessary given the dispute over who hired [employee]—[defendant] or [decedent]. As the trial court noted, 'The employment was neither stipulated nor obvious on its face.' However, if the trial court began the jury instructions or special verdict form with, 'Was [employee] unfit or incompetent to perform the work for which he was hired,' confusion was likely to result as the question assumed a hiring. Therefore, the jury needed to answer the question of whether [defendant] hired [employee] before it could determine if [defendant] negligently hired, retained, or supervised him." (*Jackson, supra,* 233 Cal.App.4th at pp. 1187−1188.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1190

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-H, *Employment Torts and Related Claims—Negligence*, ¶ 5:615 et seq. (The Rutter Group)

3 California Torts, Ch. 40B, *Employment Discrimination and Harassment*, § 40B.21 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.12 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.22 (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.)

- "To support an allocation of liability to another party in an asbestos case, a defendant must 'present evidence that the aggregate dose of asbestos particles arising from' exposure to that party's asbestos 'constituted a substantial factor in the causation of [the decedent's] cancer.' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 205 [191 Cal.Rptr.3d 263].)

- ~~"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.)

- "Mere presence at a site where asbestos was present is insufficient to establish legally significant asbestos exposure." (*Shiffer v. CBS Corp.* (2015) 240 Cal.App.4th 246, 252 [192 Cal.Rptr.3d 346].)

- "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.)

- "[T]he identified-exposure theory is a more rigorous standard of causation than the every-exposure theory. As a single example of the difference, we note [expert]'s statement that it 'takes significant exposures' to increase the risk of disease. This statement uses the plural 'exposures' and also requires that those exposures be 'significant.' The use of 'significant' as a limiting modifier appears to be connected to [expert]'s earlier testimony about the concentrations of airborne asbestos created by particular activities done by [plaintiff], such as filing, sanding and using an airhose to clean a brake drum." (*Phillips v. Honeywell Internat. Inc.* (2017) 9 Cal.App.5th 1061, 1088 [217 Cal.Rptr.3d 147].)

- "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)

454. Affirmative Defense—Statute of Limitations

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date from applicable statute of limitation***].**

New April 2007; Revised December 2007

Directions for Use

This instruction states the common-law rule that an action accrues on the date of injury. (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 [245 Cal.Rptr. 658, 751 P.2d 923].) The date to be inserted is the applicable limitation period before the filing date. For example, if the limitation period is two years and the filing date is August 31, 2007, the date is August 31, 2005.

For an instruction on the delayed-discovery rule, see CACI No. 455, *Statute of Limitations—Delayed Discovery*. See also verdict form CACI No. VF-410, *Statute of Limitations—Delayed Discovery—Reasonable Investigation Would Not Have Disclosed Pertinent Facts.*

Do not use this instruction for attorney malpractice. (See CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit.*)

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

Sources and Authority

- Two-Year Statute of Limitations. Code of Civil Procedure section 335.1.
- Three-Year Statute of Limitations. Code of Civil Procedure section 338(c).
- One-Year Statute of Limitations. Code of Civil Procedure section 340.2(c).
- "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable." (*Glue-Fold, Inc., supra,* 82 Cal.App.4th at p. 1029, internal citations omitted.)
- "Where, as here, 'damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. … "Mere threat of future harm, not yet realized, is not enough." … "Basic public policy is best served by recognizing that damage is

necessary to mature such a cause of action." … Therefore, when the wrongful act does not result in immediate damage, "the cause of action does not accrue prior to the maturation of perceptible harm." ' " (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 [129 Cal.Rptr.3d 525].)

- " '[O]nce plaintiff has suffered actual and appreciable harm, neither the speculative nor uncertain character of damages nor the difficulty of proof will toll the period of limitation.' Cases contrast actual and appreciable harm with nominal damages, speculative harm or the threat of future harm. The mere breach of duty—causing only nominal damages, speculative harm or the threat of future harm not yet realized—normally does not suffice to create a cause of action." (*San Francisco Unified School Dist. v. W. R. Grace & Co.* (1995) 37 Cal.App.4th 1318, 1326 [44 Cal.Rptr.2d 305], internal citations omitted.)

- "Generally, the bar of the statute of limitations is raised as an affirmative defense, subject to proof by the defendant." (*Czajkowski v. Haskell & White* (2012) 208 Cal.App.4th 166, 174 [144 Cal.Rptr.3d 522].)

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

- "So long as the time allowed for filing an action is not inherently unreasonable, California courts afford 'contracting parties considerable freedom to modify the length of a statute of limitations.' " (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 74 [215 Cal.Rptr.3d 835].)

Secondary Sources

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

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Tort Actions*, §§ 71.01–71.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, §§ 345.19, 345.20 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.150 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, §§ 143.20–143.65 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.05, 4.14, 4.38, 4.39

455. Statute of Limitations—Delayed Discovery

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

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

[*or***]**

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

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

Directions for Use

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

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

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

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

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

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

Sources and Authority

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

- "The policy reason behind the discovery rule is to ameliorate a harsh rule that would allow the limitations period for filing suit to expire before a plaintiff has or should have learned of the latent injury and its cause." (*Applied Medical Corp. v. Thomas* (2017) 10 Cal.App.5th 927, 939 [217 Cal.Rptr.3d 169].)

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

- "*Jolly* 'sets forth two alternate tests for triggering the limitations period: (1) a subjective test requiring actual suspicion by the plaintiff that the injury was caused by wrongdoing; and (2) an objective test requiring a showing that a reasonable person would have suspected the injury was caused by wrongdoing. [Citation.] The first to occur under these two tests begins

the limitations period.' " (*Nguyen v. Western Digital Corp.* (2014) 229 Cal.App.4th 1522, 1552 [178 Cal.Rptr.3d 897].)

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

- "[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis." (*Fox, supra,* 35 Cal.4th at p. 803.)

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

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

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

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

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

- "Thus, a two-part analysis is used to assess when a claim has accrued under the discovery rule. The initial step focuses on whether the plaintiff possessed information that would cause a reasonable person to inquire into the cause of his injuries. Under California law, this inquiry duty arises when the plaintiff becomes aware of facts that would cause a reasonably prudent person to suspect his injuries were the result of wrongdoing. If the plaintiff was in possession of such facts, thereby triggering his duty to investigate, it must next be determined whether 'such an investigation would have disclosed a factual basis for a cause of action[.] [T]he statute of limitations begins to run on that cause of action when the investigation would have brought such information to light.' " (*Alexander v. Exxon Mobil* (2013) 219 Cal.App.4th 1236, 1251 [162 Cal.Rptr.3d 617], internal citation omitted.)

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

- "[T]he discovery rule 'may be applied to breaches [of contract] which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time.' " (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 73 [215 Cal.Rptr.3d 835].)

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

- "The statute of limitations does not begin to run when some members of the public have a suspicion of wrongdoing, but only '[o]nce the plaintiff *has* a suspicion of wrongdoing.' "

(*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 364 [76 Cal.Rptr.3d 146], original italics.)

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

- "[I]t was [plaintiff]'s burden in claiming delayed discovery to set forth facts showing ' " '(1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' " ' " (*Applied Medical Corp., supra*, 10 Cal.App.5th at p. 942.)
- " '[R]esolution of the statute of limitations issue is normally a question of fact … .' " (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 487 [59 Cal.Rptr.2d 20, 926 P.2d 1114].)

- "More specifically, as to accrual, 'once properly pleaded, belated discovery is a question of fact.' " (*Nguyen, supra,* 229 Cal.App.4th at p. 1552.)

Secondary Sources

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

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

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

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

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

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

McDonald, California Medical Malpractice: Law and Practice §§ 7:1-7:7 (Thomson Reuters)

456. Defendant Estopped From Asserting Statute of Limitations Defense

[*Name of plaintiff***] claims that even if [his/her/its] lawsuit was not filed on time, [he/she/it] may still proceed because [***name of defendant***] did or said something that caused [***name of plaintiff***] to delay filing the lawsuit. In order to establish the right to proceed, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] said or did something that caused [***name of plaintiff***] to believe that it would not be necessary to file a lawsuit;**

2. **That [***name of plaintiff***] relied on [***name of defendant***]'s conduct and therefore did not file the lawsuit within the time otherwise required;**

3. **That a reasonable person in [***name of plaintiff***]'s position would have relied on [***name of defendant***]'s conduct; [and]**

4. **[That after the limitation period had expired, [***name of defendant***]'s representations by words or conduct proved to not be true; and]**

5. **That [***name of plaintiff***] proceeded diligently to file suit once [he/she/it] discovered the need to proceed.**

It is not necessary that [*name of defendant***] have acted in bad faith or intended to mislead [***name of plaintiff***].**

New October 2008; Revised December 2014, June 2015

Directions for Use

Equitable estoppel, including any disputed issue of fact, is to be decided by the court, even if there are disputed issues of fact. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745 [170 Cal.Rptr.3d 551].) This instruction is for use if the court submits the issue to the jury for advisory findings.

There is perhaps a question as to whether all the elements of equitable estoppel must be proved in order to establish an estoppel to rely on a statute of limitations. These elements are (1) the party to be estopped must know the facts; (2) the party must intend that his or her conduct will be acted on, or must act in such a way that the party asserting the estoppel had the right to believe that the conduct was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) that party must rely upon the conduct to his or her detriment. (See *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766–767 [41 Cal.Rptr.3d 819]; see also *Olofsson v. Mission Linen Supply* (2012) 211 Cal.App.4th 1236, 1246 [150 Cal.Rptr.3d 446] [equitable estoppel to deny family leave under California Family Rights Act].)

Most cases do not frame the issue as one of equitable estoppel and its four elements. All that is required is that the defendant's conduct actually have misled the plaintiff, and that plaintiff reasonably have relied

on that conduct. Bad faith or an intent to mislead is not required. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384 [2 Cal.Rptr.3d 655, 73 P.3d 517]; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43 [21 Cal.Rptr.2d 110].) Nor does it appear that there is a requirement that the defendant specifically intended to induce the plaintiff to defer filing suit. Therefore, no specific intent element has been included. However, the California Supreme Court has stated that element 4 is to be given in a construction defect case in which the defendant has assured the plaintiff that all defects will be repaired. (See *Lantzy, supra*, 31 Cal.4th at p. 384.)

Sources and Authority

- "As the name suggests, equitable estoppel is an equitable issue for court resolution." (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)

- "While the judge determines equitable causes of action, the judge may (in rare instances) empanel an advisory jury to make preliminary factual findings. The factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder. '[W]hile a jury may be used for advisory verdicts as to questions of fact [in equitable actions], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.' " (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337], internal citations omitted.)

- "[CACI No. 456 is] appropriate for use when a trial court 'empanel[s] an advisory jury to make preliminary factual findings,' with respect to equitable estoppel … ." (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)

- "Equitable tolling and equitable estoppel are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. … Equitable estoppel, however, … comes into play only after the limitations period has run and addresses … the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life … from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' Thus, equitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling." (*Lantzy, supra*, 31 Cal.4th at pp. 383–384, internal citations omitted.)

- "Accordingly, (1) if one potentially liable for a construction defect represents, while the limitations period is still running, that all actionable damage has been or will be repaired, thus making it unnecessary to sue, (2) the plaintiff reasonably relies on this representation to refrain from bringing a timely action, (3) the representation proves false after the limitations period has expired, and (4) the plaintiff proceeds diligently once the truth is discovered, the defendant may be equitably estopped to assert the statute of limitations as a defense to the action." (*Lantzy, supra*, 31 Cal.4th at p. 384, internal citations omitted.)

- "Equitable estoppel does not require factually misleading statements in all cases." (*J. P. v.*

Carlsbad Unified Sch. Dist. (2014) 232 Cal.App.4th 323, 335 [181 Cal.Rptr.3d 286].)

- " 'An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. … To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss. … Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense." ' " (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152–1153 [113 Cal.Rptr.2d 70, 33 P.3d 487].)

- [T]-he parties may, by their words or conduct, be estopped from enforcing a written contract provision. Under the doctrine of estoppel, '[a] defendant may be equitably estopped from asserting a statutory or contractual limitations period as a defense if the defendant's act or omission caused the plaintiff to refrain from filing a timely suit and the plaintiff's reliance on the defendant's conduct was reasonable.' ' "It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.]" ' (*Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 78-79 [215 Cal.Rptr.3d 835].)

- " '~~A defendant will be estopped to invoke the statute of limitations where there has been "some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action." It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.]~~ "[W]hether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law." [Citations.]' " (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925–926 [73 Cal.Rptr.3d 216], internal citations omitted.)

- "It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act. Estoppel most commonly results from misleading statements about the need for or advisability of a claim; actual fraud or the intent to mislead is not essential. A fortiori, estoppel may certainly be invoked when there are acts of violence or intimidation that are intended to prevent the filing of a claim." (*John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 445 [256 Cal.Rptr. 766, 769 P.2d 948], internal citations omitted.)

- " 'Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when the plaintiff establishes by a preponderance of the evidence: (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment.' " (*J.P. supra,* 232 Cal.App.4th at p. 333.)

- "It is well settled that the doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. ~~Apropos to this rule are the following established principles: A person, by his conduct, may be estopped to rely on the statute; where the~~

~~delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense; one cannot justly or equitably lull his adversary into a false sense of security and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought; actual fraud in the technical sense, bad faith or intent to mislead are not essential to the creation of an estoppel, but it is sufficient that the defendant made misrepresentations or so conducted himself that he misled a party, who acted thereon in good faith, to the extent that such party failed to commence the action within the statutory period; a party has a reasonable time in which to bring his action after the estoppel has expired, not exceeding the period of limitation imposed by the statute for commencing the action; and that whether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law. It is also an established principle that in cases of estoppel to plead the statute of limitations, the same rules are applicable, as in cases falling within subdivision 4 of section 338, in determining when the plaintiff discovered or should have discovered the facts giving rise to his cause of action.~~" (*Estate of Pieper* (1964) 224 Cal.App.2d 670, 690–691 [37 Cal.Rptr. 46], internal citations omitted.)

- "Although 'ignorance of the identity of the defendant … will not *toll* the statute', 'a defendant may be *equitably estopped* from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity'." (*Vaca v. Wachovia Mortgage Corp.* (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)

- "Settlement negotiations are relevant and admissible to prove an estoppel to assert the statute of limitations." (*Holdgrafer, supra,* 160 Cal.App.4th at p. 927.)

- "The estoppel issue in this case arises in a unique context. Defendants' wrongful conduct has given rise to separate causes of action for property damage and personal injury with separate statutes of limitation. Where the plaintiffs reasonably rely on defendants' promise to repair the property damage without a lawsuit, is a jury permitted to find that plaintiffs' decision to delay filing a personal injury lawsuit was also reasonable? We conclude such a finding is permissible on the facts of this case." (*Shaffer, supra,* 17 Cal.App.4th at p. 43, internal citation omitted.)

- "At the very least, [plaintiff] cannot establish the second element necessary for equitable estoppel. [Plaintiff] argues that [defendant] was estopped to rely on the time bar of section 340.9 by its continued reconsideration of her claim after December 31, 2001, had passed. But she cannot prove [defendant] intended its reconsideration of the claim to be relied upon, or acted in such a way that [plaintiff] had a right to believe it so intended." (*Ashou, supra,* 138 Cal.App.4th at p. 767.)

- " 'It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act.' Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when a plaintiff establishes by a preponderance of the evidence (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) the plaintiff

was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment." (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1239–1240 [92 Cal.Rptr.3d 1], internal citation omitted.)

- "A nondisclosure is a cause of injury if the plaintiff would have acted so as to avoid injury had the plaintiff known the concealed fact. The plaintiff's reliance on a nondisclosure was reasonable if the plaintiff's failure to discover the concealed fact was reasonable in light of the plaintiff's knowledge and experience. Whether the plaintiff's reliance was reasonable is a question of fact for the trier of fact unless reasonable minds could reach only one conclusion based on the evidence. The fact that a plaintiff was represented by counsel and the scope and timing of the representation are relevant to the question of the reasonableness of the plaintiff's reliance." (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 187–188 [104 Cal.Rptr.3d 508], internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 566–581

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

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Action,* § 71.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions,* § 345.81 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions,* § 143.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions,* 4.42

457. Statute of Limitations—Equitable Tolling—Other Prior Proceeding

[*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].)

- " ' [P]utative class members would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations.' A trial court may, nonetheless, apply tolling to save untimely claims. But in doing so, the court must address 'two major policy considerations.' The first is 'protection of the class action device,' which requires the court to determine whether the denial of class certification was 'unforeseeable by class members,' or whether potential members, in anticipation of a negative ruling, had already filed ' "protective motions to intervene or to join in the event that a class was later found unsuitable," depriving class actions "of the efficiency and economy of litigation which is a principal purpose of the procedure." ' The second consideration is 'effectuation of the purposes of the statute of limitations,' and requires the court to determine whether commencement of the class suit '

> "notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." [Citation.] In these circumstances, … the purposes of the statute of limitations would not be violated by a decision to toll.' " (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 482-483 [216 Cal.Rptr.3d 390], internal citations omitted.)

- "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird, supra,* 2 Cal.4th at p. 618 [applying rule to one-year limitation period].)

- "We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language." (*Belton, supra,* 20 Cal.4th at p. 934 [rejecting application of rule to one-year limitation period].)

- "[E]quitable tolling has never been applied to allow a plaintiff to extend the time for pursuing an administrative remedy by filing a lawsuit. Despite broad language used by courts in employing the doctrine, equitable tolling has been applied almost exclusively to extend statutory deadlines for judicial actions, rather than deadlines for commencing administrative proceedings." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1109 [150 Cal.Rptr.3d 405].)

Secondary Sources

~~Rylaarsdam~~ Turner 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)

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) 2 Cal.App.5th 1, 8 [205 Cal.Rptr.3d 719], 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.Rptr.3d 332].)

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)

701. Definition of Right-of-Way

When the law requires a [driver/pedestrian] to "yield the right-of-way" to [another/a] [vehicle/pedestrian], this means that the [driver/pedestrian] must let the [other] [vehicle/pedestrian] go first.

Even if someone has the right-of-way, that person must use reasonable care to avoid an accident.

New September 2003

Directions for Use

This instruction should be given following a reading of the appropriate Vehicle Code section.

If the case involves a statutory right-of-way, the jury could also be given instructions on negligence per se, if applicable.

Sources and Authority

- "Right of Way" Defined. Vehicle Code section 525.
- Intersection Right of Way. Vehicle Code section 21800.
- Left Turn Right of Way. Vehicle Code section 21801.
- Approaching Entrance to Intersection. Vehicle Code section 21802.
- Intersection Controlled by Yield Right-of-Way Sign. Vehicle Code section 21803.
- Entry onto Highway. Vehicle Code section 21804.
- Equestrian Crossings. Vehicle Code section 21805.
- Authorized Emergency Vehicles. Vehicle Code section 21806.
- "Right of way rules have been described as simply establishing 'a practical basis for necessary courtesy on the highway.' " (*Eagar v. McDonnell Douglas Corp.* (1973) 32 Cal.App.3d 116, 122 [107 Cal.Rptr. 819].)
- "[A] driver entering a public highway from private property who collides with a vehicle traveling on the public road is not necessarily liable for a violation of [Vehicle Code] section 21804. Rather, the driver violates this section only if he or she fails to act as a ' "reasonably prudent and cautious [person]." ' Whether the driver failed to so act is a question of fact for the trier of fact to decide." (*Spriesterbach v. Holland* (2013) 215 Cal.App.4th 255, 266 [155 Cal.Rptr.3d 306], internal citation

omitted.)

- "Of course, even if [defendant] had the right of way, he had a duty to exercise reasonable care to avoid an accident, and the jury was so instructed." (*Eagar, supra,* 32 Cal.App.3d. at p. 123, fn. 3, internal citation omitted.)

- "Where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision. He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision." (*Minnegren v. Nozar* (2016) 4 Cal.App.5th 500, 508 [208 Cal.Rptr.3d 655].)

- "When, as here, each motorist has acted reasonably and the pedestrian has failed to exercise due care for her own safety, the law of this state does not permit the technical violation of the pedestrian's right of way statute to impose negligence on the motorists as a matter of law. The statute creates a preferential, but not absolute, right in favor of the pedestrian who is still under a duty to exercise ordinary care." (*Byrne v. City and County of San Francisco* (1980) 113 Cal.App.3d 731, 742 [170 Cal.Rptr. 302].)

- " 'Even where a right of way is given by statute, if conditions so require it to avoid injury to others, the right of way must be yielded.' " (*Bove v. Beckman* (1965) 236 Cal.App.2d 555, 563 [46 Cal.Rptr. 164], internal citation omitted.)

- "Although such a driver may have the right-of-way, he is not absolved of the duty to exercise ordinary care; may not proceed blindly in disregard of an obvious danger; and must be watchful of the direction in which danger is most likely to be apprehended." (*Malone v. Perryman* (1964) 226 Cal.App.2d 227, 234 [37 Cal.Rptr. 864].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~879~~1010, ~~880~~1011

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.15

2 Levy et al., California Torts, Ch. 20, *Motor Vehicles*, § 20.68 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Action*, §§ 82.10, 82.68 (Matthew Bender)

2 California Civil Practice: Torts § 25:26 (Thomson Reuters)

902. Duty of Common Carrier

Common carriers must carry passengers [or property] safely. Common carriers must use the highest care and the vigilance of a very cautious person. They must do all that human care, vigilance, and foresight reasonably can do under the circumstances to avoid harm to passengers [or property].

While a common carrier does not guarantee the safety of its passengers [or property that it transports], it must use reasonable skill to provide everything necessary for safe transportation, in view of the transportation used and the practical operation of the business.

New September 2003

Sources and Authority

- Duty of Common Carrier. Civil Code section 2100.

- "Common carriers bind themselves to carry safely those whom they take into their vehicles, and owe both a duty of utmost care and the vigilance of a very cautious person towards their passengers. Such carriers are responsible for any, even the slightest, negligence and are required to do all that human care, vigilance, and foresight reasonably can do under all the circumstances." (*Acosta v. Southern California Rapid Transit Dist.* (1970) 2 Cal.3d 19, 27 [84 Cal.Rptr. 184, 465 P.2d 72], internal citations omitted.)

- "The Civil Code treats common carriers differently depending on whether they act gratuitously or for reward. 'A carrier of persons without reward must use ordinary care and diligence for their safe carriage.' But '[c]arriers of persons for reward have long been subject to a heightened duty of care.' Such carriers 'must use the utmost care and diligence for [passengers'] safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill.' While these carriers are not insurers of their passengers' safety, '[t]his standard of care requires common carriers 'to do all that human care, vigilance, and foresight reasonably can do under the circumstances.' " (*Huang v. The Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 338 [208Cal.Rptr.3d 591], internal citations omitted.)

- ~~The elevated standard of care for common carriers is~~ "This elevated standard of care for common carriers has its origin in English common law. It is based on a recognition that the privilege of serving the public as a common carrier necessarily entails great responsibility, requiring common carriers to exercise a high duty of care towards their customers." (*Squaw Valley Ski Corporation v. Superior Court* (1992) 2 Cal.App.4th 1499, 1507 [3 Cal.Rptr.2d 897], internal citations omitted.)

- Common carriers are not insurers of their passengers' safety. "Rather, the degree of care and diligence which they must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance adopted and the practical operation of the business of the carrier." (*Lopez v. Southern Cal. Rapid Transit Dist.* (1985) 40 Cal.3d 780, 785 [221 Cal.Rptr. 840, 710 P.2d

907], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~923~~1055, ~~925~~1057

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.02 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers* (Matthew Bender)

2A California Points and Authorities, Ch. 33, *Carriers* (Matthew Bender)

22 California Legal Forms, Ch. 54, *Shipment of Property*, § 54.32 (Matthew Bender)

2 California Civil Practice: Torts §§ 28:6–28:9 (Thomson Reuters)

1123. Affirmative Defense—Design Immunity (Gov. Code, § 830.6)

[*Name of defendant***] claims that it is not responsible for harm to [***name of plaintiff***] caused by the plan or design of the [***insert type of property, e.g., highway***]. In order to prove this claim, [***name of defendant***] must prove both of the following:**

1. **That the plan or design was [prepared in conformity with standards previously] approved before [construction/improvement] by the [[***legislative body of the public entity, e.g., city council***]/[***other body or employee, e.g., city civil engineer***]] exercising [its/specifically delegated] discretionary authority to approve the plan or design; and**

2. **That the plan or design of the [***e.g., highway***] was a substantial factor in causing harm to [***name of plaintiff***].**

New December 2014; Revised June 2016

Directions for Use

Give this instruction to present the affirmative defense of design immunity to a claim for liability caused by a dangerous condition on public property. (Gov. Code, § 830.6; see *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364, 369 [169 Cal.Rptr.3d 880] [design immunity is an affirmative defense that the public entity must plead and prove].)

A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design before construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332].) The first two elements, causation and discretionary approval, are issues of fact for the jury to decide. (*Id.* at pp. 74–75; see also *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550 [100 Cal.Rptr.3d 494] [elements may be resolved as issues of law only if facts are undisputed].) The third element, substantial evidence of reasonableness, must be tried by the court, not the jury. (*Cornette, supra,* 26 Cal.4th at pp. 66−67; see Gov. Code, § 830.6.)

In element 1, select "its" if it is the governing body that has exercised its discretionary authority. Select "specifically delegated" if it is some other body or employee.

The discretionary authority to approve the plan or design must be "vested," which means that the body or employee actually had the express authority to approve it. This authority cannot be implied from the circumstances. (*Castro v. City of Thousand Oaks* (2015) 239 Cal.App.4th 1451, 1457 [192 Cal.Rptr 3d 376],)

Sources and Authority

- Design Immunity. Government Code section 830.6.

- "The purpose of design immunity 'is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. [Citation.]' ' "[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested." ' " (*Martinez, supra,* 225 Cal.App.4th at p. 369, internal citations omitted.)

- "Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.' " (*Cornette, supra,* 26 Cal.4th at p. 66.)

- "To prove [the discretionary approval element of design immunity], the entity must show that the design was approved 'in advance' of the construction 'by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved … .' 'Approval … is a vital precondition of the design immunity.' " (*Martinez, supra,* 225 Cal.App.4th at p. 369, internal citations omitted.)

- "In many cases, the evidence of discretionary authority to approve a design decision is clear, or even undisputed. For example, '[a] detailed plan, drawn up by a competent engineering firm, and approved by a city engineer in the exercise of his or her discretionary authority, is persuasive evidence of the element of prior approval. [Citation.]' When the discretionary approval issue is disputed, however, as it was here, we must determine whether the person who approved the construction had the discretionary authority to do so." (*Martinez, supra,* 225 Cal.App.4th at pp. 370−371, internal citations omitted.)

- "Discretionary approval need not be established with testimony of the individual who approved the project. A former employee may testify to the entity's "discretionary approval custom and practice" even if the employee was not involved in the approval process at the time the challenged plan was approved." (*Gonzales v. City of Atwater* (2016) 6 Cal.App.5th 929, 947 [212 Cal.Rptr.3d 137], internal citation omitted.)

- "[T]he focus of discretional authority to approve a plan or design is fixed by law and will not be implied. '[T]he public entity claiming design immunity must prove that the person or entity who made the decision is vested with the authority to do so. Recognizing "implied" discretionary approval would vitiate this requirement and provide public entities with a blanket release from liability that finds no support in section 830.6.' " (*Castro, supra,* 239 Cal.App.4th at p. 1457.)

- "We conclude that the discretionary approval element of section 830.6 does not implicate the question whether the employee who approved the plans was aware of design standards or was aware that the design deviated from those standards. The issue of the adequacy of the deliberative process with respect to design standards may be considered in connection with the court's

determination whether there is substantial evidence that the design was reasonable. In addition, the discretionary approval element does not require the entity to demonstrate in its prima facie case that the employee who had authority to and did approve the plans also had authority to disregard applicable standards." (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 343 [195 Cal.Rptr.3d 773, 362 P.3d 417].)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~229~~273, ~~280~~ 234 et seq.

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, Liability For "Dangerous Conditions" Of Public Property, ¶ 2:2855 et seq. (The Rutter Group)

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Government Claims Act*, § 464.85[2] (Matthew Bender)

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

1200. Strict Liability—Essential Factual Elements

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

[contained a manufacturing defect;] [or]

[was defectively designed;] [or]

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

New September 2003

Sources and Authority

- "Products liability is the name currently given to the area of the law involving the liability of those who supply goods or products for the use of others to purchasers, users, and bystanders for losses of various kinds resulting from so-called defects in those products." (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 30 [192 Cal.Rptr.3d 158].)

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

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

- "Under the Restatement [Rest.3d Torts, Products Liability, § 2], a product is defective if it: '(a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product; [¶] (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe; [¶] (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.' " (*Brady v. Calsol, Inc.* (2015) 241 Cal.App.4th 1212, 1218–1219 [194 Cal.Rptr.3d 243].)

- "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. ... The purpose of such liability is to insure that the costs of injuries resulting from defective products

are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 62-63 [27 Cal.Rptr. 697, 377 P.2d 897].)

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

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

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

- "Generally, the imposition of strict liability hinges on the extent to which a party was 'responsible for placing products in the stream of commerce.' When the purchase of a product 'is the primary objective or essence of the transaction, strict liability applies even to those who are mere conduits in distributing the product to the consumer.' In contrast, the doctrine of strict liability is ordinarily inapplicable to transactions 'whose primary objective is obtaining services,' and to transactions in which the 'service aspect predominates and any product sale is merely incidental to the provision of the service.' Thus, '[i]n a given transaction involving both products and services, liability will often depend upon the defendant's role.' " (*Hernandezcueva v. E.F. Brady Co., Inc.* (2015) 243 Cal.App.4th 249, 258 [196 Cal.Rptr.3d 594], internal citations omitted.)

- "[U]nder the stream-of-commerce approach to strict liability[,] no precise legal relationship to the member of the enterprise causing the defect to be manufactured or to the member most closely connected with the customer is required before the courts will impose strict liability. It is the defendant's participatory connection, for his personal profit or other benefit, with the injury-producing product and with the enterprise that created consumer demand for and reliance upon the product (and not the defendant's legal relationship (such as agency) with the manufacturer or other entities involved in the manufacturing-marketing system) which calls for imposition of strict liability." (*Hernandezcueva, supra,* 243 Cal.App.4th at pp. 257–258.)

- " '[S]trict liability is not imposed even if the defendant is technically a "link in the chain" in getting the product to the consumer market if the judicially perceived policy considerations are not satisfied. Thus, a defendant will not be held strictly liable unless doing so will enhance product safety, maximize protection to the injured plaintiff, and apportion costs among the defendants. [Citations.]' " (*Hernandezcueva, supra,* 234 Cal.App.4th at p. 258.)

- "The component parts doctrine provides that the manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 355 [135 Cal.Rptr.3d 288, 266 P.3d 987].)

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

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

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

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

- "As a provider of services rather than a seller of a product, the hospital is not subject to strict liability for a defective product provided to the patient during the course of his or her treatment." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 316 [213 Cal.Rptr.3d 82] [however, causes of action based in negligence are not affected].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th ed. 2005~~11th ed. 2017) Torts, §§ ~~1428~~1591–~~1437~~1601

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

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

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

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

1205. Strict Liability—Failure to Warn—Essential Factual Elements

[*Name of plaintiff***] claims that the [***product***] lacked sufficient [instructions] [or] [warning of potential [risks/side effects/allergic reactions]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That the [***product***] had potential [risks/side effects/allergic reactions] that were [known/ [or] knowable in light of the [scientific/ [and] medical] knowledge that was generally accepted in the scientific community] at the time of [manufacture/distribution/sale];**

3. **That the potential [risks/side effects/allergic reactions] presented a substantial danger when the [***product***] is used or misused in an intended or reasonably foreseeable way;**

4. **That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];**

5. **That [***name of defendant***] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];**

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

7. **That the lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [***name of plaintiff***]'s harm.**

[The warning must be given to the prescribing physician and must include the potential risks, side effects, or allergic reactions that may follow the foreseeable use of the product. [*Name of defendant***] had a continuing duty to warn physicians as long as the product was in use.]**

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

Directions for Use

With regard to element 2, it has been often stated in the case law that a manufacturer is liable for failure to warn of a risk that is "knowable in light of generally recognized and prevailing best scientific and medical knowledge available." (See, e.g., *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002 [281 Cal.Rptr. 528, 810 P.2d 549]; *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347]; *Saller v. Crown Cork & Seal Company* (2010) 187 Cal.App.4th 1220, 1239 [115 Cal.Rptr.3d 151]; *Rosa v. City of Seaside* (N.D. Cal. 2009) 675 F.Supp.2d 1006, 1012.) The advisory committee believes that this standard is captured by the phrase "generally accepted in the scientific community." A risk may be "generally recognized" as a view (knowledge) advanced by one

body of scientific thought and experiment, but it may not be the "prevailing" or "best" scientific view; that is, it may be a minority view. The committee believes that when a risk is (1) generally recognized (2) as prevailing in the relevant scientific community, and (3) represents the best scholarship available, it is sufficient to say that the risk is knowable in light of "the generally accepted" scientific knowledge.

The last bracketed paragraph should be read only in prescription product cases: "In the case of prescription drugs and implants, the physician stands in the shoes of the 'ordinary user' because it is through the physician that a patient learns of the properties and proper use of the drug or implant. Thus, the duty to warn in these cases runs to the physician, not the patient." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App 5th 276, 319 [213 Cal.Rptr.3d 82~~*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1483 [81 Cal.Rptr.2d 252~~].)

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

Sources and Authority

- "Our law recognizes that even ' "a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes 'defective' simply by the absence of a warning." …' Thus, manufacturers have a duty to warn consumers about the hazards inherent in their products. The purpose of requiring adequate warnings is to inform consumers about a product's hazards and faults of which they are unaware, so that the consumer may then either refrain from using the product altogether or avoid the danger by careful use." (*Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 577 [90 Cal.Rptr.3d 414], internal citations and footnote omitted.)

- "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299].)

- "The 'known or knowable' standard arguably derives from negligence principles, and failure to warn claims are generally ' "rooted in negligence" to a greater extent than' manufacturing or design defect claims. Unlike those other defects, a ' "warning defect" relates to a failure extraneous to the product itself' and can only be assessed by examining the manufacturer's conduct. These principles notwithstanding, California law recognizes separate failure to warn claims under both strict liability

and negligence theories. In general, a product seller will be *strictly liable* for failure to warn if a warning was feasible and the absence of a warning caused the plaintiff's injury. Reasonableness of the seller's failure to warn is immaterial in the strict liability context. Conversely, to prevail on a claim for *negligent* failure to warn, the plaintiff must prove that the seller's conduct fell below the standard of care. If a prudent seller would have acted reasonably in not giving a warning, the seller will not have been negligent." (*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 181 [202 Cal.Rptr.3d 460, 370 P.3d 1022], original italics, footnote and internal citations omitted.)

- "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. … [¶] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418].)

- "The actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue. We view the standard to require that the manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances." (*Carlin, supra,* 13 Cal.4th at p. 1113, fn. 3.)

- "[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution." (*Anderson, supra,* 53 Cal.3d at p. 1004.)

- "[T]here can be no liability for failure to warn where the instructions or warnings sufficiently alert the user to the possibility of danger." (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1042 [228 Cal.Rptr. 768], internal citation omitted.)

- "A duty to warn or disclose danger arises when an article is or should be known to be dangerous for its intended use, either inherently or because of defects." (*DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 343 [195 Cal.Rptr. 867], internal citation omitted.)

- " California is well settled into the majority view that knowledge, actual or constructive, is a requisite for strict liability for failure to warn ... ." (*Anderson, supra,* 53 Cal.3d at p. 1000.)

- "[T]he duty to warn is not conditioned upon [actual or constructive] knowledge [of a danger] where the defectiveness of a product depends on the adequacy of instructions furnished by the supplier which are essential to the assembly and use of its product." (*Midgley v. S. S. Kresge Co.* (1976) 55 Cal.App.3d 67, 74 [127 Cal.Rptr. 217].)

- Under *Cronin,* plaintiffs in cases involving manufacturing and design defects do not have to prove that a defect made a product unreasonably dangerous; however, that case "did not preclude weighing the degree of dangerousness in the failure to warn cases." (*Cavers v. Cushman Motor Sales, Inc.*

(1979) 95 Cal.App.3d 338, 343 [157 Cal.Rptr. 142].)

- "Two types of warnings may be given. If the product's dangers may be avoided or mitigated by proper use of the product, 'the manufacturer may be required adequately to instruct the consumer as to how the product should be used.' If the risks involved in the use of the product are unavoidable, as in the case of potential side effects of prescription drugs, the supplier must give an adequate warning to enable the potential user to make an informed choice whether to use the product or abstain." (*Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522, 532 [166 Cal.Rptr.3d 202], internal citation omitted.)

- "[T]he warning requirement is not limited to unreasonably or unavoidably dangerous products. Rather, directions or warnings are in order where reasonably required *to prevent the use of a product from becoming unreasonably dangerous*. It is the lack of such a warning which renders a product unreasonably dangerous and therefore defective." (*Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143, 1151 [238 Cal.Rptr. 18], original italics.)

- "In most cases, ... the adequacy of a warning is a question of fact for the jury." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320 [273 Cal.Rptr. 214].)

- "There is no duty to warn of known risks or obvious dangers." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1304 [144 Cal.Rptr.3d 326].)

- "[A] pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community." (*Carlin, supra,* 13 Cal.4th at p. 1116.)

- "To be liable in California, even under a strict liability theory, the plaintiff must prove that the defendant's failure to warn was a substantial factor in causing his or her injury. (CACI No. 1205.) The natural corollary to this requirement is that a defendant is not liable to a plaintiff if the injury would have occurred even if the defendant had issued adequate warnings." (*Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1604 [116 Cal.Rptr.3d 453].)

- "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. 'Modern 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.' " (*Persons v. Salomon N. Am.* (1990) 217 Cal.App.3d 168, 178 [265 Cal.Rptr. 773], internal citation omitted.)

- "[A] manufacturer's liability to the ultimate consumer may be extinguished by 'intervening cause' where the manufacturer either provides adequate warnings to a middleman or the middleman alters the product before passing it to the final consumer." (*Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 661 [74 Cal.Rptr.3d 359].)

- " 'A manufacturer's duty to warn is a continuous duty which lasts as long as the product is in use.' [¶] ... [T]he manufacturer must continue to provide physicians with warnings, at least so long as it is manufacturing and distributing the product." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1482 [81 Cal.Rptr.2d 252]~~*Valentine, supra,* 68 Cal.App.4th at p. 1482~~.)

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

- "California law does not impose a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 361 [135 Cal.Rptr.3d 288, 266 P.3d 987].)

- "The *O'Neil* [*supra*] court concluded that *Tellez-Cordova* [*Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577] marked an exception to the general rule barring imposition of strict liability on a manufacturer for harm caused by another manufacturer's product. That exception is applicable when 'the defendant's own product contributed substantially to the harm … .' In expounding the exception, the court rejected the notion that imposition of strict liability on manufacturers is appropriate when it is merely foreseeable that their products will be used in conjunction with products made or sold by others. The *O'Neil* court further explained: 'Recognizing a duty to warn was appropriate in *Tellez-Cordova* because there the defendant's product was intended to be used with another product *for the very activity that created a hazardous situation.* Where the intended use of a product inevitably creates a hazardous situation, it is reasonable to expect the manufacturer to give warnings. Conversely, where the hazard arises entirely from another product, and the defendant's product does not create or contribute to that hazard, liability is not appropriate.' " (*Sherman v. Hennessy Industries, Inc.* (2015) 237 Cal.App.4th 1133, 1142 [188 Cal.Rptr.3d 769], original italics, internal citations omitted ; see also *Hetzel v. Hennessy Industries, Inc.* (2016) 247 Cal.App.4th 521, 529 [202 Cal.Rptr.3d 310] [*O'Neil* does not require evidence of exclusive use, but rather requires a showing of inevitable use]; *Rondon v. Hennessy Industries, Inc.* (2016) 247 Cal.App.4th 1367, 1379 [202 Cal.Rptr.3d 773] [same].)

- "[L]ike a manufacturer, a raw material supplier has a duty to warn about product risks that are known or knowable in light of available medical and scientific knowledge." (*Webb, supra*, 63 Cal.4th at p. 181.)

- [T]he duty of a component manufacturer or supplier to warn about the hazards of its products is not unlimited. … 'Making suppliers of inherently safe raw materials and component parts pay for the mistakes of the finished product manufacturer would not only be unfair, but it also would impose and intolerable burden on the business world . . . . Suppliers of versatile materials like chains, valves, sand gravel, etc., cannot be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components.' Thus, cases have subjected claims made against component suppliers to two related doctrines, the 'raw material supplier defense' and 'the bulk sales/sophisticated purchaser rule.' Although the doctrines are distinct, their application oftentimes overlaps and together they present factors which should be carefully considered in evaluating the liability of component suppliers. Those factors include whether the raw materials or components are inherently dangerous, whether the materials are significantly altered before integration into an end product, whether the supplier was involved in designing the

end-product and whether the manufacturer of the end product was in a position to discover and disclose hazards." (*Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 837 [71 Cal.Rptr.2d 817].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, §§ ~~1467~~1631~~–1479~~1643

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability for Defective Products*, ¶¶ 2:1275–2:1276 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.05 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.164 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.194 (Matthew Bender)

1207B. Strict Liability—Comparative Fault of Third Person

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

1. **[***Insert one or both of the following:***]**

   [That [*name(s) or description(s) of nonparty tortfeasor(s)***] negligently modified the [***product***];] [or]**

   [That [*name(s) or description(s) of nonparty tortfeasor(s)***] was [otherwise] [negligent/at fault];]**

   and

2. **That this [negligence/fault] was a substantial factor in causing [***name of plaintiff***]'s harm.**

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

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

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

Derived from former CACI No. 1207 April 2009; Revised December 2009, December 2015

Directions for Use

Give this instruction if the defendant has raised the issue of the comparative fault of a third person who is not also a defendant at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (See *Dafonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140]; see also CACI No. 406, *Apportionment of Responsibility*.) For an instruction on the comparative fault of the plaintiff, see CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*.

This instruction may also be used to allocate liability between a negligent and a strictly liable defendant (*Safeway Stores, Inc. v. Nest-Kart* (1978) 21 Cal.3d 322, 332 [146 Cal. Rptr. 550, 579 P.2d 441].) or between two strictly liable defendants if multiple products are involved. (*Arena v. Owens-Corning Fiberglas Corp.* (1998) 63 Cal.App.4th 1178, 1198 [74 Cal.Rptr.2d 580].) However, there is no

comparative fault among entities in the distribution chain of the same product. Each remains fully liable for the plaintiff's economic and noneconomic damages. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 325 [213 Cal.Rptr.3d 82~~*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 623 [65 Cal.Rptr.2d 532~~].)

In the first sentence, include "also" if the defendant concedes some degree of liability or alleges the comparative fault of the plaintiff, and select "fault" unless the only basis for liability at issue is negligence. Include the last paragraph if any of the defendants or others alleged to have contributed to the plaintiff's harm are not individuals.

Subsequent misuse or modification may be considered in determining comparative fault if it was a substantial factor in causing the plaintiff's injury. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 17 [56 Cal.Rptr.2d 455].) Unforeseeable misuse or modification can be a complete defense if it is the sole cause of the plaintiff's harm. (See *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.

Sources and Authority

- "[T]he comparative indemnity doctrine may be utilized to allocate liability between a negligent and a strictly liable defendant." (*Safeway Stores, Inc., supra,* 21 Cal.3d at p. 332.)

- "The record does not support [defendant]'s assertion that modification of the bracket was the sole cause of the accident. The record does indicate that if the bracket had not been modified there would have been no need to remove it to reach the flange bolts, and thus the modification was one apparent cause of [plaintiff]'s death. However, a number of other causes, or potential causes, were established, including: [plaintiff]'s failure to wear protective clothing; [third party]'s failure to furnish the correct replacement bracket for the valve; [third party]'s failure to furnish [employer] with all of the literature it received from [defendant]; and negligence on the part of [employer] independent of its modification of the valve, including violations of various federal Occupational Safety and Health Administration regulations governing equipment and training in connection with the accident." (*Torres, supra,* 49 Cal.App.4th at p. 17.)

- "This case does not present a situation where several defendants in the chain of distribution seek apportionment under Proposition 51 based on their relevant fault for injuries caused by a single defective product. In such a situation, courts have held that Proposition 51 does not apply and each defendant is liable for the plaintiff's full noneconomic damages under traditional principles of joint and several liability." (*Bigler-Engler, supra,* 7 Cal.App.5th at p. 325, fn. 35~~'We conclude Proposition 51 is inapplicable; a strictly liable defendant may not reduce or eliminate its responsibility to plaintiff for damages caused by a defective product by shifting blame to others in the product's chain of distribution." (*Wimberly v. Derby Cycle Corp.* (1997) 56 Cal.App.4th 618, 623 [65 Cal.Rptr.2d 532]~~.)

- "Proposition 51 is applicable in a strict liability asbestos exposure case where multiple products cause the plaintiff's injuries and the evidence provides a basis to allocate liability for noneconomic damages between the defective products. Where the evidence shows that a particular product is responsible for only a part of plaintiff's injury, Proposition 51 requires apportionment of the responsibility for that

part of the injury to that particular product's chain of distribution." (*Arena*, *supra*, 63 Cal.App.4th at p. 1198.)

Secondary Sources

Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, § ~~1542~~1709

California Products Liability Actions, Ch. 8, *Defenses*, §§ 8.03, 8.04 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.53, 460.182 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.253 (Matthew Bender)

1500. Former Criminal Proceeding—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully caused a criminal proceeding to be brought against [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was actively involved in causing [***name of plaintiff***] to be prosecuted [or in causing the continuation of the prosecution];**

[2. That the criminal proceeding ended in [*name of plaintiff***]'s favor;]**

[3. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were grounds for causing [***name of plaintiff***] to be arrested or prosecuted;]**

4. **That [***name of defendant***] acted primarily for a purpose other than to bring [***name of plaintiff***] to justice;**

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

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

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether a reasonable person in [***name of defendant***]'s circumstances would have believed that there were grounds for causing [***name of plaintiff***] to be arrested or prosecuted. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008, June 2015

Directions for Use

Give this instruction in a malicious prosecution case based on an underlying criminal prosecution. If there is an issue as to what it means to be "actively involved" in element 1, also give CACI No. 1504, *Former Criminal Proceeding—"Actively Involved" Explained*.

Malicious prosecution requires that the criminal proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. (See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.

- "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause." (*Cedars-Sinai Medical Center v. Superior Court* (1988) 206 Cal.App.3d 414, 417 [253 Cal.Rptr. 561], internal citation omitted.)

- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)

- "[A] cause of action for malicious prosecution cannot be premised on an arrest that does not result in formal charges (at least when the arrest is not pursuant to a warrant)." (*Van Audenhove v. Perry* (2017) 11 Cal.App.5th 915, 917 [217 Cal.Rptr.3d 843] [rejecting Rest.2d Torts, § 654. subd. (2)(c)].)

- "Cases dealing with actions for malicious prosecution against private persons require that the

defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal.Rptr. 241, 527 P.2d 865], internal citations omitted.)

- "[T]he effect of the approved instruction [in *Dreux v. Domec* (1861) 18 Cal. 83] was to impose liability upon one who had not taken part until after the commencement of the prosecution." (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263 [138 Cal.Rptr. 654].)

- "When, as here, the claim of malicious prosecution is based upon initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant … to suspect the plaintiff … had committed a crime." (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 465 [156 Cal.Rptr.3d 901].)

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when … there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)

- "Admittedly, the fact of the grand jury indictment gives rise to a prima facie case of probable cause, which the malicious prosecution plaintiff must rebut. However, as respondents' own authorities admit, that rebuttal may be by proof that the indictment was based on false or fraudulent testimony." (*Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 900 [195 Cal.Rptr. 448].)

- "Acquittal of the criminal charge, in the criminal action, did not create a conflict of evidence on the issue of probable cause. [Citations.]" (*Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 352, fn. 3 [313 P.2d 123].)

- " '[T]he plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.' Termination of the prior proceeding is not necessarily favorable simply because the party prevailed in the prior proceeding; the termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra,* 64 Cal.App.4th at p. 128, internal citations omitted.)

- " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.' " (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274], quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335].)

- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an

action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)

- "Generally, the requirements of the doctrine of collateral estoppel 'will be met when courts are asked to give preclusive effect to preliminary hearing probable cause findings in subsequent civil actions for false arrest and malicious prosecution. [Citation.]' 'A determination of probable cause at a preliminary hearing may preclude a suit for false arrest or for malicious prosecution'].) 'One notable exception to this rule would be in a situation where the plaintiff alleges that the arresting officer lied or fabricated evidence presented at the preliminary hearing. [Citation.] When the officer misrepresents the nature of the evidence supporting probable cause and that issue is not raised at the preliminary hearing, a finding of probable cause at the preliminary hearing would not preclude relitigation of the issue of integrity of the evidence.' Defendants argue, and we agree, that the stated exception itself contains an exception—i.e., if the plaintiff alleges that the arresting officer lied or fabricated evidence at the preliminary hearing, plaintiff challenges that evidence at the preliminary hearing as being false, and the magistrate decides the credibility issue in the arresting officer's favor, then collateral estoppel still may preclude relitigation of the issue in a subsequent civil proceeding involving probable cause." (*Greene v. Bank of America* (2015) 236 Cal.App.4th 922, 933 [186 Cal.Rptr.3d 887], internal citations omitted.)

- "The plea of nolo contendere is considered the same as a plea of guilty. Upon a plea of nolo contendere the court shall find the defendant guilty, and its legal effect is the same as a plea of guilty for all purposes. It negates the element of a favorable termination, which is a prerequisite to stating a cause of action for malicious prosecution." (*Cote, supra,* 218 Cal.App.3d at p. 803, internal citation omitted.)

- " '*Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.*' " (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185 [156 Cal.Rptr. 745], disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882, original italics, internal citations omitted.)

- " 'For purposes of a malicious prosecution claim, malice "is not limited to actual hostility or ill will toward the plaintiff. …" [Citation.]' '[I]f the defendant had no substantial grounds for believing in the plaintiff's guilt, but, nevertheless, instigated proceedings against the plaintiff, it is logical to infer that the defendant's motive was improper.' " (*Greene, supra,* 216 Cal.App.4th at pp. 464-465, internal citation omitted.)

- "Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff." (*Verdier, supra,* 152 Cal.App.2d at p. 354.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, §§ ~~469~~552–~~485~~570, ~~511~~605

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10–357.32 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20–147.53 (Matthew Bender)

1501. Wrongful Use of Civil Proceedings

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

1. **That [***name of defendant***] was actively involved in bringing [or continuing] the lawsuit;**

[2. That the lawsuit ended in [*name of plaintiff***]'s favor;]**

[3. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were reasonable grounds to bring the lawsuit against [***name of plaintiff***];]**

4. **That [***name of defendant***] acted primarily for a purpose other than succeeding on the merits of the claim;**

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

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

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 2 above, whether the earlier lawsuit ended in [his/her/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether [***name of defendant***] had reasonable grounds for bringing the earlier lawsuit against [him/her/it]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008

Directions for Use

Malicious prosecution requires that the proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the

proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, the jury may be required to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. (See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury to decide.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.

- "Although the tort is usually called 'malicious prosecution,' the word 'prosecution' is not a particularly apt description of the underlying civil action. The Restatement uses the term 'wrongful use of civil proceedings' to refer to the tort." (5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 486, internal citations omitted.)

- "To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor; (2) was brought without probable cause; and (3) was initiated with malice." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 50 [118 Cal.Rptr. 184, 529 P.2d 608], internal citations omitted.)

- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)

- "The malicious commencement of a civil proceeding is actionable because it harms the individual against whom the claim is made, and also because it threatens the efficient administration of justice. The individual is harmed because he is compelled to defend against a fabricated claim which not only subjects him to the panoply of psychological pressures most civil defendants suffer, but also the additional stress of attempting to resist a suit commenced out of spite or ill will, often magnified by

slanderous allegations in the pleadings." (*Merlet v. Rizzo* (1998) 64 Cal.App.4th 53, 59 [75 Cal.Rptr.2d 83], internal citation omitted.)

- "[The litigation privilege of Civil Code section 47] has been interpreted to apply to virtually all torts except malicious prosecution." (*Kimmel v. Goland* (1990) 51 Cal.3d 202, 209 [271 Cal.Rptr. 191, 793 P.2d 524].)

- "Liability for malicious prosecution is not limited to one who initiates an action. A person who did not file a complaint may be liable for malicious prosecution if he or she 'instigated' the suit or 'participated in it at a later time.' " (*Nunez v. Pennisi* (2015) 241 Cal.App.4th 861, 873 [193 Cal.Rptr.3d 912].)

- "[A] cause of action for malicious prosecution lies when predicated on a claim for affirmative relief asserted in a cross-pleading even though intimately related to a cause asserted in the complaint." (*Bertero, supra,* 13 Cal.3d at p. 53.)

- "A claim for malicious prosecution need not be addressed to an entire lawsuit; it may … be based upon only some of the causes of action alleged in the underlying lawsuit." (*Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 333 [109 Cal.Rptr.3d 143].)

- "[A] lawyer is not immune from liability for malicious prosecution simply because the general area of law at issue is complex and there is no case law with the same facts that establishes that the underlying claim was untenable. Lawyers are charged with the responsibility of acquiring a reasonable understanding of the law governing the claim to be alleged. That achieving such an understanding may be more difficult in a specialized field is no defense to alleging an objectively untenable claim." (*Franklin Mint Co., supra,* 184 Cal.App.4th at p. 346.)

- "Our repeated references in *Bertero* to the types of harm suffered by an 'individual' who is forced to defend against a baseline suit do not indicate … that a malicious prosecution action can be brought only by an individual. On the contrary, there are valid policies which would be furthered by allowing nonindividuals to sue for malicious prosecution." (*City of Long Beach v. Bozek* (1982) 31 Cal.3d 527, 531 [183 Cal.Rptr. 86, 645 P.2d 137], reiterated on remand from United States Supreme Court at 33 Cal.3d 727 [but holding that public entity cannot sue for malicious prosecution].)

- "[T]he courts have refused to permit malicious prosecution claims when they are based on a prior proceeding that is (1) less formal or unlike the process in the superior court (i.e., a small claims hearing, an investigation or application not resulting in a formal proceeding), (2) purely defensive in nature, or (3) a continuation of an existing proceeding." (*Merlet, supra,* 64 Cal.App.4th at p. 60.)

- "[I]t is not enough that the present plaintiff (former defendant) prevailed in the action. The termination must ' "reflect on the merits," ' and be such that it 'tended to indicate [the former defendant's] innocence of or lack of responsibility for the alleged misconduct.' " (*Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 450 [98 Cal.Rptr.3d 183], internal citations omitted.)

- " '[A] voluntary dismissal on technical grounds, such as lack of jurisdiction, laches, the statute of limitations or prematurity, does not constitute a favorable termination because it does not reflect on

the substantive merits of the underlying claim. … ' " (*Drummond, supra,* 176 Cal.App.4th at p. 456.)

- "[Code of Civil Procedure] Section 581c, subdivision (c) provides that where a motion for judgment of nonsuit is granted, 'unless the court in its order for judgment otherwise specifies, the judgment of nonsuit operates as an adjudication upon the merits.' … [¶] We acknowledge that not every judgment of nonsuit should be grounds for a subsequent malicious prosecution action. Some will be purely technical or procedural and will not reflect the merits of the action. In such cases, trial courts should exercise their discretion to specify that the judgment of nonsuit shall not operate as an adjudication upon the merits." (*Nunez, supra,* 241 Cal.App.4th at p. 874.)

- "[A] malicious prosecution plaintiff is not precluded from establishing favorable termination where severable claims are adjudicated in his or her favor." (*Sierra Club Found., supra,* 72 Cal.App.4th at p. 1153, internal citation omitted.)

- " ' "A voluntary dismissal may be an implicit concession that the dismissing party cannot maintain the action and may constitute a decision on the merits. [Citations.] 'It is not enough, however, merely to show that the proceeding was dismissed.' [Citation.] The reasons for the dismissal of the action must be examined to determine whether the termination reflected on the merits." [Citations.]' Whether that dismissal is a favorable termination for purposes of a malicious prosecution claim depends on whether the dismissal of the [earlier] Lawsuit is considered to be on the merits reflecting [plaintiff's 'innocence' of the misconduct alleged." (*JSJ Limited Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1524 [141 Cal.Rptr.3d 338], internal citations omitted.)

- "If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)

- "[W]hen a dismissal results from negotiation, settlement, or consent, a favorable termination is normally not recognized. Under these latter circumstances, the dismissal reflects ambiguously on the merits of the action." (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 184–185 [156 Cal.Rptr. 745], internal citations omitted, disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882.)

- "Not every case in which a terminating sanctions motion is granted necessarily results in a 'favorable termination.' But where the record from the underlying action is devoid of any attempt during discovery to substantiate allegations in the complaint, and the court's dismissal is justified by the plaintiff's lack of evidence to submit the case to a jury at trial, a prima facie showing of facts sufficient to satisfy the 'favorable termination' element of a malicious prosecution claim is established … ." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 219 [105 Cal.Rptr.3d 683].)

- "[T]he existence or absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury …. [¶] [It] requires a sensitive evaluation of legal principles and precedents, a task generally beyond the ken of lay jurors ... ." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 875.)

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable

cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when … there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)

- "Whereas the malice element is directly concerned with the *subjective* mental state of the defendant in instituting the prior action, the probable cause element calls on the trial court to make an objective determination of the 'reasonableness' of the defendant's conduct, i.e., to determine whether, on the basis of the facts known to the defendant, the institution of the prior action was legally tenable." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 878, original italics.)

- " 'The benchmark for legal tenability is whether any reasonable attorney would have thought the claim was tenable. [Citation.]' " (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 114 [151 Cal.Rptr.3d 117], internal citation omitted.)

- " 'The facts to be analyzed for probable cause are those known to the defendant [in the malicious prosecution action] at the time the underlying action was filed.' " (*Walsh v. Bronson* (1988) 200 Cal.App.3d 259, 264 [245 Cal.Rptr. 888], internal citations omitted.)

- "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 292 [46 Cal.Rptr.3d 638, 139 P.3d 30].)

- "[W]e reject their contention that unpled hidden theories of liability are sufficient to create probable cause." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1542 [161 Cal.Rptr.3d 700].)

- "California courts have held that victory at *trial*, though reversed on appeal, conclusively establishes probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383 [90 Cal.Rptr.2d 408], original italics.)

- "California courts have long embraced the so-called interim adverse judgment rule, under which 'a trial court judgment or verdict in favor of the plaintiff or prosecutor in the underlying case, unless obtained by means of fraud or perjury, establishes probable cause to bring the underlying action, even though the judgment or verdict is overturned on appeal or by later ruling of the trial court.' This rule reflects a recognition that '[c]laims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.' That is to say, if a claim succeeds at a hearing on the merits, then, unless that success has been procured by certain improper means, the claim cannot be 'totally and completely without merit.' Although the rule arose from cases that had been resolved after trial, the rule has also been applied to the 'denial of defense summary judgment motions, directed verdict motions, and similar efforts at pretrial termination of the underlying case.' " (*Parrish v. Latham & Watkins* (2017) 3 Cal.5th 767, 776–777 [-- Cal.Rptr.3d --, -- P.3d --], internal citations omitted.)

- ~~"Certain nonfinal rulings on the merits may serve as the basis for concluding that there was probable cause for prosecuting the underlying case on which a subsequent malicious prosecution action is based. This is based on the notion that '[c]laims that have succeeded at a hearing on the merits, even if that result is subsequently reversed by the trial or appellate court, are not so lacking in potential merit that a reasonable attorney or litigant would necessarily have recognized their frivolousness.' Thus, for instance, the denial of a nonsuit motion and a subsequent plaintiff's jury verdict has been found sufficient to constitute probable cause, even though the trial court or appellate court later reverses that verdict. Similarly, the denial of a defense summary judgment motion 'normally establishes there was probable cause to sue, thus barring a later malicious prosecution suit.' " (*Yee v. Cheung* (2013) 220 Cal.App.4th 184, 200–201 [162 Cal.Rptr.3d 851], internal citations omitted.)~~

- ~~"California courts have held that victory at *trial*, though reversed on appeal, conclusively establishes probable cause." (*Roberts v. Sentry Life Insurance* (1999) 76 Cal.App.4th 375, 383 [90 Cal.Rptr.2d 408], original italics.)~~

- ~~" '[T]here may be situations where denial of summary judgment should not irrefutably establish probable cause. For example, if denial of summary judgment was induced by materially false facts submitted in opposition, equating denial with probable cause might be wrong. Summary judgment might have been granted but for the false evidence.' " (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 451 [117 Cal.Rptr.3d 3]~~.)

- "[T]he fraud exception requires ' "knowing use of false and perjured testimony." ' " (*Antounian v. Louis Vuitton Malletier* (2010) 189 Cal.App.4th 438, 452 [117 Cal.Rptr.3d 3]~~*Antounian, supra*, 189 Cal.App.4th at p. 452~~.)

- "Probable cause may be present even where a suit lacks merit. ... Suits which all reasonable lawyers agree totally lack merit—that is, those which lack probable cause—are the least meritorious of all meritless suits. Only this subgroup of meritless suits present[s] no probable cause." (*Roberts, supra*, 76 Cal.App.4th at p. 382.)

- "[A]n attorney may be held liable for malicious prosecution for continuing to prosecute a lawsuit discovered to lack probable cause." (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 970 [12 Cal.Rptr.3d 54, 87 P.3d 802].)

- "[W]here several claims are advanced in the underlying action, each must be based on probable cause." (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 459 [197 Cal.Rptr.3d 227].)

- "As an element of the tort of malicious prosecution, malice at its core refers to an improper *motive* for bringing the prior action. As an element of liability it reflects the core function of the tort, which is to secure compensation for harm inflicted by *misusing* the judicial system, i.e., using it for something other than to enforce legitimate rights and secure remedies to which the claimant may tenably claim an entitlement. Thus the cases speak of malice as being present when a suit is actuated by hostility or ill will, or for some purpose other than to secure relief. It is also said that a plaintiff acts with malice when he asserts a claim with knowledge of its falsity, because one who seeks to establish such a claim 'can only be motivated by an improper purpose.' A lack of probable cause will therefore support an

inference of malice." (*Drummond, supra,* 176 Cal.App.4th at pp. 451–452, original italics, internal citations omitted.)

- "A lack of probable cause is a factor that may be considered in determining if the claim was prosecuted with malice [citation], but the lack of probable cause must be supplemented by other, additional evidence." (*Silas v. Arden* (2013) 213 Cal.App.4th 75, 90 [152 Cal.Rptr.3d 255].)

- "Because malice concerns the former plaintiff's actual mental state, it necessarily presents a question of fact." (*Drummond, supra,* 176 Cal.App.4th at p. 452.)

- "Negligence does not equate with malice. Nor does the negligent filing of a case necessarily constitute the malicious prosecution of that case." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1468 [242 Cal.Rptr. 562].)

- "The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose." (*Downey Venture v. LMI Insurance Co.* (1998) 66 Cal.App.4th 478, 494 [78 Cal.Rptr.2d 142], internal citations omitted.)

- "Malice does not require that the defendants harbor actual ill will toward the plaintiff in the malicious prosecution case, and liability attaches to attitudes that range ' "from open hostility to indifference. [Citations.]" ' " (*Cole v. Patricia A. Meyer & Associates, APC* (2012) 206 Cal.App.4th 1095, 1113–1114 [142 Cal.Rptr.3d 646], internal citations omitted.)

- " 'Suits with the hallmark of an improper purpose' include, but are not necessarily limited to, 'those in which: " '… (1) the person initiating them does not believe that his claim may be held valid; (2) the proceedings are begun primarily because of hostility or ill will; (3) the proceedings are initiated solely for the purpose of depriving the person against whom they are initiated of a beneficial use of his property; (4) the proceedings are initiated for the purpose of forcing a settlement which has no relation to the merits of the claim.' " ' [Citation.] [¶] Evidence tending to show that the defendants did not subjectively believe that the action was tenable is relevant to whether an action was instituted or maintained with malice. [Citation.]' " (*Oviedo, supra,* 212 Cal.App.4th at pp. 113-114..)

- "Although *Zamos* [*supra*] did not explicitly address the malice element of a malicious prosecution case, its holding and reasoning compel us to conclude that malice formed after the filing of a complaint is actionable." (*Daniels, supra,* 182 Cal.App.4th at p. 226.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, §§ ~~471~~554, ~~474~~557, ~~477~~562–~~484~~569, ~~486~~571–~~512~~606

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Liability For Unfair Collection Practices—Tort Liability*, ¶ 2:455 (The Rutter Group)

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06

(Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10–357.32 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process*, §§ 147.20–147.53 (Matthew Bender)

1700. Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making [one or more of] the following statement(s): [***list all claimed per se defamatory statements***]. To establish this claim, [***name of plaintiff***] must prove that all of the following are more likely true than not true:**

Liability

1. **That [***name of defendant***] made [one or more of] the statement(s) to [a person/persons] other than [***name of plaintiff***];**

2. **That [this person/these people] reasonably understood that the statement(s) [was/were] about [***name of plaintiff***];**

3. **[That [this person/these people] reasonably understood the statement(s) to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]]; and**

4. **That the statement(s) [was/were] false.**

In addition, [*name of plaintiff***] must prove by clear and convincing evidence that [***name of defendant***] knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s).**

Actual Damages

If [*name of plaintiff***] has proved all of the above, then [he/she] is entitled to recover [his/her] actual damages if [he/she] proves that [***name of defendant***]'s wrongful conduct was a substantial factor in causing any of the following:**

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; or**

d. **Shame, mortification, or hurt feelings.**

Assumed Damages

Even if [*name of plaintiff***] has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings, the law nonetheless assumes that [he/she] has suffered this harm. Without presenting evidence of damage, [***name of plaintiff***] is entitled to receive compensation for this assumed harm in whatever sum you believe is reasonable. You must award at least a nominal sum, such as one dollar.**

Punitive Damages

[*Name of plaintiff***] may also recover damages to punish [***name of defendant***] if [he/she] proves by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud.**

[*For specific provisions, see CACI Nos. 3940–3949.***]**

New September 2003; Revised April 2008, June 2016, December 2016

Directions for Use

Special verdict form CACI No. VF-1700, *Defamation per se (Public Officer/Figure and Limited Public Figure)*, should be used in this type of case.

Use the bracketed element 3 only if the statement is not defamatory on its face (i.e., if the judge has not determined that the statement is defamatory as a matter of law). For statutory grounds of defamation per se, see Civil Code sections 45 (libel) and 46 (slander). Note that certain specific grounds of libel per se have been defined by case law.

An additional element of a defamation claim is that the alleged defamatory statement is "unprivileged." (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118 [166 Cal.Rptr.3d 569].) If this element presents an issue for the jury, an instruction on the "unprivileged" element should be given.

Under the common-interest privilege of Civil Code section 47(c), the defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) If the common-interest privilege is at issue, give CACI No. 1723, *Common Interest Privilege—Malice*. The elements of CACI No. 1723 constitute the "unprivileged" element of this basic claim. If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(d); *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782] [privileged publication or broadcast].)

Sources and Authority

- Defamation. Civil Code section 44.
- Libel Defined. Civil Code section 45.
- Libel per se. Civil Code section 45a.
- Slander Defined. Civil Code section 46.
- "Defamation is the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or that causes special damage." (*Grenier v. Taylor* (2015) 234 Cal.App.4th 471, 486 [183 Cal.Rptr.3d 867].)

- "The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage. 'In general, … a written communication that is false, that is not protected by any privilege, and that exposes a person to contempt or ridicule or certain other reputational injuries, constitutes libel.' The defamatory statement must specifically refer to, or be ' "of [or] concerning," ' the plaintiff." (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1259 [217 Cal.Rptr.3d 234, internal citations omitted~~The elements of a defamation claim are (1) a publication that is (2) false, (3) defamatory, (4) unprivileged, and (5) has a natural tendency to injure or causes special damage." (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1369 [117 Cal.Rptr.3d 747~~].)

- " 'If the person defamed is a public figure, he cannot recover unless he proves, by clear and convincing evidence … , that the libelous statement was made with " 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." ' 'The rationale for such differential treatment is, first, that the public figure has greater access to the media and therefore greater opportunity to rebut defamatory statements, and second, that those who have become public figures have done so voluntarily and therefore "invite attention and comment." ' " (*Jackson*, *supra*, 10 Cal.App.5th at p. 1259, footnotes and internal citations omitted.)

- "[S]tatements cannot form the basis of a defamation action if they cannot be reasonably interpreted as stating actual facts about an individual. Thus, rhetorical hyperbole, vigorous epithets, lusty and imaginative expressions of contempt and language used in a loose, figurative sense will not support a defamation action." (*Grenier*, *supra*, 234 Cal.App.4th at p. 486.)

- " ' "If no reasonable reader would perceive in a false and unprivileged publication a meaning which tended to injure the subject's reputation in any of the enumerated respects, then there is no libel at all. If such a reader would perceive a defamatory meaning without extrinsic aid beyond his or her own intelligence and common sense, then … there is a libel per se. But if the reader would be able to recognize a defamatory meaning only by virtue of his or her knowledge of specific facts and circumstances, extrinsic to the publication, which are not matters of common knowledge rationally attributable to all reasonable persons, then … the libel cannot be libel per se but will be libel per quod," requiring pleading and proof of special damages.' " (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 351−352 [192 Cal.Rptr.3d 511].)

- "A slander that falls within the first four subdivisions of Civil Code section 46 is slander per se and requires no proof of actual damages. A slander that does not fit into those four subdivisions is slander per quod, and special damages are required for there to be any recovery for that slander." (*The Nethercutt Collection v. Regalia* (2009) 172 Cal.App.4th 361, 367 [90 Cal.Rptr.3d 882], internal citations omitted.)

- "With respect to slander per se, the trial court decides if the alleged statement falls within Civil Code section 46, subdivisions 1 through 4. It is then for the trier of fact to determine if the statement is defamatory. This allocation of responsibility may appear, at first glance, to result in an overlap of responsibilities because a trial court determination that the statement falls within those categories would seemingly suggest that the statement, if false, is necessarily defamatory. But a finder of fact might rely upon extraneous evidence to conclude that, under the circumstances, the statement was not

defamatory." (*The Nethercutt Collection, supra,* 172 Cal.App.4th at pp. 368–369.)

- "[T]he jury was instructed that if it found that defendant published matter that was defamatory on its face and it found by clear and convincing evidence that defendant knew the statement was false or published it in reckless disregard of whether it was false, then the jury 'also may award plaintiff presumed general damages.' Presumed damages 'are those damages that necessarily result from the publication of defamatory matter and are presumed to exist. They include reasonable compensation for loss of reputation, shame, mortification, and hurt feeling. No definite standard or method of calculation is prescribed by law by which to fix reasonable compensation for presumed damages, and no evidence of actual harm is required. Nor is the opinion of any witness required as to the amount of such reasonable compensation. In making an award for presumed damages, you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence. You may in the exercise of your discretion award nominal damages only, namely an insignificant sum such as one dollar.' [¶] … [¶] … [T]he instant instruction, which limits damages to 'those damages that necessarily result from the publication of defamatory matter,' constitutes substantial compliance with [Civil Code] section 3283. Thus, the instant instructions, 'if obeyed, did not allow the jurors to "enter the realm of speculation" regarding future suffering.' " (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1472–1473 [48 Cal.Rptr.2d 235], internal citations 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 v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802], internal citations omitted.)

- In matters involving public concern, the First Amendment protection applies to nonmedia defendants, putting the burden of proving falsity of the statement on the plaintiff. (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)

- "Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made. Publication need not be to the 'public' at large; communication to a single individual is sufficient." (*Smith, supra,* 72 Cal.App.4th at p. 645, internal citations omitted.)

- "[W]hen a party repeats a slanderous charge, he is equally guilty of defamation, even though he states the source of the charge and indicates that he is merely repeating a rumor." (*Jackson v. Paramount Pictures Corp.* (1998) 68 Cal.App.4th 10, 26 [80 Cal.Rptr.2d 1], internal citation omitted.)

- "At common law, one who republishes a defamatory statement is deemed thereby to have adopted it and so may be held liable, together with the person who originated the statement, for resulting injury to the reputation of the defamation victim. California has adopted the common law in this regard, although by statute the republication of defamatory statements is privileged in certain defined situations." (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 268 [79 Cal.Rptr.2d 178, 965 P.2d

696], internal citations omitted.)

- The general rule is that "a plaintiff cannot manufacture a defamation cause of action by publishing the statements to third persons; the publication must be done by the defendant." There is an exception to this rule. [When it is foreseeable that the plaintiff] " 'will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he has read it or been informed of its contents.' " (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 [286 Cal.Rptr. 198], internal citations omitted.)

- Whether a plaintiff in a defamation action is a public figure is a question of law for the trial court. (*Reader's Digest Assn. v. Superior Court* (1984) 37 Cal.3d 244, 252 [208 Cal.Rptr. 137, 690 P.2d 610].)

- "To qualify as a limited purpose public figure, a plaintiff 'must have undertaken some voluntary [affirmative] act[ion] through which he seeks to influence the resolution of the public issues involved.' " (*Rudnick v. McMillan* (1994) 25 Cal.App.4th 1183, 1190 [31 Cal.Rptr.2d 193]; see also *Mosesian v. McClatchy Newspapers* (1991) 233 Cal.App.3d 1685, 1689 [285 Cal.Rptr. 430].)

- "Characterizing a plaintiff as a limited purpose public figure requires the presence of certain elements. First, there must be a public controversy about a topic that concerns a substantial number of people. In other words, the issue was publicly debated. Second, the plaintiff must have voluntarily acted to influence resolution of the issue of public interest. To satisfy this element, the plaintiff need only attempt to thrust himself or herself into the public eye. Once the plaintiff places himself or herself in the spotlight on a topic of public interest, his or her private words and acts relating to that topic become fair game. However, the alleged defamation must be germane to the plaintiff's participation in the public controversy." (*Grenier, supra,* 234 Cal.App.4th at p. 484, internal citations omitted.)

- "The First Amendment limits California's libel law in various respects. When, as here, the plaintiff is a public figure, he cannot recover unless he proves by clear and convincing evidence that the defendant published the defamatory statement with actual malice, i.e., with 'knowledge that it was false or with reckless disregard of whether it was false or not.' Mere negligence does not suffice. Rather, the plaintiff must demonstrate that the author 'in fact entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of awareness of ... probable falsity.' " (*Masson v. New Yorker Magazine* (1991) 501 U.S. 496, 510 [111 S.Ct. 2419, 115 L.Ed.2d 447], internal citations omitted; see *St. Amant v. Thompson* (1968) 390 U.S. 727, 731 [88 S.Ct. 1323, 20 L.Ed.2d 262]; *New York Times v. Sullivan* (1964) 376 U.S. 254, 279–280 [84 S.Ct. 710, 11 L.Ed.2d 686].)

- The *New York Times v. Sullivan* standard applies to private individuals with respect to presumed or punitive damages if the statement involves a matter of public concern. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 349 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

- "California ... permits defamation liability so long as it is consistent with the requirements of the United States Constitution." (*Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1359 [78 Cal.Rptr.2d 627], citing *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 740–742 [257 Cal.Rptr. 708, 771 P.2d 406].)

- "Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. ... In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity." (*Masson, supra,* 501 U.S. at pp. 510–511, internal citations omitted.)

- Actual malice "does not require that the reporter hold a devout belief in the truth of the story being reported, only that he or she refrain from either reporting a story he or she knows to be false or acting in reckless disregard of the truth." (*Jackson, supra,* 68 Cal.App.4th at p. 35.)

- "The law is clear [that] the recklessness or doubt which gives rise to actual or constitutional malice is subjective recklessness or doubt." (*Melaleuca, Inc., supra,* 66 Cal.App.4th at p. 1365.)

- To show reckless disregard, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." (*St. Amant, supra,* 390 U.S. at p. 731.)

- " 'A defamation plaintiff may rely on inferences drawn from circumstantial evidence to show actual malice. [Citation.] "A failure to investigate [fn. omitted] [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication." ' " (*Sanders v. Walsh* (2013) 219 Cal.App.4th 855, 873 [162 Cal.Rptr.3d 188].)

- " ' "[Evidence] of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity." [Citations.] A failure to investigate [citation], anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable [citations], or known to be biased against the plaintiff [citations]—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication. [¶] We emphasize that such evidence is relevant only to the extent that it reflects on the subjective attitude of the publisher. [Citations.] The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy. [Citations.] Similarly, mere proof of ill will on the part of the publisher may likewise be insufficient. [Citation.]' " (*Young v. CBS Broadcasting, Inc.* (2012) 212 Cal.App.4th 551, 563 [151 Cal.Rptr.3d 237], quoting *Reader's Digest Assn., supra,* 37 Cal.3d at pp. 257–258, footnote omitted.)

- "An entity other than a natural person may be libeled." (*Live Oak Publishing Co., supra,* 234 Cal.App.3d at p. 1283.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, §§ ~~529~~623–~~555~~654, ~~601~~705–~~612~~718

Chin, et al., California Practice Guide: Employment Litigation, Ch. 5-D, *Employment Torts And Related Claims—Defamation*, ¶ 5:~~372~~ 472 (The Rutter Group)

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.04, 45.13 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.10 et seq. (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.24–142.27 (Matthew Bender)

California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:44–21:52 (Thomson Reuters)

1720. Affirmative Defense—Truth

[*Name of defendant***] is not responsible for [***name of plaintiff***]'s harm, if any, if [***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.)

- "Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' " (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1262-1263 [217 Cal.Rptr.3d 234].)

- "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 (11th ed. 2017~~10th ed. 2005~~) Torts, §§ ~~556~~655–~~560~~659, ~~611~~720, ~~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)

1730. Slander of Title—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by [making a statement/taking an action] that cast doubts about [***name of plaintiff***]'s ownership of [***describe real or personal property, e.g., the residence located at [address]***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [made a statement/[***specify other act, e.g., recorded a deed***] that cast doubts about [***name of plaintiff***]'s ownership of the property;**

2. **That the [statement was made to a person other than [***name of plaintiff***]/[***specify other publication, e.g., deed became a public record***];**

3. **That [the statement was untrue and] [***name of plaintiff***] did in fact own the property;**

4. **That [***name of defendant***] [knew that/acted with reckless disregard of the truth or falsity as to whether] [***name of plaintiff***] owned the property;**

5. **That [***name of defendant***] knew or should have recognized that someone else might act in reliance on the [statement/***e.g., deed***], causing [***name of plaintiff***] financial loss;**

6. **That [***name of plaintiff***] did in fact suffer immediate and direct financial harm because someone else acted in reliance on the [statement/***e.g., deed***];**

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

New December 2012

Directions for Use

Slander of title may be either by words or an act that clouds title to the property. (See, e.g., *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 661 [132 Cal.Rptr.3d 781] [filing of lis pendens].) If the slander is by means other than words, specify the means in element 1. If the slander is by words, select the first option in element 2.

The privileges of Civil Code section 47 apply to actions for slander of title. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405].) The defendant has the burden of proving privilege as an affirmative defense. (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339].) If privilege is claimed, additional instructions will be necessary to state the affirmative defense and frame the privilege.

The privilege of Civil Code section 47(c), applicable to communications between "interested" persons

(see CACI No. 1723, *Qualified Privilege*), requires an absence of malice. To defeat this privilege, the plaintiff must show malice defined as a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708, 771 P.2d 406].) While defendant has the burden of proving that an allegedly defamatory statement falls within the scope of the common-interest privilege, plaintiffs have the burden of proving that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) Give CACI No. 1723 if the defendant presents evidence to put the privilege of Civil Code section 47(c) at issue.

Beyond the privilege of Civil Code section 47(c), it would appear that actual malice in the sense of ill will toward and intent to harm the plaintiff is not required and that malice may be implied in law from absence of privilege (see *Gudger v. Manton* (1943) 21 Cal.2d 537, 543–544 [134 P.2d 217], disapproved on other grounds in *Albertson, supra,* 46 Cal.2d at p. 381.) or from the attempt to secure property to which the defendant had no legitimate claim (see *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 623 [44 Cal.Rptr. 683].) or from accusations made without foundation (element 4) (See *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67 [7 Cal.Rptr. 358].)

Sources and Authority

- "[S]lander of title is not a form of deceit. It is a form of the separate common law tort of disparagement, also sometimes referred to as injurious falsehood." (*Finch Aerospace Corp. v. City of San Diego* (2017) 8 Cal.App.5th 1248, 1253 [214 Cal.Rptr.3d 628].)

- "The Supreme Court has recently determined a viable disparagement claim, which necessarily includes a slander of title claim, requires the existence of a 'misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication.' " (*Finch Aerospace Corp., supra*, 8 Cal.App.5th at p. 1253~~The elements of a cause of action for slander of title are '(1) a publication, (2) which is *without privilege* or justification, (3) which is false, and (4) which causes direct and immediate pecuniary loss.'(*Alpha & Omega Development, LP, supra*, 200 Cal.App.4th at p. 664, original italics, internal citations omitted~~.)

- " 'Slander of title is effected by one who without privilege publishes untrue and disparaging statements with respect to the property of another under such circumstances as would lead a reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions. It is an invasion of the interest in the vendibility of property. In order to commit the tort actual malice or ill will is unnecessary. Damages usually consist of loss of a prospective purchaser. To be disparaging a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership.' 'However, it is not necessary to show that a particular pending deal was hampered or prevented, since recovery may be had for the depreciation in the market value of the property.' " (*M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 198–199 [143 Cal.Rptr.3d 160], internal citations omitted.)

- "Slander of title 'occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes pecuniary loss. [Citation.]' The false statement must be

‘ “maliciously made with the intent to defame.” ’ ” (*Cyr v. McGovran* (2012) 206 Cal.App.4th 645, 651 [142 Cal.Rptr.3d 34], internal citations omitted.)

- “One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.” (*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214 [206 Cal.Rptr. 259], quoting Rest. 2d Torts § 623A.)

- “One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused.” (*Chrysler Credit Corp. v. Ostly* (1974) 42 Cal.App.3d 663, 674 [117 Cal.Rptr. 167], quoting Rest. Torts, § 624 [motor vehicle case].)

- “Sections 623A, 624 and 633 of the Restatement Second of Torts further refine the definition so it is clear included elements of the tort are that there must be (a) a publication, (b) which is without privilege or justification and thus with malice, express or implied, and (c) is false, either knowingly so or made without regard to its truthfulness, and (d) causes direct and immediate pecuniary loss.” (*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 263–264 [169 Cal.Rptr. 678], footnote and internal citations omitted.)

- “Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, substantially the same privileges are recognized in relation to both torts in the absence of statute. Questions of privilege relating to both torts are now resolved in the light of section 47 of the Civil Code.” (*Albertson, supra*, 46 Cal.2d at pp. 378–379, internal citations omitted.)

- “[The privilege of Civil Code section 47(c)] is lost, however, where the person making the communication acts with malice. Malice exists where the person making the statement acts out of hatred or ill will, or has no reasonable grounds for believing the statement to be true, or makes the statement for any reason other than to protect the interest for the protection of which the privilege is given.” (*Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285 [175 Cal.Rptr. 767], disapproved on other grounds in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219 [266 Cal.Rptr. 638, 786 P.2d 365].)

- “The existence of privilege is a defense to an action for defamation. Therefore, the burden is on the defendant to plead and prove the challenged publication was made under circumstances that conferred the privilege.” (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1380 [1 Cal.Rptr.3d 116] [applying rule to slander of title].)

- “The principal issue presented in this case is whether the trial court properly instructed the jury that, in the jury's determination whether the common-interest privilege set forth in section 47(c) has been established, defendants bore the burden of proving not only that the allegedly

defamatory statement was made upon an occasion that falls within the common-interest privilege, but also that the statement was made without malice. Defendants contend that, in California and throughout the United States, the general rule is that, although a defendant bears the initial burden of establishing that the allegedly defamatory statement was made upon an occasion falling within the purview of the common-interest privilege, once it is established that the statement was made upon such a privileged occasion, the plaintiff may recover damages for defamation only if the plaintiff successfully meets the burden of proving that the statement was made with malice. As stated above, the Court of Appeal agreed with defendants on this point. Although, as we shall explain, there are a few (primarily early) California decisions that state a contrary rule, both the legislative history of section 47(c) and the overwhelming majority of recent California decisions support the Court of Appeal's conclusion. Accordingly, we agree with the Court of Appeal insofar as it concluded that the trial court erred in instructing the jury that defendants bore the burden of proof upon the issue of malice, for purposes of section 47(c).” (*Lundquist, supra,* 7 Cal.4th at pp. 1202–1203, internal citations omitted.)

- “ ‘The burden is also upon the defendant to prove any affirmative defense upon which he relies, including . . . that the communication is privileged. But when the pleadings admit . . . such facts, manifestly the defendant is thereby relieved of this burden.’ ‘Normally, privilege is an affirmative defense which must be pleaded in the answer [citation]. However, if the complaint discloses existence of a qualified privilege, it must allege malice to state a cause of action [citation].’ Finally, ‘Ordinarily privilege must be specially pleaded by the defendant, and the burden of proving it is on him. [Citations.] But where the complaint shows that the communication or publication is one within the classes qualifiedly privileged, it is necessary for the plaintiff to go further and plead and prove that the privilege is not available as a defense in the particular case, e.g., because of malice.’” (*Smith, supra,* 177 Cal.App.3d at pp. 630–631, internal citations omitted.)

- “Civil Code section 47(b)(4) clearly describes the conditions for application of the [litigation] privilege to a recorded lis pendens as follows: ‘A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.’ Those conditions are (1) the lis pendens must identify a previously filed action and (2) the previously filed action must be one that affects title or right of possession of real property. We decline to add a third requirement that there must also be evidentiary merit.” (*La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 476 [149 Cal.Rptr.3d 716], internal citation omitted.)

- “[T]he property owner may recover for the impairment of the vendibility ‘of his property’ without showing that the loss was caused by prevention of a particular sale. ‘The most usual manner in which a third person’s reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. . . . The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land or other thing might with reasonable certainty have found a purchaser.’ ” (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424 [96 Cal.Rptr. 902].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts § ~~642~~747

6 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts § ~~1703~~1886

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.80 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.90 (Matthew Bender)

1801. Public Disclosure of Private Facts

[*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***] publicized private information concerning [***name of plaintiff***];**

2. **That a reasonable person in [***name of plaintiff***]'s position would consider the publicity highly offensive;**

3. **That [***name of defendant***] knew, or acted with reckless disregard of the fact, that a reasonable person in [***name of plaintiff***]'s position would consider the publicity highly offensive;**

4. **That the private information was not of legitimate public concern [or did not have a substantial connection to a matter of legitimate public concern];**

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.**

In deciding whether the information was a matter of legitimate public concern, you should consider, among other factors, the following:

(a) The social value of the information;

(b) The extent of the intrusion into [*name of plaintiff***]'s privacy; [and]**

(c) Whether [*name of plaintiff***] consented to the publicity explicitly or by voluntarily seeking public attention or a public office; [and]**

(d) [*Insert other applicable factor***].**

[In deciding whether [*name of defendant***] publicized the information, you should determine whether it was made public either by communicating it to the public at large or to so many people that the information was substantially certain to become public knowledge.]**

New September 2003

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.

Comment (a) to Restatement Second of Torts, section 652D states that "publicity" "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." This point has been placed in brackets because it may not be an issue in every case.

Sources and Authority

- "[T]he allegations involve a public disclosure of private facts. The elements of this tort are ' "(1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to the reasonable person and (4) which is not of legitimate public concern." ' The absence of any one of these elements is a complete bar to liability." (*Moreno v. Hanford Sentinel, Inc.* (2009) 172 Cal.App.4th 1125, 1129–1130 [91 Cal.Rptr.3d 858], internal citations omitted.)

- "California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)

- "Generally speaking, matter which is already in the public domain is not private, and its publication is protected." (*Diaz v. Oakland Tribune* (1983) 139 Cal.App.3d 118, 131 [188 Cal.Rptr. 762], internal citations omitted.) "[M]atter which was once of public record may be protected as private facts where disclosure of that information would not be newsworthy." (*Id.* at p. 132.)

- "[W]e find it reasonable to require a plaintiff to prove, in each case, that the publisher invaded his privacy with reckless disregard for the fact that reasonable men would find the invasion highly offensive." (*Briscoe v. Reader's Digest Assn., Inc.* (1971) 4 Cal.3d 529, 542-543 [93 Cal.Rptr. 866, 483 P.2d 34].)

- "If a jury finds that a publication discloses private facts which are 'highly offensive and injurious to the reasonable man' [citation] then it would *inter alia* also satisfy the reckless disregard requirement." (*Johnson v. Harcourt, Brace, Jovanovich, Inc.* (1974) 43 Cal.App.3d 880, 891, fn. 11 [118 Cal.Rptr. 370].)

- "*Diaz* ... expressly makes the lack of newsworthiness part of the plaintiff's case in a private facts action. ... We therefore agree with defendants that under California common law the dissemination of truthful, newsworthy material is not actionable as a publication of private facts." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 215 [74 Cal.Rptr.2d 843, 955 P.2d 469], internal citations omitted.)

- "In analyzing the element of newsworthiness, appellate decisions 'balance[] the public's right to know against the plaintiff's privacy interest by drawing a protective line at the point the material revealed ceases to have any substantial connection to the subject matter of the newsworthy report.' " (*Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1257 [217 Cal.Rptr.3d 234].)

- " '[N]ewsworthiness is not limited to "news" in the narrow sense of reports of current events. "It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published" ' " (*Jackson, supra,* 10 Cal.App.5th at p. 1257.)

- "[T]here is a public interest which attaches to people who by their accomplishments, mode of living, professional standing or calling, create a legitimate and widespread attention to their activities. Certainly, the accomplishments and way of life of those who have achieved a marked reputation or notoriety by appearing before the public such as actors and actresses [and] professional athletes, … may legitimately be mentioned and discussed in print or on radio or television. Such public figures have to some extent lost the right of privacy, and it is proper to go further in dealing with their lives and public activities than with those of entirely private persons." (*Jackson, supra,* 10 Cal.App.5th at pp. 1257–1258.)

- "In the matter before us, however, there is no indication that any issue of public interest or freedom of the press was involved. ' "In determining what is a matter of legitimate public interest, account must be taken of the customs and conventions of the community; and in the last analysis what is proper becomes a matter of the community mores. The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern." ' Put another way, morbid and sensational eavesdropping or gossip 'serves no legitimate public interest and is not deserving of protection. [Citations.]' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 874 [104 Cal.Rptr.3d 352], internal citation omitted.)

- "Almost any truthful commentary on public officials or public affairs, no matter how serious the invasion of privacy, will be privileged." (*Briscoe, supra,* 4 Cal.3d at p. 535, fn. 5.)

- "We have previously set forth criteria for determining whether an incident is newsworthy. We consider '[1] the social value of the facts published, [2] the depth of the article's intrusion into ostensibly private affairs, and [3] the extent to which the party voluntarily acceded to a position of public notoriety.' " (*Briscoe, supra,* 4 Cal.3d at p. 541, internal citations omitted.)

- "[T]he right of privacy is purely personal. It cannot be asserted by anyone other than the person whose privacy has been invaded." (*Moreno, supra,* 172 Cal.App.4th at p. 1131.)

- "[L]imiting liability for public disclosure of private facts to those recorded in a writing is contrary to the tort's purpose, which has been since its inception to allow a person to control the kind of information about himself made available to the public—in essence, to define his public persona. While this restriction may have made sense in the 1890's—when no one dreamed of talk radio or confessional television—it certainly makes no sense now. Private facts can be just as widely disclosed—if not more so—through oral media as through written ones. To allow a plaintiff redress for one kind of disclosure but not the other, when both can be equally damaging to privacy, is a rule better suited to an era when the town crier was the principal purveyor of news. It is long past time to discard this outmoded rule." (*Ignat v. Yum! Brands, Inc.* (2013) 214 Cal.App.4th 808, 819 [154 Cal.Rptr.3d 275], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, §§ ~~664~~772 – ~~667~~775

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.03 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.32 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.20 (Matthew Bender)

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

1901. Concealment

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

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

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

[or]

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

[or]

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

[or]

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

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

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

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

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

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

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

Directions for Use

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

selected.

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

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

Sources and Authority

- Concealment. Civil Code section 1710(3).

- ~~"The elements of fraud, which give rise to the tort action for deceit, are (1) misrepresentation (false representation, concealment or non-disclosure); (2) knowledge of falsity (or 'scienter'); (3) intent to defraud, i.e., to induce reliance; (4) justifiable reliance; and (5) resulting damage." (*Hackethal v. Nat'l Casualty Co.* (1987) 189 Cal.App.3d 1102, 1110 [234 Cal.Rptr. 853].)~~

- "[T]he elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, 248 [129 Cal.Rptr.3d 874].)

- "A duty to speak may arise in four ways: it may be directly imposed by statute or other prescriptive law; it may be voluntarily assumed by contractual undertaking; it may arise as an incident of a relationship between the defendant and the plaintiff; and it may arise as a result of other conduct by the defendant that makes it wrongful for him to remain silent." (*SCC Acquisitions, Inc. v. Central Pacific Bank* (2012) 207 Cal.App.4th 859, 860 [143 Cal.Rptr.3d 711].)

- "In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff." (*Warner Construction Corp., supra,* 2 Cal.3d at p. 294, footnotes omitted.)

- "[O]ther than the first instance, in which there must be a fiduciary relationship between the parties, 'the other three circumstances in which nondisclosure may be actionable: presuppose[] the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. … "[W]here material facts are known to one party and not to the other, failure to disclose them is not actionable fraud unless there is *some relationship* between the parties which gives rise to a duty to disclose such known facts." [Citation.]' A relationship between the parties is present if there is 'some sort of *transaction* between the parties. [Citations.] Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement.' " (*Hoffman, supra*, 228 Cal.App.4th at p. 1187, original italics, internal citations omitted.)

- "Even if a fiduciary relationship is not involved, a non-disclosure claim arises when the defendant makes representations but fails to disclose additional facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 666 [51 Cal.Rptr.2d 907], internal citations omitted.)

- " '[T]he rule has long been settled in this state that although one may be under no duty to speak as to a matter, "if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure." ' " (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 613 [7 Cal.Rptr.2d 859].)

- "While a reasonable jury could, and in this case did, find these warnings inadequate for product liability purposes given [defendant]'s knowledge of the risk of NFCI's, these statements are not 'misleading "half-truths" ' that give rise to a duty to disclose in the absence of an otherwise sufficient relationship or transaction. To hold otherwise would unduly conflate two distinct areas of law, products liability and fraud, and transform every instance of inadequate product warning into a potential claim for fraud." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 313-314 [213 Cal.Rptr.3d 82].)

- "[F]raudulent intent is an issue for the trier of fact to decide." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1061 [141 Cal.Rptr.3d 142].)

- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged

damage." (*Beckwith, supra,* 205 Cal.App.4th at p. 1062.)

- "[P]laintiffs argue that actual reliance cannot logically be an element of a cause of action for deceit based on an omission because it is impossible to demonstrate reliance on something that one was not told. In support of the argument, plaintiffs cite *Affiliated Ute Citizens v. United States, supra,* 406 U.S. 128 (*Ute*) … , Interpreting Rule 10b-5, the high court held that 'positive proof of reliance is not a prerequisite to recovery' in a case 'involving primarily a failure to disclose … .' [¶] Contrary to plaintiffs' assertion, it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently." (*Mirkin, supra,* 5 Cal.4th at p. 1093.)

- "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he [or she] transacts business. Laws are made to protect the trusting as well as the suspicious. [T]he rule of *caveat emptor* should not be relied upon to reward fraud and deception." (*Boschma, supra,* 198 Cal.App.4th at p. 249, original italics.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, §§ ~~793~~912–~~799~~919

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

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

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

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

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

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

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

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

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

   [*or***]**

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

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

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

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

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

New September 2003; Revised June 2013

Directions for Use

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

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

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

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

Include the last paragraph if the plaintiff claims harm based on lost aesthetics and functionality.

Sources and Authority

- Damages for Injury to Timber. Civil Code section 3346(a).

- "[T]he effect of [Civil Code] section 3346 as amended, read together with [Code of Civil Procedure] section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages." (*Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 645, fn.3 [199 Cal.Rptr.3d 705].)

- "The measure of damages to be doubled or trebled under Code of Civil Procedure section 733 and Civil Code section 3346 is not limited to the value of the timber or the damage to the trees. The statutes have been interpreted to permit doubling or trebling the full measure of compensable damages for tortious injury to property." (*Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1312, 1317 [212 Cal.Rptr.3d 920] [annoyance and discomfort damages resulting from tortious injuries to timber or trees are subject to the damage multiplier under Code of Civil Procedure section 733 and Civil Code section 3346].)

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

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- "Diminution in market value ... is not an absolute limitation; several other theories are available to fix appropriate compensation for the plaintiff's loss. ... [¶] One alternative measure of damages is the cost of restoring the property to its condition prior to the injury. Courts will normally not award costs of restoration if they exceed the diminution in the value of the property; the plaintiff may be awarded the

lesser of the two amounts." (*Heninger v. Dunn* (1980) 101 Cal.App.3d 858, 862 [162 Cal.Rptr. 104], internal citations omitted.)

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

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

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

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

- "Although [plaintiff] never quantified the loss of aesthetics at $15,000, she need not have done so. As with other hard-to-quantify injuries, such as emotional and reputational ones, the trier of fact court was free to place any dollar amount on aesthetic harm, unless the amount was ' "so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the [trier of fact] was under the influence of passion or prejudice." ' " (*Rony, supra,* 210 Cal.App.4th at p. 756.)

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

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, §§ ~~1732~~1917–~~1734~~1919

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

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

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

2003. Damage to Timber—Willful and Malicious Conduct

[*Name of plaintiff*] also claims that [*name of defendant*]'s conduct in cutting down, damaging, or harvesting [*name of plaintiff*]'s trees was willful and malicious.

"Willful" simply means that [*name of defendant*]'s conduct was intentional.

"Malicious" means that [*name of defendant*] acted with intent to vex, annoy, harass, or injure, or that [*name of defendant*]'s conduct was done with a 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.

New September 2003; Revised December 2010

Directions for Use

Read this instruction if the plaintiff is seeking double or treble damages because the defendant's conduct was willful and malicious. (See Civ. Code, § 3346; Code Civ. Proc., § 733; *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391].) The judge should ensure that this finding is noted on the special verdict form. The jury should find the actual damages suffered. If the jury finds willful and malicious conduct, the court must award double damages and may award treble damages. (See *Ostling*, *supra*, 27 Cal.App.4th at p. 1742.)

Sources and Authority

- Damages for Injury to Timber. Civil Code section 3346(a).
- Treble Damages for Injury to Timber. Code of Civil Procedure section 733.
- "[T]he effect of [Civil Code] section 3346 as amended, read together with [Code of Civil Procedure] section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages." (*Salazar v. Matejcek* (2016) 245 Cal.App.4th 634, 645, fn. 3 [199 Cal.Rptr.3d 705].)
- "The measure of damages to be doubled or trebled under Code of Civil Procedure section 733 and Civil Code section 3346 is not limited to the value of the timber or the damage to the trees. The statutes have been interpreted to permit doubling or trebling the full measure of compensable damages for tortious injury to property." (*Fulle v. Kanani* (2017) 7 Cal.App.5th 1305, 1312, 1317 [212 Cal.Rptr.3d 920] [annoyance and discomfort damages resulting from tortious injuries to timber

or trees are subject to the damage multiplier under Code of Civil Procedure section 733 and Civil Code section 3346].)

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

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- " ' " '[T]reble damages may only be awarded when the wrongdoer intentionally acted wilfully or maliciously. The intent required is the intent to vex, harass, or annoy or injure the plaintiff. It is a question of fact for the trial court whether or not such intent exists.' [Civil Code section 3346 and Code of Civil Procedure section 733] are permissive and not mandatory and while they 'prescribe the degree of penalty to be invoked they commit to the sound discretion of the trial court the facts and circumstances under which it shall be invoked.' " ' " (*Salazar, supra*, 245 Cal.App.4th at p. 646, internal citation omitted.)

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

- "A proper and helpful analogue here is the award of exemplary damages under section 3294 of the Civil Code when a defendant has been guilty, inter alia, of 'malice, express or implied.' … 'In order to warrant the allowance of such damages the act complained of must not only be wilful, in the sense of intentional, but it must be accompanied by some aggravating circumstance, amounting to malice. Malice implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others. There must be an intent to vex, annoy or injure. Mere spite or ill will is not sufficient.' … Malice may consist of a state of mind determined to perform an act with reckless or wanton disregard of or indifference to the rights of others. Since a defendant rarely admits to such a state of mind, it must frequently be established from the circumstances surrounding his allegedly malicious acts." (*Caldwell, supra*, 211 Cal.App.2d at pp. 763-764, internal citations omitted.)

- "Under [Health and Safety Code] section 13007, a tortfeasor generally is liable to the owner of property for damage caused by a negligently set fire. '[T]he statute places no restrictions on the type of property damage that is compensable.' Such damages might include, for example, damage to structures, to movable personal property, to soil, or to undergrowth; damages may even include such elements as the lost profits of a business damaged by fire. If the fire also damages trees—that is, causes 'injuries to … trees … upon the land of another'—then the actual damages recoverable under section 13007 may be doubled (for negligently caused fires) or trebled (for fires intended to spread to the plaintiff's property) pursuant to section 3346." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 461 [102 Cal.Rptr.3d 32], internal citations omitted; but see *Gould v. Madonna* (1970) 5 Cal.App.3d 404, 407–408 [85 Cal.Rptr. 457] [Civ. Code, § 3346 does not apply to fires

negligently set; Health & Saf. Code, § 13007 provides sole remedy].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, § ~~1733~~1918

4 Levy et al., California Torts, Ch. 52, *Recovery for Medical Expenses and Economic Loss*, § 52.34 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 350, *Logs and Timber*, § 350.12 (Matthew Bender)

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

2020. Public Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] suffered harm because [***name of defendant***] created a nuisance. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***], by acting or failing to act, created a condition 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;]**

2. **That the condition affected a substantial number of people at the same time;**

3. **That an ordinary person would be reasonably annoyed or disturbed by the condition;**

4. **That the seriousness of the harm outweighs the social utility of [***name of defendant***]'s conduct;**

5. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

6. **That [***name of plaintiff***] suffered harm that was different from the type of harm suffered by the general public; and**

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

New September 2003; Revised December 2007, June 2016, November 2017

Directions for Use

Give this instruction for a claim for public nuisance. For an instruction on private nuisance, give CACI No. 2021, *Private Nuisance—Essential Factual Elements.* While a ~~Private~~ private nuisance is designed to vindicate individual land ownership interests~~concerns injury to a property interest.~~ a ~~Public~~ public

nuisance is not dependent on an interference with any particular rights of land: The public nuisance doctrine aims at the protection and redress of community interests. ~~"[A] private nuisance is a civil wrong based on disturbance of rights in land while a public nuisance is not dependent upon a disturbance of rights in land but upon an interference with the rights of the community at large."~~ (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 358 [213 Cal.Rptr.3d 538]~~*Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 124 [99 Cal.Rptr. 350], internal citation omitted~~.)

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Public Nuisance. Civil Code section 3480.
- Action by Private Person for Public Nuisance. Civil Code section 3493.
- Act Done Under Express Authority of Statute. Civil Code section 3482.
- Property Used for Dogfighting and Cockfighting. Civil Code section 3482.8.
- "[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.)
- "Public nuisance and private nuisance 'have almost nothing in common except the word "nuisance" itself.' Whereas private nuisance is designed to vindicate individual land ownership interests, the public nuisance doctrine has historically distinct origins and aims at 'the protection and redress of *community interests*.' With its roots tracing to the beginning of the 16th century as a criminal offense against the crown, public nuisances at common law are 'offenses against, or interferences with, the exercise of *rights common to the public*,' such as public health, safety, peace, comfort, or convenience." (*Citizens for Odor Nuisance Abatement, supra,* 8 Cal.App.5th at p. 358, original italics, internal citation omitted.)
- "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto, supra,* 22 Cal.App.3d at p. 124, internal citations omitted; but see *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1550 [87 Cal.Rptr.3d 602] ["to the extent *Venuto* … can be read as precluding an action to abate a public nuisance by a private individual who has suffered personal injuries as a result of the challenged condition, we believe it is an incorrect statement of the law"].)
- "Unlike the private nuisance-tied to and designed to vindicate individual ownership interests in land-

the ‘common’ or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century.” (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1103 [60 Cal.Rptr.2d 277, 929 P.2d 596].)

- “[W]hen the nuisance is a private as well as a public one, there is no requirement the plaintiff suffer damage different in kind from that suffered by the general public. That is, the plaintiff ‘ “does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree … .” ’ ” (*Birke, supra,* 169 Cal.App.4th at p. 1551, internal citations omitted.)

- “Of course, not every interference with collective social interests constitutes a public nuisance. To qualify ... the interference must be both substantial and unreasonable.” (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105.)

- “The fact that the defendants’ alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability.” (*Birke, supra,* 169 Cal.App.4th at p. 1552 [citing this instruction], internal citation 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.)

- “An essential element of a cause of action for nuisance is damage or injury.” (*Helix Land Co., Inc. v. City of San Diego* (1978) 82 Cal.App.3d 932, 950 [147 Cal.Rptr. 683].)

- “[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].)

- “By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance.” (*People ex rel. Gallo, supra,* 14 Cal.4th at p. 1105, fn. 3, internal citation omitted.)

- “The elements ‘of a cause of action for public nuisance include the existence of a duty and causation.’ Public nuisance liability ‘does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance.’ ” (*Melton v. Boustred* (2010) 183

Cal.App.4th 521, 542 [107 Cal.Rptr.3d 481], internal citations omitted.)

- "Causation is an essential element of a public nuisance claim. A plaintiff must establish a 'connecting element' or a 'causative link' between the defendant's conduct and the threatened harm." (*Citizens for Odor Nuisance Abatement, supra*, 8 Cal.App.5th at p. 359 [citing this instruction], internal citation omitted.)

- "Causation may consist of either '(a) an act; or [¶] (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the public interest.' A plaintiff must show the defendant's conduct was a 'substantial factor' in causing the alleged harm." (*Citizens for Odor Nuisance Abatement, supra*, 8 Cal.App.5th at p. 359 [citing this instruction], internal citation omitted.)

- " 'Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim.' The nuisance claim 'stands or falls with the determination of the negligence cause of action' in such cases." (*Melton, supra*, 183 Cal.App.4th at p. 542, internal citations omitted.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Equity, § ~~133~~152

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 5-D, *Common Law Environmental Hazards Liability*, ¶¶ 5:140-5:179 (The Rutter Group)

California Real Property Remedies and Damages (Cont.Ed.Bar 2d ed.) Ch. 11, Remedies for Nuisance and Trespass, § 11.7

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.04, 17.06 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.12 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 17:1–17:3 (Thomson Reuters)

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***] 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,* (2014) 231 Cal.App.4th 1177, 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.)

- "[D]amages for emotional distress growing out of a defendant's conversion of personal property are recoverable." (*Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th.1337, 1358 [213 Cal.Rptr.3d 803].)

- " '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.)

- "[I]t is 'well settled in California that shares of corporate stock are subject to an action in conversion' and 'it is not necessary that possession of the certificate evidencing title be disturbed.' Instead, it is sufficient that there is interference with the owner's 'free and unhampered right to dispose of property without limitations imposed by strangers to the title.' " (*Applied Medical Corp. v. Thomas* (2017) 10 Cal.App.5th 927, 938 [217 Cal.Rptr.3d 169].)

- "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.)

- "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 [labeled "defense of justification"]; see Rest.2d Torts, § 261.)

- "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 (11th ed. 2017~~10th ed. 2005~~) Torts, §§ ~~699~~810–~~719~~831

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)

2336. Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements

[*Name of plaintiff***] claims [he/she/it] was harmed by [***name of defendant***]'s breach of the obligation of good faith and fair dealing because [***name of defendant***] failed to defend [***name of plaintiff***] in a lawsuit that was brought against [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was insured under an insurance policy with [***name of defendant***];**

2. **That a lawsuit was brought against [***name of plaintiff***];**

3. **That [***name of plaintiff***] gave [***name of defendant***] timely notice that [he/she/it] had been sued;**

4. **That [***name of defendant***], unreasonably, that is, without proper cause, failed to defend [***name of plaintiff***] against the lawsuit;**

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

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

New October 2004; Revised December 2007, December 2014, December 2015

Directions for Use

The instructions in this series assume that the plaintiff is an insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

The court will decide the issue of whether the claim was potentially covered by the policy. (See *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 52 [221 Cal.Rptr. 171].) If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute establishes a possibility of coverage and thus a duty to defend. (*North Counties Engineering, Inc. v. State Farm General Ins. Co.* (2014) 224 Cal.App.4th 902, 922 [169 Cal.Rptr.3d 726].) Therefore, the jury does not resolve factual disputes that determine coverage.

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

Sources and Authority

- "A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken

without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364], internal citations omitted.)

- "To prevail in an action seeking declaratory relief on the question of the duty to defend, 'the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.' The duty to defend exists if the insurer 'becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.' " (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 [97 Cal.Rptr.3d 298, 211 P.3d 1083], original italics, internal citation omitted.)

- " ' [A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. … This duty … is separate from and broader than the insurer's duty to indemnify. … ' ' "[F]or an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. … Hence, the duty 'may exist even where coverage is in doubt and ultimately does not develop.' … " … ' " (*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323 [78 Cal.Rptr.3d 828], internal citations omitted.)

- "If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1506 [86 Cal.Rptr.3d 515].)

- "A duty to defend can be extinguished only prospectively and not retrospectively." (*Navigators Specialty Ins. Co. v. Moorefield Construction, Inc.* (2016) 6 Cal.App.5th 1258, 1284 [212 Cal.Rptr.3d 231].)

- "[F]acts known to the insurer and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy. [Citation.] This is so because current pleading rules liberally allow amendment; the third party plaintiff cannot be the arbiter of coverage." (*Tidwell Enterprises, Inc. v. Financial Pacific Ins. Co., Inc.* (2016) 6 Cal.App.5th 100, 106 [210 Cal.Rptr.3d 634].)

- "~~In determining its duty to defend, the insurer must consider facts from any source—the complaint, the insured, and other sources.~~ An insurer does not have a continuing duty to investigate the potential for coverage if it has made an informed decision on coverage at the time of tender. However, where the information available at the time of tender shows no coverage, but information available later shows otherwise, a duty to defend may then arise." (*American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 26 [102 Cal.Rptr.3d 591], internal citations omitted.)

- "The duty does not depend on the labels given to the causes of action in the underlying claims against the insured; 'instead it rests on whether the *alleged facts or known extrinsic facts* reveal a *possibility* that the claim may be covered by the policy.' " (*Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969, 976 [144 Cal.Rptr.3d 12], original italics, disapproved on other grounds in *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

- "The obligation of the insurer to defend is of vital importance to the insured. 'In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.' 'The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.' " (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831–832 [61 Cal.Rptr.2d 909], internal citations omitted.)

- "An anomalous situation would be created if, on the one hand, an insured can sue for the tort of breach of the implied covenant if the insurer accepts the defense and later refuses a reasonable settlement offer, but, on the other hand, an insured is denied tort recovery if the insurer simply refuses to defend. ... This dichotomy could have the effect of encouraging an insurer to stonewall the insured at the outset by simply refusing to defend." (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319–1320 [52 Cal.Rptr.2d 385].)

- "[T]he mere existence of a legal dispute does not create a potential for coverage: 'However, we have made clear that where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance, and the insurer may properly deny a defense. *Moreover, the law governing the insurer's duty to defend need not be settled at the time the insurer makes its decision*.' " (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 209 [97 Cal.Rptr.3d 568], original italics.)

- "The trial court erroneously thought that because the case law was 'unsettled' when the insurer first turned down the claim, that unsettledness created a potential for a covered claim. … [I]f an insurance company's denial of coverage is reasonable, as shown by substantial case law in favor of its position, there can be no bad faith even though the insurance company's position is *later* rejected by our state Supreme Court." (*Griffin Dewatering Corp., supra*, 176 Cal.App.4th at p. 179, original italics.)

- "Unresolved factual disputes impacting insurance coverage do not absolve the insurer of its duty to defend. 'If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend.' " (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 520 [115 Cal.Rptr.3d 42].)

- " 'If the insurer is obliged to take up the defense of its insured, it must do so as soon as possible, both to protect the interests of the insured, and to limit its own exposure to loss. . . . [T]he duty to defend must be assessed at the outset of the case.' It follows that a belated offer to pay the costs of defense may mitigate damages but will not cure the initial breach of duty." (*Shade Foods, Inc., supra,* 78

Cal.App.4th at p. 881, internal citations omitted.)

- "When a complaint states multiple claims, some of which are potentially covered by the insurance policy and some of which are not, it is a mixed action. In these cases, 'the insurer has a duty to defend as to the claims that are at least potentially covered, having been paid premiums by the insured therefor, but does not have a duty to defend as to those that are not, not having been paid therefor.' However, in a " "mixed" action, the insurer has a duty to defend the action in its entirety.' Thereafter, the insurance company is entitled to seek reimbursement for the cost of defending the claims that are not potentially covered by the policy." (*Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, 1231 [184 Cal.Rptr.3d 394], internal citations omitted.)

- "No tender of defense is required if the insurer has already denied coverage of the claim. In such cases, notice of suit and tender of the defense are excused because other insurer has already expressed its unwillingness to undertake the defense." (Croskey et al., California Practice Guide: Insurance Litigation, ¶ 7:614 (The Rutter Group).)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Insurance, §§ ~~297~~ 427, 428

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, Third Party Cases—Refusal To Defend Cases, ¶¶ 12:598–12:650.5 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Defend, §§ 25.1–26.38

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.10–82.16 (Matthew Bender)

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

2351. Insurer's Claim for Reimbursement of Costs of Defense of Uncovered Claims

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[*Name of insurer***] claims that it is entitled to partial reimbursement from [***name of insured***] for the costs that it spent in defending [***name of insured***] in the lawsuit brought by [***name of plaintiff in underlying suit***] against [***name of insured***]. [***Name of insurer***] may obtain reimbursement only for those defense costs that it proves can be allocated solely to claims that are not even potentially covered by the insurance policy.**

I have determined that the following claims in [*name of plaintiff in underlying suit***]'s lawsuit were not even potentially covered by the policy: [***specify***]. You must determine the dollar amount of [***name of insurer***]'s costs of defense that were attributable only to these claims. Costs for work that also helped the defense of the other claims that were potentially covered should not be included.**

New December 2015

Directions for Use

This instruction is for use if the insurer has provided a defense under a reservation of rights to deny indemnity if coverage cannot be established. In such a case, the insurer can seek reimbursement of the cost of defense that can be allocated solely to claims for which there was no possible potential coverage. (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 57−58 [65 Cal.Rptr.2d 366, 939 P.2d 766].)

If the insurer denies a defense, but the court finds that there is coverage for some but not all claims in the underlying case, it would appear that the insured can recover all costs of defense from the insurer. The insurer is not entitled to apportion the costs of defense (damages) between covered and uncovered claims if it denies a defense. (See *Hogan v. Midland Nat'l Ins. Co.* (1970) 3 Cal.3d 553, 563-564 [91 Cal.Rptr. 153, 476 P.2d 825].) Therefore, this instruction may not be modified for use in a denial-of-coverage case.

Sources and Authority

- "An insurer may obtain reimbursement *only* for defense costs that can be allocated *solely* to the claims that are not even potentially covered. To do that, it must carry the burden of proof as to these costs by a preponderance of the evidence. And to do that, … it must accomplish a task that, 'if ever feasible," may be "extremely difficult.' " (*Buss, supra,* 16 Cal.4th at pp. 57−58, original italics.)

- "Whether [insurer] will be able to carry its burden of proof by a preponderance of the evidence that specific costs can be allocated solely to the causes of action that were not even potentially covered is far from plain. But there is at least a triable issue of material fact that it can. It must be allowed the attempt." (*Buss, supra,* 16 Cal.4th at p. 61.)

- "By law applied in hindsight, courts can determine that no potential for coverage, and thus no duty to defend, ever existed. If that conclusion is reached, the insurer, having reserved its right, may recover from its insured the costs it expended to provide a defense which, under its contract

of insurance, it was never obliged to furnish." (*Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 658 [31 Cal.Rptr.3d 147, 115 P.3d 460].)

- "The ultimate determination that the loss was caused by a noncovered occurrence does not mean that [third party]'s lawsuit (and [developer]'s cross-complaint) never presented any potential for policy coverage. If that were so, a determination an insurer has no duty to indemnify would automatically extinguish the duty to defend retrospectively and give the insurer the right to seek reimbursement from the insured. That result is inconsistent with the firmly established principle that the duty to defend is broader than the duty to indemnify." (*Navigators Specialty Ins. Co. v. Moorefield Construction, Inc.* (2016) 6 Cal.App.5th 1258, 1285 [212 Cal.Rptr.3d 231].)

- " 'Under the policy, the insurer does not have a duty to defend the insured as to the claims that are not even potentially covered. With regard to defense costs for these claims, the insurer has not been paid premiums by the insured. It did not bargain to bear these costs. . . . The "enrichment" of the insured by the insurer through the insurer's bearing of unbargained-for defense costs is inconsistent with the insurer's freedom under the policy and therefore must be deemed 'unjust." ' If [insurer], after providing an entire defense, can prove that a claim was 'not even potentially covered because it did not even possibly embrace any triggering harm of the specified sort within its policy period or periods caused by an included occurrence,' it should have that opportunity. This task ' "if ever feasible," may be "extremely difficult." ' " (*State v. Pac. Indem. Co.* (1998) 63 Cal.App.4th 1535, 1550 [75 Cal.Rptr.2d 69], internal citations omitted.)

- "The cases which have considered apportionment of attorneys' fees upon the wrongful refusal of an insurer to defend an action against its insured generally have held that the insurer is liable for the total amount of the fees despite the fact that some of the damages recovered in the action against the insured were outside the coverage of the policy." (*Hogan, supra*, 3 Cal.3d at p. 564.)

- "The insurer, not the insured, has the burden of proving by a preponderance of the evidence that 'the settlement payments were allocable to claims not actually covered, and the defense costs were allocable to claims not even potentially covered.' " (*Navigators Specialty Ins. Co, supra*, 6 Cal.App.5th at p. 1287.)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2010~~) Insurance, § ~~269~~381

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.123 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.51 (Matthew Bender)

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

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

1. **That [***name of plaintiff***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] discharged [***name of plaintiff***];**

3. **That [***insert alleged violation of public policy, e.g., "***[***name of plaintiff***]***'s refusal to engage in price fixing"***] was a substantial motivating reason for [***name of plaintiff***]'s discharge; and**

4. **That the discharge caused [***name of plaintiff***] harm.**

New September 2003; Revised June 2013, June 2014, December 2014

Directions for Use

The judge should determine whether the purported reason for firing the plaintiff would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal.Rptr.2d 874, 824 P.2d 680]; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80 fn. 6 [78 Cal. Rptr.2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Note that this instruction uses the term "substantial motivating reason" to express causation between the public policy and the discharge (see element 3). "Substantial motivating reason" has been held to be the appropriate standard for cases alleging termination in violation of public policy. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; see *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

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

This instruction may be modified for adverse employment actions other than discharge, for example demotion, if done in violation of public policy. (See *Garcia v. Rockwell Internat. Corp.* (1986) 187 Cal.App.3d 1556, 1561 [232 Cal.Rptr. 490], disapproved on other grounds in *Gantt v. Sentry Ins.* (1992)

1 Cal.4th 1083, 1093 [4 Cal.Rptr.2d 874, 824 P.2d 680] [public policy forbids retaliatory action taken by employer against employee who discloses information regarding employer's violation of law to government agency].) See also CACI No. 2509, *"Adverse Employment Action" Explained*.

Sources and Authority

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

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

- "The elements of a claim for wrongful discharge in violation of public policy are (1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm." (*Yau v. Allen* (2014) 229 Cal.App.4th 144, 154 [176 Cal.Rptr.3d 824].)

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

- "Policies are not 'public' (and thus do not give rise to a common law tort claim) when they are derived from statutes that 'simply regulate conduct between private individuals, or impose requirements whose fulfillment does not implicate fundamental public policy concerns.' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 926 [180 Cal.Rptr.3d 359].)

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

- " [T]ermination of an employee most clearly violates public policy when it contravenes the provision of a statute forbidding termination for a specified reason … ." (*Diego, supra,* 231 Cal.App.4th at p. 926)

- "[Discharge because of employee's] [r]efusal to violate a governmental regulation may also be the

basis for a tort cause of action where the administrative regulation enunciates a fundamental public policy and is authorized by statute." (*Scott v. Phoenix Schools, Inc.* (2009) 175 Cal.App.4th 702, 708–709 [96 Cal.Rptr.3d 159].)

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

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

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

- " [T]here is a 'fundamental public interest in a workplace free from illegal practices … .' '[T]he public interest is in a lawful, not criminal, business operation. Attainment of this objective requires that an employee be free to call his or her employer's attention to illegal practices, so that the employer may prevent crimes from being committed by misuse of its products by its employees.' " (*Yau, supra,* 229 Cal.App.4th at p. 157.)

- "An action for wrongful termination in violation of public policy 'can only be asserted against *an employer*. An individual who is not an employer cannot commit the tort of wrongful discharge in violation of public policy; rather, he or she can only be the agent by which *an employer* commits that tort.' " (*Kim v. Konad USA Distribution, Inc.* (2014) 226 Cal.App.4th 1336, 1351 [172 Cal.Rptr.3d 686], original italics.)

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

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

- "In sum, a wrongful termination against public policy common law tort based on sexual harassment can be brought against an employer of any size." (*Kim, supra,* 226 Cal.App.4th at p. 1351.)

- "To establish a claim for wrongful termination in violation of public policy, an employee must prove causation. (See CACI No. 2430 [using phrase 'substantial motivating reason' to express causation].) Claims of whistleblower harassment and retaliatory termination may not succeed where a plaintiff 'cannot demonstrate the required nexus between his reporting of alleged statutory violations and his allegedly adverse treatment by [the employer].' " (*Ferrick v. Santa Clara University* (2014) 231 Cal.App.4th 1337, 1357 [181 Cal.Rptr.3d 68].)

- "It would be nonsensical to provide a different standard of causation in FEHA cases and common law tort cases based on public policies encompassed by FEHA." (*Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, 1341 [166 Cal.Rptr.3d 720].)

- "If claims for wrongful termination in violation of public policy must track FEHA, it necessarily follows that jury instructions pertinent to causation and motivation must be the same for both. Accordingly, we conclude the trial court did not err in giving the instructions set forth in the CACI model jury instructions." (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1323 [200 Cal.Rptr.3d 315].)

- "Under California law, if an employer did not violate FEHA, the employee's claim for wrongful termination in violation of public policy necessarily fails." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169 [217 Cal.Rptr.3d 258].)

- "FEHA's policy prohibiting disability discrimination in employment is sufficiently substantial and fundamental to support a claim for wrongful termination in violation of public policy." (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal. App. 4th 635, 660 [163 Cal.Rptr.3d 392].)t

- "Although the fourth cause of action references FEHA as one source of the public policy at issue, this is not a statutory FEHA cause of action. FEHA does not displace or supplant common law tort claims for wrongful discharge." (*Kim, supra,* 226 Cal.App.4th at p. 1349.)

- "[T]o the extent the trial court concluded Labor Code section 132a is the exclusive remedy for work-related injury discrimination, it erred. The California Supreme Court held '[Labor Code] section 132a does not provide an exclusive remedy and does not preclude an employee from pursuing FEHA and common law wrongful discharge remedies.' " (*Prue v. Brady Co./San Diego, Inc.* (2015) 242 Cal.App.4th 1367, 1381 [196 Cal.Rptr.3d 68].)

- "California's minimum wage law represents a fundamental policy for purposes of a claim for wrongful termination or constructive discharge in violation of public policy." (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 831−832 [166 Cal.Rptr.3d 242].)

- " 'Labor Code section 1102.5, subdivision (b), which prohibits employer retaliation against an employee who reports a reasonably suspected violation of the law to a government or law enforcement agency, reflects the broad public policy interest in encouraging workplace "whistleblowers," who may without fear of retaliation report concerns regarding an employer's illegal conduct. This public policy is the modern day equivalent of the long-established duty of the citizenry to bring to public attention the doings of a lawbreaker. [Citation.] …' " (*Ferrick, supra,* 231 Cal.App.4th at p. 1355.)

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

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

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Agency and Employment, § ~~222~~235

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

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

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

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

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

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

2509. "Adverse Employment Action" Explained

[*Name of plaintiff***] must prove that [he/she] was subjected to an adverse employment action.**

Adverse employment actions are not limited to ultimate actions such as termination or demotion. There is an adverse employment action if [*name of defendant***] has taken an action or engaged in a course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of [***name of plaintiff***]'s employment. An adverse employment action includes conduct that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion. However, minor or trivial actions or conduct that is not reasonably likely to do more than anger or upset an employee cannot constitute an adverse employment action.**

New June 2012

Directions for Use

Give this instruction with CACI No. 2500, *Disparate Treatment—Essential Factual Elements,* CACI No. 2505, *Retaliation,* CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements,* or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements,* if there is an issue as to whether the employee was the victim of an adverse employment action.

For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute discrimination or 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].) Or the case may involve acts that, considered alone, would not appear to be adverse, but could be adverse under the particular circumstances of the case. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389–1390 [37 Cal.Rptr.3d 113] [lateral transfer can be adverse employment action even if wages, benefits, and duties remain the same].)

Sources and Authority

- "Appropriately viewed, [section 12940(a)] protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Yanowitz, supra,* 36 Cal.4th at pp. 1053–1054, footnotes

omitted.)

- "[T]he determination of what type of adverse treatment properly should be considered discrimination in the terms, conditions, or privileges of employment is not, by its nature, susceptible to a mathematically precise test, and the significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee. Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of sections 12940(a) and 12940(h)." (*Yanowitz, supra,* 36 Cal.4th at pp. 1054–1055.)

- "An ' "adverse employment action," ' … , requires a 'substantial adverse change in the terms and conditions of the plaintiff's employment'. " (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1063 [119 Cal.Rptr.3d 878, internal citations omitted.)

- "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra,* 36 Cal.4th at pp. 1055–1056, internal citations omitted.)

- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424 [69 Cal.Rptr.3d 1], internal citations omitted.)

- "The employment action must be both detrimental and substantial ... [¶]. We must analyze [plaintiff's] complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury ... . [W]e do not find that [plaintiff's] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events ... . The other allegations ... are not accompanied by facts which evidence both a substantial and detrimental effect on her employment." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511–512 [91 Cal.Rptr.2d 770], internal citations omitted.)

- "The 'materiality' test of adverse employment action … looks to 'the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career,' and the test 'must be interpreted liberally … with a reasonable appreciation of the realities of the workplace … .' " (*Patten, supra,* 134 Cal.App.4th at p. 1389.)

- "Mere ostracism in the workplace is insufficient to establish an adverse employment decision. However, ' "[W]orkplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action sufficient to satisfy the second prong of the prima facie case for … retaliation cases." [Citation].' " (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 212 [126 Cal.Rptr.3d 651], internal citations omitted.)

- "Not every change in the conditions of employment, however, constitutes an adverse employment action. ' "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." … ' '[W]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.' " (*Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357 [58 Cal.Rptr.3d 444].)

- "[R]efusing to allow a former employee to rescind a voluntary discharge—that is, a resignation free of employer coercion or misconduct—is not an adverse employment action." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1161 [217 Cal.Rptr.3d 258].)

Secondary Sources

1 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Contracts, § 11

8 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Constitutional Law, §§ ~~940~~1052–1055

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:203, 7:731, 7:785 (The Rutter Group)

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

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

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

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] [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.)

- " '[A]n employer "knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation. The employer need only know the underlying facts, not the legal significance of those facts." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 592 [210 Cal.Rptr.3d 59].)

- " '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 (11th ed. 2017~~10th ed. 2005~~) Constitutional Law, §§ ~~936, 937~~1045–1049

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]n employee's probationary status does not, in and of itself, deprive an employee of the protections of FEHA, including a reasonable reassignment. The statute does not distinguish between the types of reasonable accommodations an employer may have to provide to employees on probation or in training and those an employer may have to provide to other employees. We decline to read into FEHA a limitation on an employee's eligibility for reassignment based on an employee's training or probationary status. Instead, the trier of fact should consider whether an employee is on probation or in training in determining whether a particular reassignment is comparable in pay and status to the employee's original position." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 724 [214 Cal.Rptr.3d 113], internal citations omitted.)

- "[A] disabled employee seeking reassignment to a vacant position 'is entitled to preferential consideration.' " (*Swanson, supra,* 232 Cal.App.4th at p. 970.)

- " 'Generally, " '[t]he employee bears the burden of giving the employer notice of the disability.' " ' An employer, in other words, has no affirmative duty to investigate whether an employee's illness might qualify as a disability. ' " '[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.' " ' " (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1167 [217 Cal.Rptr.3d 258], internal citations omitted.~~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.~~)

- “ ‘[A]n employer “knows an employee has a disability when the employee tells the employer about his condition, or when the employer otherwise becomes aware of the condition, such as through a third party or by observation.” ’ … [¶] ‘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 under the [FEHA].” ’ ” (*Featherstone, supra,* 10 Cal.App.5th at p. 1167, internal citations omitted.)

- “ ‘ “ ‘This notice then triggers the employer's burden to take “positive steps” to accommodate the employee's limitations. … [¶] … The employee, of course, retains a duty to cooperate with the employer's efforts by explaining [his or her] disability and qualifications. [Citation.] Reasonable accommodation thus envisions an exchange between employer and employee where each seeks and shares information to achieve the best match between the [employee's] capabilities and available positions.’ ” ’ ” (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 598 [210 Cal.Rptr.3d 59].)

- “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.)

- “[A]n 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 … .” (*Atkins*, *supra*, 8 Cal.App.5th at p. 721~~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 (11th ed. 2017~~10th ed. 2005~~) Constitutional Law, § ~~762~~833

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)

2543. Disability Discrimination—"Essential Job Duties" Explained (Gov. Code, §§ 12926(f), 12940(a)(1))

In deciding whether a job duty is essential, you may consider, among other factors, the following:

a. Whether the reason the job exists is to perform that duty;

b. Whether there is a limited number of employees available who can perform that duty;

c. Whether the job duty is highly specialized so that the person currently holding the position was hired for his or her expertise or ability to perform the particular duty.

Evidence of whether a particular duty is essential includes, but is not limited to, the following:

a. [*Name of defendant*]**'s judgment as to which functions are essential;**

b. Written job descriptions prepared before advertising or interviewing applicants for the job;

c. The amount of time spent on the job performing the duty;

d. The consequences of not requiring the person currently holding the position to perform the duty;

e. The terms of a collective bargaining agreement;

f. The work experiences of past persons holding the job;

g. The current work experience of persons holding similar jobs;

h. Reference to the importance of the job in prior performance reviews.

"Essential job duties" do not include the marginal duties of the position. "Marginal duties" are those that, if not performed would not eliminate the need for the job, or those that could be readily performed by another employee, or those that could be performed in another way.

New September 2003; Revoked June 2013; Restored and Revised December 2013

Directions for Use

Give this instruction with CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* or CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements,* or both, if it is necessary to explain what is an "essential job duty." (See

Gov. Code, §§ 12926(f), 12940(a)(1); see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 743−744 [151 Cal.Rptr.3d 292].) While the employee has the burden to prove that he or she can perform essential job duties, with or without reasonable accommodation, it is unresolved which party has the burden of proving that a job duty is essential. (See *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 972−973 [150 Cal.Rptr.3d 385].)

Sources and Authority

- Ability to Perform Essential Duties. Government Code section 12940(a)(1).
- "Essential Functions" Defined. Government Code section 12926(f).
- Evidence of Essential Functions. 2 California Code of Regulations section 11065(e)(2).
- Marginal Functions. 2 California Code of Regulations section 11065(e)(3).
- " ' "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. "Essential functions" does not include the marginal functions of the position.' ' "Marginal functions" of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way.' 'A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following: [¶] (A) … [T]he reason the position exists is to perform that function. [¶] (B) … [T]he limited number of employees available among whom the performance of that job function can be distributed. [¶] [And] (C) … the incumbent in the position is hired for his or her expertise or ability to perform the particular [highly specialized] function.' " (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 373 [184 Cal.Rptr.3d 9], internal citations omitted.)
- "Evidence of 'essential functions' may include the employer's judgment, written job descriptions, the amount of time spent on the job performing the function, the consequences of not requiring employees to perform the function, the terms of a collective bargaining agreement, the work experiences of past incumbents in the job, and the current work experience of incumbents in similar jobs." (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 717–718 [214 Cal.Rptr.3d 113].)
- "The trial court's essential functions finding is also supported by the evidence presented by defendant corresponding to the seven categories of evidence listed in [Government Code] section 12926(f)(2). 'Usually no one listed factor will be dispositive … .' " (*Lui, supra*, 211 Cal.App.4th at p. 977.)
- "The question whether plaintiffs could perform the essential functions of a position to which they sought reassignment is relevant to a claim for failure to accommodate under section 12940, subdivision (m), and to a claim for failure to engage in the interactive process under section 12940, subdivision (n)." (*Atkins, supra*, 8 Cal.App.5th at p. 717.)
- "The identification of essential job functions is a 'highly fact-specific inquiry.' " (*Lui, supra*, 211 Cal.App.4th at p. 971.)

- "It is clear that plaintiff bore the burden of proving 'that he or she is a qualified individual under the FEHA (i.e., that he or she can perform the essential functions of the job with or without reasonable accommodation).' It is less clear whether that burden included the burden of proving what the essential functions of the position are, rather than just plaintiff's ability to perform the essential functions. Under the ADA, a number of federal decisions have held that '[a]lthough the plaintiff bears the ultimate burden of persuading the fact finder that he can perform the job's essential functions, … "an employer who disputes the plaintiff's claim that he can perform the essential functions must put forth evidence establishing those functions." [Citation.]' … Arguably, plaintiff's burden of proving he is a qualified individual includes the burden of proving which duties are essential functions of the positions he seeks. Ultimately, we need not and do not decide in the present case which party bore the burden of proof on the issue at trial … ." (*Lui, supra,* 211 Cal.App.4th at pp. 972−973, internal citations omitted.)

" [R]equiring employers to eliminate an essential function of a job to accommodate a disabled employee 'would be at odds with the definition of the employee's prima facie case' under FEHA. The employee's burden includes 'showing he or she can perform the essential functions of the job with accommodation, not that an essential function can be eliminated altogether to suit his or her restrictions.' " (*Atkins, supra,* 8 Cal.App.5th at p. 720~~The trial court's essential functions finding is also supported by the evidence presented by defendant corresponding to the seven categories of evidence listed in [Government Code] section 12926(f)(2). 'Usually no one listed factor will be dispositive … .' " (*Lui, supra,* 211 Cal.App.4th at p. 977~~.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Constitutional Law, §§ 1045–1049~~936, 937~~

Chin et al., Cal. Practice Guide: Employment Litigation ~~(The Rutter Group)~~ ¶¶ 9.2247, 9:2247.1, 9:2247.2, 9:2402–9:2402.1 ~~8:744, 9:2298, 9:2402–9:2403, 9:2405, 9:2420~~ (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,* § 41.97[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination,* §§ 115.22, 115.54, 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:86 (Thomson Reuters)

2545. Disability Discrimination—Affirmative Defense—Undue Hardship

[*Name of defendant*] claims that [*name of plaintiff*]'s proposed accommodations would create an undue hardship to the operation of [his/her/its] business. To succeed, [*name of defendant*] must prove that the accommodations would be significantly difficult or expensive to make. In deciding whether an accommodation would create an undue hardship, you may consider the following factors:

a. The nature and cost of the accommodation;

b. [*Name of defendant*]'s ability to pay for the accommodation;

c. The type of operations conducted at the facility;

d. The impact on the operations of the facility;

e. The number of [*name of defendant*]'s employees and the relationship of the employees' duties to one another;

f. The number, type, and location of [*name of defendant*]'s facilities; and

g. The administrative and financial relationship of the facilities to one another.

New September 2003

Directions for Use

The issue of whether undue hardship is a true affirmative defense or whether the defendant only has the burden of coming forward with the evidence of hardship as a way of negating the element of plaintiff's case concerning the reasonableness of an accommodation appears to be unclear.

Sources and Authority

- Employer Duty to Provide Reasonable Accommodation. Government Code section 12940(m).
- "Undue Hardship" Defined. Government Code section 12926(~~t~~u).
- " 'Undue hardship' means 'an action requiring significant difficulty or expense, when considered in light of the following factors: [¶] (1) The nature and cost of the accommodation needed. [¶] (2) The overall financial resources of the facilities involved in the provision of the reasonable accommodations, the number of persons employed at the facility, and the effect on expenses and resources or the impact otherwise of these accommodations upon the operation of the facility. [¶] (3) The overall financial resources of the covered entity, the overall size of the business of a covered entity with respect to the number of employees, and the number, type, and location of its facilities. [¶]

(4) The type of operations, including the composition, structure, and functions of the workforce of the entity. [¶] (5) The geographic separateness or administrative or fiscal relationship of the facility or facilities.' (§ 12926, subd. (u).) ' "Whether a particular accommodation will impose an undue hardship for a particular employer is determined on a case by case basis" ' and 'is a multi-faceted, fact-intensive inquiry.' " (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 733 [214 Cal.Rptr.3d 113].)

- "[U]nder California law and the instructions provided to the jury, an employer must do more than simply assert that it had economic reasons to reject a plaintiff's proposed reassignment to demonstrate undue hardship. An employer must show *why* and *how* asserted economic reasons would affect its ability to provide a particular accommodation." (*Atkins*, *supra*, 8 Cal.App.5th at p. 734, original italics, internal citation omitted.)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA)*, ¶¶ 9:2250, 9:2345, 9:2366, 9:2367 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.51[4][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.35, 115.54, 115.100 (Matthew Bender)

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." (*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.)

- "Typically, the employee must initiate the process 'unless the disability and resulting limitations are obvious.' " (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1169 [217 Cal.Rptr.3d 258].)

- "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~~11th ed. 2017) Constitutional Law, § ~~936(2)~~1048

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).)

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.)

- "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." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 601 [210 Cal.Rptr.3d 59].)

- "[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 (11th ed. 2017~~10th ed. 2005~~) Constitutional Law, §§ ~~942–944~~1060, 1061

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)~~.
- "In enacting CFRA 'the Legislature expressly delegated to [California's Fair Employment and Housing] Commission the task of "adopt[ing] a regulation specifying the elements of a reasonable request" for CFRA leave.' The regulation adopted by the commission provides, in part, to request CFRA leave an employee 'shall provide at least verbal notice sufficient to make the employer aware that the employee needs CFRA leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under CFRA or FMLA, or even mention CFRA or FMLA, 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 necessary to determine whether the employee is requesting CFRA leave and to obtain necessary information concerning the leave (i.e., commencement date, expected duration, and other permissible information).' The regulation further provides, 'Under all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as CFRA or CFRA/FMLA qualifying, based on information provided by the employee … , and to give notice of the designation to the employee.' "~~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]~~ (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 602–603 [210 Cal.Rptr.3d 59], quoting Cal. Code Regs., tit. 2, § 11091~~7297.4~~(a)(1), internal citations omitted.)
- "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.)

- "[Cal. Code Regs., tit. 2, § 11091(a)(1)] appears to presume the existence of circumstances in which an employee is able to provide an employer with notice of the need for leave. Indeed, the regulation permits employers to 'require that employees provide at least 30 days' advance notice before CFRA leave is to begin *if the need for the leave is foreseeable* based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or a family member.' However, the regulations provide that this 30-day general rule is inapplicable when the need for medical leave is not foreseeable: 'If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, *notice must be given as soon as practicable*.' Further, '[a]n employer shall not deny a CFRA leave, the need for which is an emergency or is otherwise unforeseeable, on the basis that the employee did not provide advance notice of the need for the leave, *so long as the employee provided notice to the employer as soon as practicable*.' " (*Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 563 [212 Cal.Rptr.3d 682], original italics; see Cal. Code Regs.. tit. 2, § 11091(a)(2)–(a)(4).)

- "When viewed as a whole, it is clear that CFRA and its implementing regulations envision a scheme in which employees are provided reasonable time within which to request leave for a qualifying purpose, and to provide the supporting certification to demonstrate that the requested leave was, in fact, for a qualifying purpose, particularly when the need for leave is not foreseeable or when circumstances have changed subsequent to an initial request for leave." (*Bareno*, *supra*, 7 Cal.App.5th at p. 565.)

- "[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].)

- "Whether notice is sufficient under CFRA is a question of fact." (*Soria*, *supra*, 5 Cal.App.5th at p. 603.)

- "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].)

- "The regulations thus expressly contemplate that an employee may be out on CFRA-protected leave *prior* to providing medical certification regarding that leave." (*Bareno*, *supra*, 7 Cal.App.5th at p. 758, original italics; see Cal. Code Regs., tit. 2, § 11091(b)(3).)

- "CFRA establishes that a certification issued by an employee's health provider is sufficient if it includes '[t]he date on which the serious health condition commenced'; '[t]he probable duration of the condition'; and '[a] statement that, due to the serious health condition, the employee is unable to perform the function of his or her position.' " (*Bareno*, *supra*, 7 Cal.App.5th at pp. 569–570.)

- "[A]n employee need not share his or her medical condition with the employer, and a certification

need not include such information to be considered sufficient: 'For medical leave for the employee's own serious health condition, this certification *need not*, but may, at the employee's option, identify the serious health condition involved.' " (*Bareno, supra*, 7 Cal.App.5th at p. 570, fn. 18, original italics.)

- "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).

- "The elements of a cause of action for retaliation in violation of CFRA are " '(1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA [leave]; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of her exercise of her right to CFRA [leave]." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 604 [210 Cal.Rptr.3d 59]~~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].)

- " 'When an adverse employment action "follows hard on the heels of protected activity, the timing often is strongly suggestive of retaliation." ' " (*Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 571 [212 Cal.Rptr.3d 682].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Constitutional Law, §§ 1058–1060~~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)

2720. Affirmative Defense—Nonpayment of Overtime—Executive Exemption

[*Name of defendant***] claims that [he/she/it] is not required to pay [***name of plaintiff***] for overtime because [***name of plaintiff***] is an executive employee. [***Name of plaintiff***] is exempt from overtime pay requirements as an executive if [***name of defendant***] proves all of the following:**

1. **[***Name of plaintiff***]'s duties and responsibilities involve management of [***name of defendant***]'s [business/enterprise] or of a customarily recognized department or subdivision of the [business/enterprise];**

2. **[***Name of plaintiff***] customarily and regularly directs the work of two or more employees;**

3. **[***Name of plaintiff***] has the authority to hire or fire employees, or [his/her] suggestions as to hiring or firing and as to advancement and promotion or other changes in status are given particular weight;**

4. **[***Name of plaintiff***] customarily and regularly exercises discretion and independent judgment;**

5. **[***Name of plaintiff***] performs executive duties more than half of the time; and**

6. **[***Name of plaintiff***]'s monthly salary is at least [***insert amount that is twice the state minimum wage for full time employment***].**

In determining whether [*name of plaintiff***] performs executive duties more than half of the time, the most important consideration is how [he/she] actually spends [his/her] time. But also consider whether [***name of plaintiff***]'s practice differs from [***name of defendant***]'s realistic expectations of how [***name of plaintiff***] should spend [his/her] time and the realistic requirements of the job.**

[Each of [*name of plaintiff***]'s activities is either an exempt or a nonexempt activity depending on the primary purpose for which [he/she] undertook it at that time. Time spent on an activity is either exempt or nonexempt, not both.]**

New December 2012; Revised June 2014

Directions for Use

This instruction is an affirmative defense to an employee's claim for statutory overtime earnings. (See CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements*.) The employer claims that the employee is an exempt executive. (See Lab. Code, § 515(a).) The employer must prove all of the elements. (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1014 [118 Cal.Rptr.3d 834].) For an instruction for the affirmative defense of administrative exemption, see CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption.*

This instruction is based on Industrial Welfare Commission Wage Order 9, which is applicable to the transportation industry. (See 8 Cal. Code Regs., § 11090.) Different wage orders are applicable to

different industries. (See Lab. Code, § 515.) The requirements of the executive exemptions under the various wage orders are essentially the same. (Cf., e.g., 8 Cal. Code Regs., § 11040, Wage Order 4, applicable to persons employed in professional, technical, clerical, mechanical, and similar occupations.).

The exemption requires that the employee be primarily engaged in duties that "meet the test of the exemption." (See 8 Cal. Code Regs., § 11090 sec. 1(A)(1)(e) , sec. 2(J) ("primarily" means more than one-half the employee's work time).) This requirement is expressed in element 5. However, the contours of executive duties are quite detailed in the wage orders, which incorporate federal regulations under the Fair Labor Standards Act and also provide some specific examples. (See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802 [85 Cal.Rptr.2d 844, 978 P.2d 2].) In many cases, it will be advisable to instruct further with details from the applicable wage order and regulations as to what constitutes "executive duties" in element 5.

Include the optional last paragraph if a particular work activity arguably involves more than one purpose and could be characterized as exempt or nonexempt, depending on its primary purpose.

This instruction may be expanded to provide examples of the specific exempt and nonexempt activities relevant to the work at issue. (See, e.g., *Heyen v. Safeway, Inc.* (2013) 216 Cal.App.4th 795, 808−809 [157 Cal.Rptr.3d 280].)

Sources and Authority

- Exemptions to Overtime Requirements. Labor Code section 515(a).

- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra,* 20 Cal.4th at pp. 794–795.)

- "In order to discharge its burden to show [plaintiff] was exempt as an executive employee pursuant to Wage Order 9, [defendant] was required to demonstrate the following: (1) his duties and responsibilities involve management of the enterprise or a 'customarily recognized department or subdivision thereof'; (2) he customarily and regularly directs the work of two or more employees; (3) he has the authority to hire or terminate employees, or his suggestions as to hiring, firing, promotion or other changes in status are given 'particular weight'; (4) he customarily and regularly exercises discretion and independent judgment; (5) he is primarily engaged in duties that meet the test of the exemption; and (6) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment." (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014 [citing 8 Cal. Code Regs., § 11090, subd. 1(A)(1)].)

- "Determining whether or not all of the elements of the exemption have been established is a fact-intensive inquiry." (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014.)

- "Review of the determination that [plaintiff] was not an exempt employee is a mixed question of

law and fact. Whether an employee satisfies the elements of the exemption is a question of fact reviewed for substantial evidence. The appropriate manner of evaluating the employee's duties is a question of law that we review independently." (*Heyen, supra,* 216 Cal.App.4th at p. 817, internal citations omitted.)

- "The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that '[t]he *work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work,* together with the employer's realistic expectations and the realistic requirements of the job, shall be considered … .' No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. 'A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations … .' " (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014–1015, original italics, internal citation omitted.)

- "This is not a day-by-day analysis. The issue is whether the employees ' "spend more than 51% of their time on managerial tasks in any given workweek." ' " (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 473, fn. 36 [216 Cal.Rptr.3d 390].)

- "Put simply, 'the regulations do not recognize "hybrid" activities—i.e., activities that have both "exempt" and "nonexempt" aspects. Rather, the regulations require that each discrete task be separately classified as either "exempt' or "nonexempt." [Citations.]' [¶] We did not state, however, that the same task must always be labeled exempt or nonexempt: ' [I]dentical tasks may be "exempt" or 'nonexempt" based on the purpose they serve within the organization or department.' " (*Batze, supra,* 10 Cal.App.5th at p. 474.)

- "[T]he federal regulations incorporated into Wage Order 7 do not support the 'multi-tasking' standard proposed by [defendant]. Instead, they suggest, as the trial court correctly instructed the jury, that the trier of fact must categorize tasks as either 'exempt' or 'nonexempt' based on the purpose for which [plaintiff] undertook them." (*Heyen, supra,* 216 Cal.App.4th at p. 826.)

- "Wage Order 4 refers to compensation in the form of a 'salary.' It does not define the term. The regulation does not use a more generic term, such as 'compensation' or 'pay.' Either of these terms would encompass hourly wages, a fixed annual salary, and anything in between. 'Salary' is a more specific form of compensation. A salary is generally understood to be a fixed rate of pay as distinguished from an hourly wage. Thus, use of the word 'salary' implies that an exempt employee's pay must be something other than an hourly wage. California's Labor Commission noted in an opinion letter dated March 1, 2002, that the Division of Labor Standards Enforcement (DLSE) construes the IWC wage orders to incorporate the federal salary-basis test for purposes of determining whether an employee is exempt or nonexempt." (*Negri v. Koning & Associates* (2013) 216 Cal.App.4th 392, 397−398 [156 Cal.Rptr.3d 697, footnote omitted.)

- "The rule is that state law requirements for exemption from overtime pay must be at least as protective of the employee as the corresponding federal standards. Since federal law requires that,

in order to meet the salary basis test for exemption the employee would have to be paid a predetermined amount that is not subject to reduction based upon the number of hours worked, state law requirements must be at least as protective." (*Negri, supra,* 216 Cal.App.4th at p. 398, internal citation omitted.)

- "Under California law, to determine whether an employee was properly classified as 'exempt,' the trier of fact must look not only to the 'work actually performed by the employee during the … workweek,' but also to the 'employer's realistic expectations and the realistic requirements of the job.' " (*Heyen, supra,* 216 Cal.App.4th at p. 828.)

- "Having recognized California's distinctive quantitative approach to determining which employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC's quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the *realistic* requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job." (*Ramirez, supra,* 20 Cal.4th at pp. 801−802, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Agency and Employment, § ~~361~~392 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General,* ¶ 11:345 et seq. (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, § 2.04 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.71 (Matthew Bender)

Simmons, Wage and Hour Manual for California Employers, Ch. 2, *Coverage of Wage and Hour Laws*

(Castle Publications Limited)

Simmons, Wage and Hour Manual for California Employers, Ch. 10, *Exemptions* (Castle Publications Limited)

2721. Affirmative Defense—Nonpayment of Overtime—Administrative Exemption

[*Name of defendant***] claims that [he/she/it] is not required to pay [***name of plaintiff***] for overtime because [***name of plaintiff***] is an administrative employee. [***Name of plaintiff***] is exempt from overtime pay requirements as an administrator if [***name of defendant***] proves all of the following:**

1. **[***Name of plaintiff***]'s duties and responsibilities involve the performance of office or nonmanual work directly related to management policies or general business operations of [***name of defendant***] or [***name of defendant***]'s customers;**

2. **[***Name of plaintiff***] customarily and regularly exercises discretion and independent judgment;**

3. **[[***Name of plaintiff***] performs, under general supervision only, specialized or technical work that requires special training, experience, or knowledge;]**

   [*or***]**

   [[*Name of plaintiff***] regularly and directly assists a proprietor or bona fide executive or administrator;]**

   [*or***]**

   [[*Name of plaintiff***] performs special assignments and tasks under general supervision only;]**

4. **[***Name of plaintiff***] performs administrative duties more than half of the time; and**

5. **[***Name of plaintiff***]'s monthly salary is at least [***insert amount that is twice the state minimum wage for full time employment***].**

In determining whether [*name of plaintiff***] performs administrative duties more than half of the time, the most important consideration is how [he/she] actually spends [his/her] time. But also consider whether [***name of plaintiff***]'s practice differs from [***name of defendant***]'s realistic expectations of how [***name of plaintiff***] should spend [his/her] time and the realistic requirements of the job.**

[Each of [*name of plaintiff***]'s activities is either an exempt or a nonexempt activity depending on the primary purpose for which [he/she] undertook it at that time. Time spent on an activity is either exempt or nonexempt, not both.]**

New December 2012; Revised June 2014

Directions for Use

This instruction is an affirmative defense to an employee's claim for statutory overtime earnings. (See CACI No. 2702, *Nonpayment of Overtime Compensation—Essential Factual Elements*.) The employer

claims that the employee is an exempt administrator. (See Lab. Code, § 515(a).) The employer must prove all of the elements. (*Eicher v. Advanced Business Integrators, Inc*. (2007) 151 Cal.App.4th 1363, 1372 [61 Cal.Rptr.3d 114].) For an instruction for the affirmative defense of executive exemption, see CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption.*

This instruction is based on Industrial Welfare Commission Wage Order 9, which is applicable to the transportation industry. (See 8 Cal. Code Regs., § 11090.) Different wage orders are applicable to different industries. (See Lab. Code, § 515.) The requirements of the administrative exemptions under the various wage orders are essentially the same. (Cf., e.g., 8 Cal. Code Regs., § 11040, Wage Order 4, applicable to persons employed in professional, technical, clerical, mechanical, and similar occupations.).

The exemption requires that the employee be "primarily engaged in duties that meet the test of the exemption." (See 8 Cal. Code Regs., § 11090 sec. 1(A)(2)(f), sec. 2(J) ("primarily" means more than one-half the employee's work time).) This requirement is expressed in element 4. However, the contours of administrative duties are quite detailed in the wage orders, which incorporate federal regulations under the Fair Labor Standards Act and also provide some specific examples. (See also *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802 [85 Cal.Rptr.2d 844, 978 P.2d 2].) In many cases, it will be advisable to instruct further with details from the applicable wage order and regulations as to what constitutes "administrative duties" (element 4) and the meaning of "directly related" (element 1).

Include the optional last paragraph if a particular work activity arguably involves more than one purpose and could be characterized as exempt or nonexempt, depending on its primary purpose.

This instruction may be expanded to provide examples of the specific exempt and nonexempt activities relevant to the work at issue. (See, e.g., *Heyen v. Safeway, Inc.* (2013) 216 Cal.App.4th 795, 808−809 [157 Cal.Rptr.3d 280].)

Sources and Authority

- Exemptions to Overtime Requirements. Labor Code section 515(a).

- "[T]he assertion of an exemption from the overtime laws is considered to be an affirmative defense, and therefore the employer bears the burden of proving the employee's exemption." (*Ramirez, supra,* 20 Cal.4th at pp. 794–795.)

- "In order to establish that [plaintiff] was exempt as an administrative employee, [defendant] was required to show all of the following: (1) his duties and responsibilities involve the performance of office or nonmanual work directly related to management policies or general business operations of [defendant]; (2) he customarily and regularly exercises discretion and independent judgment; (3) he performs work requiring special training, experience, or knowledge under general supervision only (the two alternative prongs of the general supervision element are not pertinent to our discussion); (4) he is primarily engaged in duties that meet the test of exemption; and (5) his monthly salary is equivalent to no less than two times the state minimum wage for full-time employment." (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1028 [relying on 8 Cal. Code Regs., § 11090, subd. 1(A)(2)].)

- "Read together, the applicable Labor Code statutes, wage orders, and incorporated federal regulations now provide an explicit and extensive framework for analyzing the administrative exemption." (*Harris v. Superior Court* (2011) 53 Cal.4th 170, 182 [135 Cal.Rptr.3d 247, 266 P.3d 953].)

- "Determining whether or not all of the elements of the exemption have been established is a fact-intensive inquiry." (*United Parcel Service Wage & Hour Cases* (2010) 190 Cal.App.4th 1001, 1014 [118 Cal.Rptr.3d 834].)

- "Review of the determination that [plaintiff] was not an exempt employee is a mixed question of law and fact. Whether an employee satisfies the elements of the exemption is a question of fact reviewed for substantial evidence. The appropriate manner of evaluating the employee's duties is a question of law that we review independently." (*Heyen, supra,* 216 Cal.App.4th at p. 817, internal citations omitted.)

- "The appropriateness of any employee's classification as exempt must be based on a review of the actual job duties performed by that employee. Wage Order 9 expressly provides that '[t]he *work actually performed by the employee during the course of the workweek must, first and foremost, be examined and the amount of time the employee spends on such work,* together with the employer's realistic expectations and the realistic requirements of the job, shall be considered … .' No bright-line rule can be established classifying everyone with a particular job title as per se exempt or nonexempt—the regulations identify job duties, not job titles. 'A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations … .' " (*United Parcel Service Wage & Hour Cases, supra,* 190 Cal.App.4th at p. 1014–1015, original italics, internal citation omitted.)

- "This is not a day-by-day analysis. The issue is whether the employees ' "spend more than 51% of their time on managerial tasks in any given workweek." ' " (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 473, fn. 36 [216 Cal.Rptr.3d 390].)

- "Put simply, 'the regulations do not recognize "hybrid" activities—i.e., activities that have both "exempt" and "nonexempt" aspects. Rather, the regulations require that each discrete task be separately classified as either "exempt' or "nonexempt." [Citations.]' [¶] We did not state, however, that the same task must always be labeled exempt or nonexempt: ' [I]dentical tasks may be "exempt" or 'nonexempt" based on the purpose they serve within the organization or department.' " (*Batze, supra,* 10 Cal.App.5th at p. 474.)

- "In basic terms, the administrative/production worker dichotomy distinguishes between administrative employees who are primarily engaged in ' "administering the business affairs of the enterprise" ' and production-level employees whose ' "primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market." [Citation.]' ¶¶ [T]he dichotomy is a judicially created creature of the common law, which has been effectively superseded in this context by the more specific and detailed statutory and regulatory enactments." (*Harris, supra,* 53 Cal.4th at pp. 183, 188.)

- "We do not hold that the administrative/production worker dichotomy … can never be used as an analytical tool. We merely hold that the Court of Appeal improperly applied the administrative/production worker dichotomy as a dispositive test. [¶] … [I]n resolving whether work qualifies as administrative, courts must consider the particular facts before them and apply the language of the statutes and wage orders at issue. Only if those sources fail to provide adequate guidance … is it appropriate to reach out to other sources." (*Harris, supra,* 53 Cal.4th at p. 190.)

- "[T]he federal regulations incorporated into Wage Order 7 do not support the 'multi-tasking' standard proposed by [defendant]. Instead, they suggest, as the trial court correctly instructed the jury, that the trier of fact must categorize tasks as either 'exempt' or 'nonexempt' based on the purpose for which [plaintiff] undertook them." (*Heyen, supra,* 216 Cal.App.4th at p. 826.)

- "Wage Order 4 refers to compensation in the form of a 'salary.' It does not define the term. The regulation does not use a more generic term, such as 'compensation' or 'pay.' Either of these terms would encompass hourly wages, a fixed annual salary, and anything in between. 'Salary' is a more specific form of compensation. A salary is generally understood to be a fixed rate of pay as distinguished from an hourly wage. Thus, use of the word 'salary' implies that an exempt employee's pay must be something other than an hourly wage. California's Labor Commission noted in an opinion letter dated March 1, 2002, that the Division of Labor Standards Enforcement (DLSE) construes the IWC wage orders to incorporate the federal salary-basis test for purposes of determining whether an employee is exempt or nonexempt." (*Negri v. Koning & Associates* (2013) 216 Cal.App.4th 392, 397−398 [156 Cal.Rptr.3d 697, footnote omitted.)

- "The rule is that state law requirements for exemption from overtime pay must be at least as protective of the employee as the corresponding federal standards. Since federal law requires that, in order to meet the salary basis test for exemption the employee would have to be paid a predetermined amount that is not subject to reduction based upon the number of hours worked, state law requirements must be at least as protective." (*Negri, supra,* 216 Cal.App.4th at p. 398.)

- "Under California law, to determine whether an employee was properly classified as 'exempt,' the trier of fact must look not only to the 'work actually performed by the employee during the … workweek,' but also to the 'employer's realistic expectations and the realistic requirements of the job.' " (*Heyen, supra,* 216 Cal.App.4th at p. 828.)

- "Having recognized California's distinctive quantitative approach to determining which employees are outside salespersons, we must then address an issue implicitly raised by the parties that caused some confusion in the trial court and the Court of Appeal: Is the number of hours worked in sales-related activities to be determined by the number of hours that the employer, according to its job description or its estimate, claims the employee should be working in sales, or should it be determined by the actual average hours the employee spent on sales activity? The logic inherent in the IWC's quantitative definition of outside salesperson dictates that neither alternative would be wholly satisfactory. On the one hand, if hours worked on sales were determined through an employer's job description, then the employer could make an employee exempt from overtime laws solely by fashioning an idealized job description that had little basis in reality. On the other hand, an employee who is supposed to be engaged in sales activities

during most of his working hours and falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption. A trial court, in determining whether the employee is an outside salesperson, must steer clear of these two pitfalls by inquiring into the *realistic* requirements of the job. In so doing, the court should consider, first and foremost, how the employee actually spends his or her time. But the trial court should also consider whether the employee's practice diverges from the employer's realistic expectations, whether there was any concrete expression of employer displeasure over an employee's substandard performance, and whether these expressions were themselves realistic given the actual overall requirements of the job." (*Ramirez, supra*, 20 Cal.4th at pp. 801−802, original italics.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Agency ~~and Employment~~, § ~~361~~392 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:345 et seq. (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, § 2.04 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.71 (Matthew Bender)

Simmons, Wage and Hour Manual for California Employers, Ch. 2, *Coverage of Wage and Hour Laws* (Castle Publications Limited)

Simmons, Wage and Hour Manual for California Employers, Ch. 10, *Exemptions* (Castle Publications Limited)

3000. Violation of Federal Civil Rights—In General—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] violated [his/her] civil rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [intentionally/[***other applicable state of mind***]] [***insert wrongful act***];**

2. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

3. **That [***name of defendant***]'s conduct violated [***name of plaintiff***]'s right [***insert right, e.g., "of privacy"***];**

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

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

New September 2003

Directions for Use

In element 1, the standard is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involve conduct carried out with "deliberate indifference," and Fourth Amendment claims do not necessarily involve intentional conduct. The "official duties" referred to in element 2 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 a jury issue, so it has been omitted to shorten the wording of element 2. This instruction is intended for claims not covered by any of the following more specific instructions regarding the elements that the plaintiff must prove.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.

- "As we have said many times, § 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " (*Graham v. Connor* (1989) 490 U.S. 386, 393-394 [109 S.Ct. 1865, 104 L.Ed.2d 443], internal citation omitted.)

- "42 U.S.C. § 1983 creates a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the Constitution. Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental

officials." (*Jones v. Williams* (9th Cir. 2002) 297 F.3d 930, 934.)

- "By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 890 [104 Cal.Rptr.3d 352].)

- "Section 1983 can also be used to enforce federal statutes. For a statutory provision to be privately enforceable, however, it must create an individual right." (*Henry A. v. Willden* (9th Cir. 2012) 678 F.3d 991, 1005, internal citation omitted.)

- "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 jury was properly instructed on [plaintiff]'s burden of proof and the particular elements of the section 1983 claim. (CACI No. 3000.)" (*King v. State of California* (2015) 242 Cal.App.4th 265, 280 [195 Cal.Rptr.3d 286].)

- " 'State courts look to federal law to determine what conduct will support an action under section 1983. The first inquiry in any section 1983 suit is to identify the precise constitutional violation with which the defendant is charged.' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 203 [73 Cal.Rptr.2d 571], internal citations omitted.)

- " 'Qualified immunity is an affirmative defense against section 1983 claims. Its purpose is to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." The defense provides immunity from suit, not merely from liability. Its purpose is to spare defendants the burden of going forward with trial.' Because it is an immunity from suit, not just a mere defense to liability, it is important to resolve immunity questions at the earliest possible stage in litigation. Immunity should ordinarily be resolved by the court, not a jury." (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 342 [54 Cal.Rptr.2d 772], internal citations omitted.)

- "Constitutional torts employ the same measure of damages as common law torts and are not augmented 'based on the abstract "value" or "importance" of constitutional rights ... .' Plaintiffs have the burden of proving compensatory damages in section 1983 cases, and the amount of damages depends 'largely upon the credibility of the plaintiffs' testimony concerning their injuries.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 321 [103 Cal.Rptr.2d 339], internal citations omitted.)

- "[E]ntitlement to compensatory damages in a civil rights action is not a matter of discretion: 'Compensatory damages . . . are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.' " (*Hazle v. Crofoot* (9th Cir. 2013) 727 F.3d 983, 992.)

- "[T]he state defendants' explanation of the jury's zero-damages award as allocating all of [plaintiff]'s injury to absent persons reflects the erroneous view that not only could zero damages be awarded to

[plaintiff], but that [plaintiff]'s damages were capable of apportionment. [Plaintiff] independently challenges the jury instruction and verdict form that allowed the jury to decide this question, contending that the district judge should have concluded, as a matter of law, that [plaintiff] was entitled to compensatory damages and that defendants were jointly and severally liable for his injuries. He is correct. The district judge erred in putting the question of apportionment to the jury in the first place, because the question of whether an injury is capable of apportionment is a legal one to be decided by the judge, not the jury." (*Hazle, supra,* 727 F.3d at pp. 994−995.)

- "An individual acts under color of state law when he or she exercises power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " (*Naffe v. Frey* (9th Cir. 2015) 789 F.3d 1030, 1036.)

- "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.)

- "A state employee who is off duty nevertheless acts under color of state law when (1) the employee 'purport[s] to or pretend[s] to act under color of law,' (2) his 'pretense of acting in the performance of his duties . . . had the purpose and effect of influencing the behavior of others,' and (3) the harm inflicted on plaintiff 'related in some meaningful way either to the officer's governmental status or to the performance of his duties,' " (*Naffe, supra,* 789 F.3d at p. 1037, internal citations omitted.)

- "[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.)

- " 'While generally not applicable to private parties, a § 1983 action can lie against a private party when "he is a willful participant in joint action with the State or its agents." ' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App 5th 360, 396 [218 Cal.Rptr.3d 38]~~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~~.)

- "The Ninth Circuit has articulated four tests for determining whether a private person acted under color of law: (1) the public function test, (2) the joint action test, (3) the government nexus test, and

(4) the government coercion or compulsion test. ‘Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists.’ ‘ “[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.” ’ ” (*Julian*, *supra*, 11 Cal.App.5th at p. 396.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Constitutional Law, §§ ~~816~~888, ~~819~~ 892 et seq.

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law-General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶¶ 7.05–7.07, Ch. 17, *Deprivation of Rights Under Color of State Law-General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶ 17.02 (Matthew Bender)

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

3001. Local Government Liability—Policy or Custom—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [he/she] was deprived of [his/her] civil rights as a result of an official [policy/custom] of the [***name of local governmental entity***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That the [***name of local governmental entity***] had an official [policy/custom] [***specify policy or custom***];**

2. **That [***name of officer or employee***] was an [officer/employee/[***other***]] of [***name of local governmental entity***];**

3. **That [***name of officer or employee***] [intentionally/[***insert other applicable state of mind***]] [***insert conduct allegedly violating plaintiff's civil rights***];**

4. **That [***name of officer or employee***]'s conduct violated [***name of plaintiff***]'s right [***specify right***];**

5. **That [***name of officer or employee***] acted because of this official [policy/custom].**

New September 2003; Revised December 2010; Renumbered from CACI No. 3007 and Revised December 2012

Directions for Use

Give this instruction and CACI No. 3002, *"Official Policy or Custom" Explained,* if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the entity's official policy or custom. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements,* and the instructions on the particular constitutional violation alleged.

In element 3, a constitutional violation is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involving failure to provide a prisoner with proper medical care require "deliberate indifference." (See *Hudson v. McMillian* (1992) 503 U.S. 1, 5 [112 S.Ct. 995, 117 L.Ed.2d 156].) And Fourth Amendment claims require an "unreasonable" search or seizure. (See *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834.)

For other theories of liability against a local governmental entity, see CACI No. 3003, *Local Government Liability—Failure to Train—Essential Factual Elements,* and CACI No. 3004, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." (*Monell v. Dept. of Social Services of New York* (1978) 436 U.S. 658, 694 [98 S.Ct. 2018, 56 L.Ed.2d 611].)

- Local governmental entities " 'can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted. ...' " Local governmental entities also can be sued " 'for constitutional deprivations visited pursuant to governmental "custom." ' " In addition, " '[t]he plaintiff must ... demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1147 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)

- "Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy. This was the situation in *Monell*, where there was an explicit policy requiring pregnant government employees to take unpaid leaves of absence before such leaves were medically required. ... Alternatively, the municipality may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)

- " '[I]n order to successfully maintain an action under 42 United States Code section 1983 against governmental defendants for the tortious conduct of employees under federal law, it is necessary to establish that the conduct occurred in execution of a government's policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1564 [266 Cal.Rptr. 682], internal citations omitted.)

- "Under *Monell*, a local government body can be held liable under § 1983 for policies of inaction as well as policies of action. A policy of action is one in which the government body itself violates someone's constitutional rights, or instructs its employees to do so; a policy of inaction is based on a government body's 'failure to implement procedural safeguards to prevent constitutional violations.' " (*Jackson v. Barnes* (9th Cir. 2014) 749 F.3d 755, 763], internal citations omitted.)

- ~~"[T]he City argues that, in order to prevail on a *Monell* claim, [plaintiff] must prove that the City's policy amounts to deliberate indifference of her constitutional right … . Once again, the City relies on an inapplicable part of our *Monell* jurisprudence: the 'deliberate indifference' requirement applies only to claims involving allegations of constitutional deprivations resulting from governmental inaction or omission, such as a failure to adequately train. Because [plaintiff] claims her constitutional deprivation resulted from a City policy and affirmative government conduct — training [dog] to 'bite and hold' and releasing [dog] off-lead into Suite 201 — the 'deliberate indifference' analysis does not apply." (*Lowry v. City of San Diego* (9th Cir. 2016) 818 F.3d 840, 855.)~~

- "Normally, the question of whether a policy or custom exists would be a jury question. However, when there are no genuine issues of material fact and the plaintiff has failed to establish a prima facie case, disposition by summary judgment is appropriate." (*Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911, 920.)

- "A triable issue exists as to whether the root of the unconstitutional behavior exhibited in [plaintiff]'s case lies in the unofficial operating procedure of [defendant] County or in the errant acts of individual social workers, and this question should go to a jury." (*Kirkpatrick v. County of Washoe* (9th Cir. 2015) 792 F.3d 1184, 1201.)

- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate, supra,* 86 Cal.App.4th at p. 328.)

- "Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]'s injuries. [Plaintiff]'s recovery, if any, based upon a *Monell* claim would be limited to nominal damages." (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)

- "Local governmental bodies such as cities and counties are considered 'persons' subject to suit under section 1983. States and their instrumentalities, on the other hand, are not." (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1101 [100 Cal.Rptr.2d 289], internal citations omitted.)

- "A municipality can be sued under section 1983 for 'constitutional deprivations visited pursuant to governmental "custom." ' However, 'Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, … a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.' " (*Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1118 [190 Cal.Rptr.3d 97], original italics, internal citation omitted.)

- "A local governmental unit is liable only if the alleged deprivation of rights 'implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers,' or when the injury is in 'execution of a [local] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1171 [80 Cal.Rptr.2d 860], internal citations omitted.)

- "A municipality's policy or custom resulting in constitutional injury may be actionable even though the individual public servants are shielded by good faith immunity." (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 568 [195 Cal.Rptr. 268], internal citations omitted.)

- "No punitive damages can be awarded against a public entity." (*Choate, supra,* 86 Cal.App.4th at p.

328, internal citation omitted.)

- "[T]he requirements of *Monell* do apply to suits against private entities under § 1983. … [W]e see no basis in the reasoning underlying *Monell* to distinguish between municipalities and private entities acting under color of state law." (*Tsao v. Desert Palace, Inc.* (9th Cir. 2012) 698 F.3d 1128, 1139, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Constitutional Law, §§ ~~816~~888, ~~819~~ 892 et seq.

17A Moore's Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 123.23 (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[2][a] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

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.)

- "Because there are no genuine issues of material fact and 'the relevant set of facts' has been determined, the reasonableness of the use of force is 'a pure question of law.' " (*Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1256 (en banc)~~In 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~~.)

- "In assessing the objective reasonableness of a particular use of force, we consider: (1) 'the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted,' (2) 'the government's interest in the use of force,' and (3) the balance between 'the gravity of the intrusion on the individual' and 'the government's need for that intrusion.' " (*Lowry,*

supra, 858 F.3d at p. 1256~~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.)

- “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.)

- "[A] dismissal under section 1203.4 does not invalidate a conviction for purposes of removing the *Heck* bar preventing a plaintiff from bringing a civil action." (*Baranchik v. Fizulich* (2017) 10 Cal.App.5th 1210, 1224 [217 Cal.Rptr.3d 423].)

- "[Plaintiff]'s section 1983 claim *is* barred to the extent it alleges that [the arresting officer] lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. 'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899 [76 Cal.Rptr.3d 787, 183 P.3d 471], original italics.)

- "[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 (11th ed. 2017~~10th ed. 2005~~) Constitutional Law, §§ ~~816~~888, ~~819~~ 892 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1526 et seq. (The Rutter Group)

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3021. Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully arrested [him/her] because [he/she] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] arrested [***name of plaintiff***] without a warrant[and without probable cause];**

2. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

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

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

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] was arrested without probable cause. But in order for me to do so, you must first decide:**

[*List all factual disputes that must be resolved by the jury.***]]**

New April 2009; Revised December 2009; Renumbered from CACI No. 3014 December 2012, June 2016

Directions for Use

Give this instruction in a false arrest case brought under title 42 United States Code section 1983. For an instruction for false arrest under California law, see CACI No. 1401, *False Arrest Without Warrant by Peace Officer—Essential Factual Elements.*

The ultimate determination of whether the arresting officer had probable cause (element 1) is to be made by the court as a matter of law. (*Hunter v. Bryant* (1991) 502 U.S. 224, 227−228 [112 S.Ct. 534, 116 L.Ed.2d 589].) However, in exercising this role, the court does not sit as the trier of fact. It is still the province of the jury to determine the facts on conflicting evidence as to what the arresting officer knew at the time. (See *Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, 1018−1023; see also *King v. State of California* (2015) 242 Cal.App.4th 265, 289 [195 Cal.Rptr.3d 286].) Include "without probable cause" in element 1 and the last optional paragraph if the jury will be asked to find facts with regard to probable cause.

The "official duties" referred to in element 2 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 2.

Sources and Authority

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)

- " 'A claim for unlawful arrest is cognizable under § 1983 as a violation of the Fourth Amendment, provided the arrest was without probable cause or other justification.'. 'Probable cause exists if the arresting officers "had knowledge and reasonably trustworthy information of facts and circumstances sufficient to lead a prudent person to believe that [the arrestee] had committed or was committing a crime." ' " (*Gravelet-Blondin v. Shelton* (9th Cir. 2013) 728 F.3d 1086, 1097−1098.)

- "The Court of Appeals' confusion is evident from its statement that 'whether a reasonable officer could have believed he had probable cause is a question for the trier of fact, and summary judgment . . . based on lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.' This statement of law is wrong for two reasons. First, it routinely places the question of immunity in the hands of the jury. Immunity ordinarily should be decided by the court long before trial. Second, the court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." (*Hunter, supra,* 502 U.S. at pp. 227−228, internal citations omitted.)

- "The mere existence of some evidence that could suggest self-defense does not negate probable cause. [Plaintiff]'s claim of self-defense apparently created doubt in the minds of the jurors, but probable cause can well exist (and often does) even though ultimately, a jury is not persuaded that there is proof beyond a reasonable doubt." (*Yousefian v. City of Glendale* (9th Cir. 2015) 779 F.3d 1010, 1014.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "Although the plaintiff bears the burden of proof on the issue of unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant." (*Dubner v. City & County of San Francisco* (9th Cir. 2001) 266 F.3d 959, 965.)

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- "There is no bright-line rule to establish whether an investigatory stop has risen to the level of an arrest. Instead, this difference is ascertained in light of the ' "totality of the circumstances." ' This is a highly fact-specific inquiry that considers the intrusiveness of the methods used in light of whether these methods were 'reasonable *given the specific circumstances*.' " (*Green v. City & County of San Francisco* (9th Cir. 2014) 751 F.3d 1039, 1047, original italics, internal citations omitted.)

- "Because stopping an automobile and detaining its occupants, 'even if only for a brief period and for a limited purpose,' constitutes a 'seizure' under the Fourth Amendment, an official must have individualized 'reasonable suspicion' of unlawful conduct to carry out such a stop." (*Tarabochia v. Adkins* (9th Cir. 2014) 766 F.3d 1115, 1121, internal citation omitted.)

- " '[Q]ualified immunity is a question of law, not a question of fact. [Citation.] But Defendants are only entitled to qualified immunity as a matter of law if, taking the facts in the light most favorable to [the plaintiff], they violated no clearly established constitutional right. The court must deny the motion for judgment as a matter of law if reasonable jurors could believe that Defendants violated [the plaintiff's] constitutional right, and the right at issue was clearly established.' 'The availability of qualified immunity after a trial is a legal question informed by the jury's findings of fact, but ultimately committed to the court's judgment.' '' '[D]eference to the jury's view of the facts persists throughout each prong of the qualified immunity inquiry.' " '[T]he jury's view of the facts must govern our analysis once litigation has ended with a jury's verdict.' 'Where, as here, the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability.' " (*King, supra,* 242 Cal.App.4th at p. 289, internal citations omitted.)

- "[Plaintiff] did have a constitutional right under the Fourth Amendment to be free from involuntary detention without probable cause. Therefore, the issue is whether the undisputed facts demonstrated that a reasonable officer would have believed there was probable cause to detain [plaintiff] under [Welfare and Institutions Code] section 5150." (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 387 [218 Cal.Rptr.3d 38].)

- "[I]f what the policeman knew prior to the arrest is genuinely in dispute, and if a reasonable officer's perception of probable cause would differ depending on the correct version, that factual dispute must be resolved by a fact finder. [Citations.] [¶] … [W]e do not find the facts relative to probable cause to arrest, and the alleged related conspiracy, so plain as to lead us to only a single conclusion, i.e., a conclusion in defendants' favor. The facts are complex, intricate and in key areas contested. Even more important, the inferences to be drawn from the web of facts are disputed and unclear—and are likely to depend on credibility judgments." (*King, supra,* 242 Cal.App.4th at p. 291, internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, § 181

Chin et al., California Practice Guide: Employment Litigation, Ch.7-C, *42 USC § 1983*, ¶ 7:1365 (The Rutter Group)

5 Levy et al., California Torts, Ch. 60, *Principles of Liability and Immunity of Public Entities and*

Employees, § 60.06 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery*, § 21.36A (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Institutional and Individual Immunity*, § 2.03 (Matthew Bender)

3022. Unreasonable Search—Search With a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] carried out an unreasonable search of [his/her] [person/home/automobile/office/[***insert other***]]. To establish this claim, [***name of plaintiff***] must prove the following:**

1. **That [***name of defendant***] searched [***name of plaintiff***]'s [person/home/automobile/office/[***insert other***]];**

2. **That [***name of defendant***]'s search was unreasonable;**

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 unreasonable search was a substantial factor in causing [***name of plaintiff***]'s harm.**

In deciding whether the search was unreasonable, you should consider, among other factors, the following:

(a) The scope of the warrant;

(b) The extent of the particular intrusion;

(c) The place in which the search was conducted; [and]

(d) The manner in which the search was conducted; [and]

(e) [*Insert other applicable factor***].**

New September 2003; Renumbered from CACI No. 3002 December 2012; Revised November 2017

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.

This instruction may be modified to assert a claim for an unreasonable detention while a search warrant is being executed by referencing the detention in elements 2 and 5, in the sentence introducing the factors,

and in factor (d). Additional factors relevant to the reasonableness of the detention should be included under factor (e). (See *Davis v. United States* (9th Cir. 2017) 854 F.3d 594, 599.)

Sources and Authority

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)

- "Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful and the fruits of the search not subject to suppression." (*U.S. v. Ramirez* (1998) 523 U.S. 65, 71 [118 S.Ct. 992, 140 L.Ed.2d 191.)

- " 'The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.' " (*Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834], internal citation omitted.)

- " '[T]he Fourth Amendment proscribes only "unreasonable" searches and seizures.' The reasonableness of a search or seizure depends 'not only on *when* [it] is made, but also *how* it is carried out.' 'In other words, even when supported by probable cause, a search or seizure may be invalid if carried out in an unreasonable fashion.' " (*Cameron v. Craig* (9th Cir. 2013) 713 F.3d 1012, 1021, original italics, internal citation omitted.)

- "Under the Fourth Amendment, 'a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.' Nevertheless, 'special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case.' For instance, search-related detentions that are 'unnecessarily painful [or] degrading' and 'lengthy detentions[] of the elderly, or of children, or of individuals suffering from a serious illness or disability raise additional concerns.' Thus, a 'seizure must be "carefully tailored' to the law enforcement interests that . . . justify detention while a search warrant is being executed.' " (*Davis, supra*, 854 F.3d at p. 599, 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.)

- "[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~~11th ed. 2017) Constitutional Law, §§ ~~816~~888, ~~819~~ 892 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)

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." (*Devereaux, supra,* 263 F.3d at p. 1076.)

- "[T]he Constitution prohibits the deliberate fabrication of evidence whether or not the officer knows that the person is innocent. The district court erred by granting judgment as a matter of law to Defendants because, in this case involving direct evidence of fabrication, Plaintiff was not required to show that [defendant] actually or constructively knew that he was innocent." (*Spencer v. Peters* (9th Cir. 2017) 857 F.3d 789, 800, internal citations omitted.)

- "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.)

- "[N]ot all inaccuracies in an investigative report give rise to a constitutional claim. Mere 'careless[ness]' is insufficient, as are mistakes of 'tone.' Errors concerning trivial matters cannot establish causation, a necessary element of any § 1983 claim. And fabricated evidence does not give rise to a claim if the plaintiff cannot 'show the fabrication actually injured her in some way.' " (*Spencer, supra*, 857 F3d at p. 798, internal citations omitted.)

- "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. __ [137 S.Ct. 911, 918, 197 L.Ed.2d 312], internal citation omitted.)
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Secondary Sources

8 Witkin, Summary of California Law (~~10th ed. 2005~~11th ed. 2017) Constitutional Law, § ~~826~~ 901 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)

3063. Acts of Violence—Ralph Act—Essential Factual Elements (Civ. Code, § 51.7)

[*Name of plaintiff***] claims that [***name of defendant***] committed an act of violence against [him/her] because of [his/her] [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/citizenship/primary language/immigration status/position in a labor dispute/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] committed a violent act against [***name of plaintiff***] [or [his/her] property];**

2. **That a substantial motivating reason for [***name of defendant***]'s conduct was [[his/her] perception of] [***name of plaintiff***]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/citizenship/primary language/immigration status/position in a labor dispute/[***insert other actionable characteristic***]];**

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

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

Derived from former CACI No. 3023 December 2009; Renumbered from CACI No. 3023A December 2012; Revised June 2013, December 2016

Directions for Use

Use this instruction for a cause of action under the Ralph Act involving actual acts of violence alleged to have been committed by the defendant against the plaintiff. For an instruction involving only threats of violence, see CACI No. 3064, *Threats of Violence—Ralph Act—Essential Factual Elements*.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's acts. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Ralph Act has not been addressed by the courts.

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under Civil Code section 51.7. (Civ. Code, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (CACI No. 3600 et seq.).

Sources and Authority

- Ralph Act. Civil Code section 51.7.

- Protected Characteristics. Civil Code section 51(b).

- Remedies Under Ralph Act. Civil Code section 52(b).

- "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)

- "Under the Ralph Act, a plaintiff must establish the defendant threatened or committed violent acts against the plaintiff or their property, and a motivating reason for doing so was a prohibited discriminatory motive, or that [defendant] aided, incited, or conspired in the denial of a protected right." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1291 [217 Cal.Rptr.3d 275].)

- "Nor do we agree with defendants that 'because of' logically means 'hatred.' Section 51.7 provides that all persons 'have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of …' specified characteristics, including sex, and provides for a civil remedy for violation of that right. Nothing in the statute requires that a plaintiff prove that the offending act was motivated by hate." (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 269 [150 Cal.Rptr.3d 861].)

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

Secondary Sources

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

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

Cheng, et al., Calif. Fair Housing and Public Accommodations § 9:36, 9:37 (The Rutter Group) (Ralph Act, Calif. Jury Instructions)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

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

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

[*Name of plaintiff***] claims that [***name of defendant***] intimidated [him/her] by threat of violence because of [his/her] [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/citizenship/primary language/immigration status/position in a labor dispute/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] intentionally threatened violence against [***name of plaintiff***] [or [his/her] property], [whether or not [***name of defendant***] actually intended to carry out the threat];**

2. **That a substantial motivating reason for [***name of defendant***]'s conduct was [[his/her] perception of] [***name of plaintiff***]'s [race/color/religion/ancestry/national origin/political affiliation/sex/sexual orientation/age/disability/citizenship/primary language/immigration status/position in a labor dispute/[***insert other actionable characteristic***]];**

3. **That a reasonable person in [***name of plaintiff***]'s position would have believed that [***name of defendant***] would carry out [his/her] threat;**

4. **That a reasonable person in [***name of plaintiff***]'s position would have been intimidated by [***name of defendant***]'s conduct;**

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

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

Derived from former CACI No. 3023 December 2009; Renumbered from CACI No. 3023B December 2012; Revised June 2013, December 2016

Directions for Use

Use this instruction for a cause of action under the Ralph Act involving threats of violence alleged to have been directed by the defendant toward the plaintiff. For an instruction involving actual acts of violence, see CACI No. 3063, *Acts of Violence—Ralph Act—Essential Factual Elements*.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's threats. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Ralph Act has not been addressed by the courts.

No published California appellate opinion establishes elements 3 and 4. However, the Ninth Circuit Court of Appeals and the California Fair Employment and Housing Commission have held that a reasonable person in the plaintiff's position must have been intimidated by the actions of the defendant and have perceived a threat of violence. (See *Winarto v. Toshiba America Electronics Components, Inc.* (9th Cir. 2001) 274 F.3d 1276, 1289–1290; *Dept. Fair Empl. & Hous. v. Lake Co. Dept. of Health Serv.* (July 22, 1998) 1998 CAFEHC LEXIS 16, **55–56.)

Liability may also be found if a defendant "aids, incites, or conspires" in the denial of a right protected under Civil Code section 51.7. (Civ. Code, § 52(b).) This instruction should be modified if aiding, inciting, or conspiring is asserted as theories of liability. See also instructions in the Conspiracy series (CACI No. 3600 et seq.).

Sources and Authority

- Ralph Act. Civil Code section 51.7.
- Protected Characteristics. Civil Code section 51(b).
- Remedies Under Ralph Act. Civil Code section 52(b).
- "The unambiguous language of this section gives rise to a cause of action in favor of a person against whom violence or intimidation has been committed or threatened." (*Coon v. Joseph* (1987) 192 Cal.App.3d 1269, 1277 [237 Cal.Rptr. 873].)
- "Under the Ralph Act, a plaintiff must establish the defendant threatened or committed violent acts against the plaintiff or their property, and a motivating reason for doing so was a prohibited discriminatory motive, or that [defendant] aided, incited, or conspired in the denial of a protected right." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1291 [217 Cal.Rptr.3d 275].)
- "Nor do we agree with defendants that 'because of' logically means 'hatred.' Section 51.7 provides that all persons 'have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of …' specified characteristics, including sex, and provides for a civil remedy for violation of that right. Nothing in the statute requires that a plaintiff prove that the offending act was motivated by hate." (*Ventura v. ABM Industries Inc.* (2012) 212 Cal.App.4th 258, 269 [150 Cal.Rptr.3d 861].)
- "The test is: 'would a reasonable person, standing in the shoes of the plaintiff, have been intimidated by the actions of the defendant and have perceived a threat of violence?' " (*Winarto, supra,* 274 F.3d at pp. 1289–1290, internal citation omitted.)
- "When a threat of violence would lead a reasonable person to believe that the threat will be carried out, in light of the 'entire factual context,' including the surrounding circumstances and the listeners' reactions, then the threat does not receive First Amendment protection, and may be actionable under the Ralph Act. The only intent requirement is that respondent 'intentionally or knowingly

communicates his [or her] threat, not that he intended or was able to carry out his threat.' A threat exists if the 'target of the speaker reasonably believes that the speaker has the ability to act him or herself or to influence others. . . . It is the perception of a reasonable person that is dispositive, not the actual intent of the speaker.' " (*Dept. Fair Empl. & Hous., supra,* 1998 CAFEHC LEXIS at pp. 55–56, internal citations omitted.)

- "Section 51 by its express language applies only within California. It cannot (with its companion penalty provisions in § 52) be extended into the Hawaiian jurisdiction. A state cannot regulate or proscribe activities conducted in another state or supervise the internal affairs of another state in any way, even though the welfare or health of its citizens may be affected when they travel to that state." (*Archibald v. Cinerama Hawaiian Hotels, Inc.* (1977) 73 Cal.App.3d 152, 159 [140 Cal.Rptr. 599], internal citations omitted, disapproved on other grounds in *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24 [219 Cal.Rptr. 133, 707 P.2d 195].)

Secondary Sources

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

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

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

Cheng, et al., Calif. Fair Housing and Public Accommodations §§ 9:36, 9:37 (The Rutter Group) (Ralph Act, Calif. Jury Instructions)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, § 116.80 (Matthew Bender)

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

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

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

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

[*or***]**

[That [*name of defendant***] acted violently against [[***name of plaintiff***]/ [and] [***name of plaintiff***]'s property] [to prevent [him/her] from exercising [his/her] right [***insert right***]/to retaliate against [***name of plaintiff***] for having exercised [his/her] right [***insert right***]];]**

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; Renumbered from CACI No. 3025 and Revised December 2012

Directions for Use

Select the first option for element 1 if the defendant's conduct involved threats of violence. (See Civ. Code, § 52.1(j).) Select the second option if the conduct involved actual violence.

The Bane Act provides that speech alone is not sufficient to constitute a violation unless it involves a credible threat of violence. (Civ. Code, § 52.1(j).) This limitation would appear to foreclose a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] [to state a cause of action under Bane Act there must first be violence or intimidation by threat of violence].) For example, it would not be a violation to threaten to report someone to immigration if the person exercises a right granted under labor law. No case has been found, however, that applies the speech limitation to foreclose such a claim, and several courts have suggested that this point is not fully settled. (See *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959 [137 Cal.Rptr.3d 839] [we "need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1"]; *City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 408 [39 Cal.Rptr.3d 1] [also noting issue but finding it unnecessary to address].) To assert such a claim, modify element 2 to allege coercion based on a nonviolent threat with severe consequences.

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

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

Sources and Authority

- Bane Act. Civil Code section 52.1.
- Remedies Under Bane Act. Civil Code section 52.
- "The Bane Act permits an individual to pursue a civil action for damages where another person 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state.' 'The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., "threat[], intimidation or coercion"), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.' " (*King v. State of California* (2015) 242 Cal.App.4th 265, 294 [195 Cal.Rptr.3d 286], internal citation omitted.)
- "[S]ection 52.1, was enacted a decade [after the Ralph Act] as part of Assembly Bill No. 63 (1987–1988 Reg. Sess.) (Assembly Bill No. 63) and is known as the Tom Bane Civil Rights Act. It was intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence. The stated purpose of the bill was 'to fill in the gaps left by the Ralph Act' by allowing an individual to seek relief to prevent the violence from occurring before it was committed and providing for the filing of criminal charges. (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447 [39 Cal.Rptr.3d 706], internal citation omitted.)
- "The Legislature enacted section 52.1 to stem a tide of hate crimes." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 [70 Cal.Rptr.2d 844, 949 P.2d 941], internal citation omitted.)
- "[T]o state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence. Second, the violence or threatened violence must be due to plaintiff's membership in one

of the specified classifications set forth in Civil Code section 51.7 or a group similarly protected by constitution or statute from hate crimes." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1290 [217 Cal.Rptr.3d 275].)

- "The plaintiff must show 'the defendant interfered with or attempted to interfere with the plaintiff's legal right by threatening or committing violent acts.' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 395 [218 Cal.Rptr.3d 38].)

- "However, the statutory language does not limit its application to hate crimes. Notably, the statute does not require a plaintiff to allege the defendant acted with discriminatory animus or intent based upon the plaintiff's membership in a protected class of persons." (*Shoyoye, supra,* 203 Cal.App.4th at p. 956.)

- "Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.* (1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

- "[T]he Bane Act requires that the challenged conduct be intentional." (*Simmons v. Superior Court* (2016) 7 Cal.App.5th 1113, 1125 [212 Cal.Rptr.3d 884].)

- "[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones, supra,* 17 Cal.4th at p. 334.)

- "The statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence." (*Shoyoye, supra,* 203 Cal.App.4th at p. 958.)

- Section 52.1 is not a remedy to be used against private citizens for violations of rights that apply only to the state or its agents. (*Jones, supra,* 17 Cal.4th at p. 337 [right to be free from unreasonable search and seizure].)

- " '[W]here coercion is inherent in the constitutional violation alleged, … the statutory requirement of "threats, intimidation, or coercion" is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.' " (*Simmons, supra,* 7 Cal.App.5th at p. 1126~~Numerous California decisions make clear that a plaintiff in a search-and-seizure case must allege threats or coercion beyond the coercion inherent in a detention or search in order to recover under the Bane Act." (*Lyall v. City of Los Angeles* (9th Cir. 2015) 807 F.3d 1178, 1196~~.)

- ~~"[I]t is clear that to state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence." (*Cabesuela, supra,* 68 Cal.App.4th at p. 111.)~~

- Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282], which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under section 52.1: "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the

United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things."

- "Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' ... The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S., supra,* 10 Cal.4th at p. 715, internal citation omitted.)

- "[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code section 52.1." (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741].)

- "[A] wrongful detention that is 'accompanied by the requisite threats, intimidation, or coercion'—'coercion independent from the coercion inherent in the wrongful detention itself' that is 'deliberate or spiteful'—is a violation of the Bane Act." (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981 [159 Cal.Rptr.3d 204], internal citations omitted.)

- "Here, there clearly *was* a showing of coercion separate and apart from the coercion inherent in an unlawful arrest. [Defendant officer] wrongfully detained and arrested plaintiff, because he had no probable cause to believe plaintiff had committed any crime. But, in addition, [defendant officer] deliberately and unnecessarily beat and pepper sprayed the unresisting, already handcuffed plaintiff. That conduct was not the coercion that is inherent in a wrongful arrest." (*Bender, supra,* 217 Cal.App.4th at p. 979, original italics.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 895

Cheng, et al., Calif. Fair Housing and Public Accommodations § 9:38 (The Rutter Group) (The Bane Act)

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

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

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

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act,* §§ 35.01, 35.27 (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.)

- "The text of section 15610.30 is broad. It speaks not only of 'taking' real or personal property, but also 'secreting, appropriating, obtaining, or retaining' such property, and then, to capture the sense of all of these terms, goes on to use the more expansive term 'deprive[]' Some of the terms used in section 15610.30 are narrower than others; to 'secret,' for example, suggests hiding or concealment, and to 'retain' or to 'obtain' suggests affirmatively acquiring possession of something. But we have no trouble concluding that the broadest of these terms—the word 'deprive'—in its ordinary meaning covers what the [elders] have alleged. The trial court's determination to the contrary relies heavily on the fact that the [elders] gifted (or intend to gift) whatever money or assets they transferred (or will transfer) to the Trust, but in our view this makes no difference. The Act, as amended in 2008, expressly contemplates that liability may flow from transfers made by 'agreement, donative transfer, or testamentary bequest … .' " (*Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 12 Cal.App.5th

442, 460 [218 Cal.Rptr.3d 808], internal citations omitted.)

- "It is one thing to say that financial agreements entered into by elders should be 'subject to special scrutiny', but quite another to suggest, as [plaintiff] does, that a lender has duties to a borrower who resides in this state and is '65 years of age or older' different from those it owes other borrowers." (*Hilliard v. Harbour* (2017) 12 Cal.App.5th 1006, 1015 [219 Cal.Rptr.3d 613].)

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)

VF-3102. Neglect—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15610.57, 15657; Civ. Code, § 3294(b))

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff/decedent***] [65 years of age or older/a dependent adult] while [he/she] was in [***name of employee defendant***]'s care or custody?**
   ____ 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 employee defendant***] have a substantial caretaking or custodial relationship with ~~have care or custody of~~ [***name of plaintiff/decedent***], involving ongoing responsibility for [his/her] basic needs?**
   ____ 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 employee defendant***] fail to use that degree of care that a reasonable person in the same situation would have used in assisting in personal hygiene or in the provision of food, clothing, or shelter?**
   ____ Yes ____ No

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

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

   If your answer to question 4 is yes, then answer question[s] 5 [and] [*select 6, 7 or both***]. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.**

5. **What are [***name of plaintiff/decedent***]'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 $ _____

[6. Did [*name of plaintiff***] prove by clear and convincing evidence that an officer, a director, or a managing agent of [***name of employer defendant***] had advance knowledge of the unfitness of [***name of employee defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others?**
____ Yes ____ No]

[7. Did [*name of plaintiff***] prove 1 through 4 above by clear and convincing evidence and also prove by clear and convincing evidence that [***name of employee defendant***] acted with [recklessness/malice/oppression/ [or] fraud]?**
____ 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 were [*name of decedent***]'s damages for noneconomic loss for pain, suffering, or disfigurement incurred before death?**

$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008, October 2008, December 2010, December 2016, November 2017

Directions for Use

This verdict form is based on CACI No. 3103, *Neglect—Essential Factual Elements,* CACI No. 3104, *Neglect—Enhanced Remedies Sought,* and CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants.*

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 3 can be modified to correspond to the alleged wrongful conduct as in element 3 of CACI No. 3103.

Optional questions 6, 7, and 8 address enhanced remedies. If the neglect is proved by clear and convincing evidence, and it is also proved by clear and convincing evidence that the individual defendant acted with recklessness, malice, oppression, or fraud, attorney fees, costs, and a decedent's predeath pain and suffering may be recovered. (See Welf. & Inst. Code, § 15657.) If any of these remedies are sought against the employer, include question 6. (See Welf. & Inst. Code, § 15657(c).) Question 6 may be altered to correspond to one of the alternative bracketed options for employer liability in CACI No. 3102A.

If any enhanced remedies are sought against either the individual or the employer, include question 7. If the neglect led to the elder's death, in question 5 include only item 5a for past economic loss. But also include the transitional language after question 7 and include question 8.

In the transitional language after question 4, direct the jury to answer questions 6 or 7 or both, depending on which questions are to be included. If question 7 is to be included but question 6 is not, then 7 will be renumbered as 6.

If punitive damages are sought, incorporate language from a verdict form for punitive damages. (See CACI Nos. VF-3900–VF-3904.)

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.

3430. "Noerr-Pennington" Doctrine

[*Name of defendant***] claims that [his/her/its] agreement with [***name of alleged coparticipant***] did not violate the law because [he/she/it] was trying in good faith to influence government action. [***Name of plaintiff***] claims that this action was a sham or a pretext to restrain competition.**

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

1. **That [***name of defendant***]'s actions before [***name of governmental body***] were undertaken without regard to the merits; and**

2. **That the reason [***name of defendant***] engaged in [***specify the petitioning activity, e.g., "filing an objection to an environmental impact report"***] was to use the [***specify the claimed process, e.g., "environmental agency approval"***] process to harm [***name of plaintiff***] by [***specify the manner of harm, e.g., "delaying [name of plaintiff]'s entry into the market"***], rather than to obtain a successful outcome from that process.**

New September 2003

Sources and Authority

- "The *Noerr-Pennington* doctrine provides that there is no antitrust liability under the Sherman Act for efforts to influence government which are protected by the First Amendment right to petition for redress of grievances, even if the motive behind the efforts is anticompetitive." (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 678 [156 Cal.Rptr.3d 90].)

- "The *Noerr-Pennington* doctrine immunizes legitimate efforts to influence a branch of government from virtually all forms of civil liability. The doctrine originated in the context of federal antitrust litigation. Stated generally, it was initially intended to ensure that 'efforts to influence government action are not within the scope of the Sherman Act, regardless of anticompetitive purpose or effect. [Citations.]' The *Noerr-Pennington* doctrine is reinforced by two constitutional considerations: 'the First Amendment right to petition the government … and comity, i.e., noninterference on the part of the courts with governmental bodies that may validly cause otherwise anticompetitive effects and with efforts intended to influence such bodies [citations].' " (*People ex rel. Harris v. Aguayo* (2017) 11 Cal.App.5th 1150, 1160-1161 [218 Cal.Rptr.3d 221], internal citations omitted.)

- ~~An exception to the doctrine arises when efforts to influence government are merely a sham; such efforts are not protected by the *Noerr-Pennington* doctrine and are subject to antitrust liability." (*Hi-Top Steel Corp. v. Lehrer* (1994) 24 Cal.App.4th 570, 574-575 [29 Cal.Rptr.2d 646], internal citations omitted.)~~

- "Stated most generally, the *Noerr-Pennington* doctrine declares that efforts to influence government action are not within the scope of the Sherman Act, regardless of anticompetitive purpose or effect." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 320 [216 Cal.Rptr. 718, 703 P.2d 58], internal citations

omitted.)

- " 'The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.' " (*Hi-Top Steel Corp. v. Lehrer* (1994) 24 Cal.App.4th 570, 576 [29 Cal.Rptr.2d 646], ~~*supra*, 24 Cal.App.4th at p. 576,~~ internal citations omitted.)

- "[B]ecause *Noerr-Pennington* protects federal constitutional rights, it applies in all contexts, even where a state law doctrine advances a similar goal." (*Theme Promotions, Inc. v. News Am. Mktg. FSI* (9th Cir. 2008) 546 F.3d 991, 1007.)

- "While the *Noerr-Pennington* doctrine was 'formulated in the context of antitrust cases,' it has been applied in cases involving other types of civil liability, including liability for interference with contractual relations or prospective economic advantage or unfair competition." (*Hernandez, supra*, 215 Cal.App.4th at p. 679, internal citations omitted.)

- "The *Noerr-Pennington* doctrine has been extended to preclude virtually all civil liability for a defendant's petitioning activities before not just courts, but also before administrative and other governmental agencies." (*People ex rel. Harris*, *supra*, 11 Cal.App.5th at p. 1161.)

- An exception to the doctrine arises when efforts to influence government are merely a sham; such efforts are not protected by the *Noerr-Pennington* doctrine and are subject to antitrust liability." (*Hi-Top Steel Corp.*, *supra*, , 24 Cal.App.4th at pp. 574–475, internal citations omitted.)

- "Efforts to influence governmental agencies ' "amount to a sham when though 'ostensibly directed toward influencing governmental action, … [they are] actually nothing more than an attempt to interfere directly with the business relationships of a competitor … ." [Citation.]' " (*People ex rel. Harris*, *supra*, 11 Cal.App.5th at p. 1161~~An entity loses *Noerr-Pennington* immunity from antitrust liability if its conduct falls within the 'sham' exception to the doctrine. That is, '[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified.' " (*Kaiser Found. Health Plan, Inc. v. Abbott Labs, Inc.* (9th Cir. 2009) 552 F.3d 1033, 1044, internal citation omitted~~.)

- "[T]he sham exception 'encompasses situations in which persons use the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.' It 'involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, not one "who 'genuinely seeks to achieve his governmental result, but does so through improper means.' " ' " (*Hi-Top Steel Corp.*, *supra*, 24 Cal.App.4th at p. 577, internal citations omitted.)

- "[W]e hold the sham exception to the *Noerr-Pennington* doctrine is applicable in California." (*Hi-Top Steel Corp.*, *supra*, 24 Cal.App.4th at p. 579.)

- "[W]e identified three circumstances in which the sham litigation exception might apply: first, where the lawsuit is objectively baseless and the defendant's motive in bringing it was unlawful; second, where the conduct involves a series of lawsuits 'brought pursuant to a policy of starting legal proceedings without regard to the merits' and for an unlawful purpose; and third, if the allegedly unlawful conduct 'consists of making intentional misrepresentations to the court, litigation can be deemed a sham if 'a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy.' " (*Sosa v. DIRECTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 938, internal citations omitted.)

- "The United States Supreme Court has set forth a two-part test for determining whether a defendant's petitioning activities fall within the so-called 'sham exception' to the *Noerr-Pennington* doctrine: 'first, it "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; second, the litigant's subjective motivation must "conceal an attempt to interfere *directly with the business relationships of a competitor … through the use [of] the governmental process*—as opposed to the *outcome* of that process—as an anticompetitive weapon." [Citation.]' " (*People ex rel. Harris, supra,* 11 Cal.App.5th at p. 1161, original italics~~The Supreme Court has endorsed a two-part test for sham litigation. First, the lawsuit must be objectively baseless in the sense that no reasonable litigant could reasonably expect success on the merits. Only if the challenged litigation is objectively baseless may we consider the litigant's subjective motivation. The question then is 'whether the baseless lawsuit conceals an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.' " (*Theme Promotions, Inc., supra,* 546 F.3d at p. 1007, internal citations omitted~~.)

- "Even though [plaintiff] must ultimately prove the existence of a 'sham' by clear and convincing evidence, it need only show that there is a genuine issue of material fact to avoid summary judgment." (*Kaiser Found. Health Plan, Inc., supra,* 552 F.3d at p. 1044.)

- ~~"While the *Noerr-Pennington* doctrine was 'formulated in the context of antitrust cases,' it has been applied in cases involving other types of civil liability, including liability for interference with contractual relations or prospective economic advantage or unfair competition." (*Hernandez, supra,* 215 Cal.App.4th at p. 679, internal citations omitted.)~~

Secondary Sources

1 Witkin, Summary of California Law (~~10th ed. 2005~~11th ed. 2017) Contracts, § ~~594~~607

6 Antitrust Laws & Trade Regulation, Ch. 105, *California*, § 105.10[1][h] (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.164[5][a] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.73 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust*, 5.41

3501. "Fair Market Value" Explained

Just compensation includes the fair market value of the property as of [*insert date of valuation***]. Fair market value is the highest price for the property that a willing buyer would have paid in cash to a willing seller, assuming that:**

1. **There is no pressure on either one to buy or sell; and**

2. **The buyer and seller know all the uses and purposes for which the property is reasonably capable of being used.**

New September 2003; Revised June 2015

Directions for Use

Do not give this instruction if there is no relevant market for the property. Instead, instruct on the appropriate alternative method of valuation.

The jury determines the fair market value of the property based on the highest and best use for which the property is geographically and economically adaptable. (See *San Diego Gas & Electric Co. v. Schmidt* (2014) 228 Cal.App.4th 1280, 1288 [175 Cal.Rptr.3d 858].) If the highest and best use is disputed, give CACI No. 3502, *"Highest and Best Use" Explained*.

Sources and Authority

- "Fair Market Value" Defined. Code of Civil Procedure section 1263.320.

- Property With No Relevant Market. Evidence Code section 823.

- "The measure of compensation in a condemnation case 'is the fair market value of the property taken.' 'The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available.' 'A jury should consider all those factors, including lawful legislative and administrative restrictions on property, which a buyer would take into consideration in arriving at the fair market value.' " (*City of Perris v. Stamper* (2016) 1 Cal.5th 576, 598−599 [205 Cal.Rptr.3d 797, 376 P.3d 1221].)

- " 'Market value,' in turn, traditionally has been defined as 'the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.' " (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43 [104 Cal.Rptr. 1, 500 P.2d 1345], internal citation omitted.)

- "Recognized alternatives to the market data approach to valuation are reproduction or replacement costs less depreciation or obsolescence." (*Redevelopment Agency of the City of Long Beach v. First Christian Church of Long Beach* (1983) 140 Cal.App.3d 690, 698 [189 Cal.Rptr. 749], internal citation omitted, disapproved on other grounds in *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp*. (1997) 16 Cal.4th 694, 720-721 [66 Cal.Rptr.2d 630, 941 P.2d 809].)

- Alternative methods of valuation particularly apply to properties such as schools, churches, cemeteries, parks, and utilities for which there is no relevant market; therefore these properties may be valued on any basis that is just and equitable. (*County of San Diego v. Rancho Vista Del Mar, Inc.* (1993) 16 Cal.App.4th 1046, 1060 [20 Cal.Rptr.2d 675].)

- "However, when there is 'a market for this property in the private marketplace as demonstrated by the evidence,' the trial court errs in admitting evidence of a valuation methodology that ignores the developed market for a particular type of property." (*Central Valley Gas Storage, LLC v. Southam* (2017) 11 Cal.App.5th 686, 692 [217 Cal.Rptr.3d 715].)

- "[T]he fair market value of property taken has not been limited to the value of the property as used at the time of the taking, but has long taken into account the 'highest and most profitable use to which the property might be put in the reasonable near future, to the extent that the probability of such a prospective use affects the market value.' " (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 744 [25 Cal.Rptr.2d 480, 863 P.2d 725], internal citations omitted.)

- "In condemnation actions, California courts have long recognized what has been referred to as the 'appraisal trinity.' This term encompasses three methods or approaches used by appraisers to determine the fair market value of real estate: (1) the current cost of reproducing (or replacing) the property less depreciation from all sources; (2) the 'market data' value as indicated by recent sale of comparable properties; and (3) the 'income approach,' or the value of which the property's net earning power will support based upon the capitalization of net income. In 1965, the state Legislature codified these three approaches in Evidence Code section 815-820. A qualified appraiser in an eminent domain proceeding may use one or more of these valuation techniques to ascertain the fair market value of the condemned property." (*Redevelopment Agency of the City of Long Beach, supra*, 140 Cal.App.3d at p. 705, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Constitutional Law, § ~~1230~~1368

1 Condemnation Practice in California (Cont.Ed.Bar 3d ed.) §§ 4.1-4.2

4 Nichols on Eminent Domain, Ch. 12, *Valuation Generally*, §§ 12.01-12.05, Ch. 13, *Fair Market Value-Physical Character*, § 13.01 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.135 (Matthew Bender)

3705. Existence of "Agency" Relationship Disputed

[*Name of plaintiff***] claims that [***name of agent***] was [***name of defendant***]'s agent and that [***name of defendant***] is therefore responsible for [***name of agent***]'s conduct.**

If [*name of plaintiff***] proves that [***name of defendant***] gave [***name of agent***] authority to act on [his/her/its] behalf, then [***name of agent***] was [***name of defendant***]'s agent. This authority may be shown by words or may be implied by the parties' conduct. This authority cannot be shown by the words of [***name of agent***] alone.**

New September 2003; Revised November 2017

Directions for Use

This instruction should be used when the factual setting involves a relationship other than employment, such as homeowner-real estate agent or franchisor-franchisee. For an instruction for use for employment, give CACI No. 3704, *Existence of "Employee" Status Disputed*. The secondary factors (a) through (j) in CACI No. 3704 may be given with this instruction also. (See *Secci v. United Independant Taxi Drivers, Inc.* (2017) 8 Cal.App.5th 846, 855 [214 Cal.Rptr.3d 379].)

Sources and Authority

- "Agent" Defined. Civil Code section 2295.
- " ' "The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence. [Citation.]" [Citation.] Inferences drawn from conflicting evidence by the trier of fact are generally upheld. [Citation.]' 'Only when the essential facts are not in conflict will an agency determination be made as a matter of law. [Citation.]' " (*Secci, supra*, 8 Cal.App.5th at p. 854~~The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence." (*L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp.* (1991) 1 Cal.App.4th 300, 305 [1 Cal.Rptr.2d 680], internal citation omitted~~.)
- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)
- One who performs a mere favor for another without being subject to any legal duty of service and without assenting to right of control is not an agent, because the agency relationship rests upon mutual consent. (*Hanks v. Carter & Higgins of Cal., Inc.* (1967) 250 Cal.App.2d 156, 161 [58 Cal.Rptr. 190].)
- An agency must rest upon an agreement. (*D'Acquisto v. Evola* (1949) 90 Cal.App.2d 210, 213 [202 P.2d 596].) "Agency may be implied from the circumstances and conduct of the parties." (*Michelson v. Hamada* (1994) 29 Cal.App.4th 1566, 1579 [36 Cal.Rptr.2d 343], internal citations omitted.)

- "Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent. ... It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (*White v. Uniroyal, Inc.* (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- " '[W]hether an agency relationship has been created or exists is determined by the relation of the parties as they in fact exist by agreement or acts [citation], and the primary right of control is particularly persuasive. [Citations.] Other factors may be considered to determine if an independent contractor is acting as an agent, including: whether the "principal" and "agent" are engaged in distinct occupations; the skill required to perform the "agent's" work; whether the "principal" or "agent" supplies the workplace and tools; the length of time for completion; whether the work is part of the 'principal's" regular business; and whether the parties intended to create an agent/principal relationship. [Citation.]' " (*Secci, supra*, 8 Cal.App.5th at p. 855.)

- "[T]here is substantial overlap in the factors for determining whether one is an employee or an agent." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1184 [183 Cal.Rptr.3d 384].)

- "Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*Jackson, supra*, 233 Cal.App.4th at p. 1184, original italics, internal citations omitted.)

- "[Defendant] argues that when public regulations require a company to exert control over its independent contractors, evidence of that government-mandated control cannot support a finding of vicarious liability based on agency. This argument conflicts with the policy behind the regulated hirer exception, which emphasizes that the effectiveness of public regulations 'would be impaired if the carrier could circumvent them by having the regulated operations conducted by an independent contractor.' " (*Secci, supra*, 8 Cal.App.5th at pp. 860–861.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 92–96

Greenwald, et al., California Practice Guide: Real Property Transactions, Ch. 2-C *Broker's Relationship and Obligations to Principal and Third Parties*, ¶ 2:120 et seq. (The Rutter Group)

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Theories of Recovery*, ¶ 2:600, 2:611 (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.12 (Matthew Bender)

18 California Points and Authorities, Ch. 182, *Principal and Agent*, § 182.30 et seq. (Matthew Bender)

1 California Civil Practice: Torts, §§ 3:26–3:27 (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 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.]' … 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.)

- " '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~~11th ed. 2017) Agency and Employment, § ~~184~~195

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]; see also *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 183 [217 Cal.Rptr.3d 519] [CACI 3903A is an accurate statement of the law].)

- "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].)

- "[T]he collateral source rule is not violated when a defendant is allowed to offer evidence of the market value of future medical benefits." (*Cuevas, supra*, 11 Cal.App.5th at p. 180.)

- "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.)

- "[W]hile an injured plaintiff is entitled to recover the reasonable value of medical services that are reasonably certain to be necessary in the future, evidence of the full amount billed for past medical services cannot support an expert opinion on the reasonable value of future medical services. It does not appear, however, that [expert] used the full amount billed for past medical services in making the calculations for her life care plan. We observe 'the "requirement of certainty … cannot be strictly applied where prospective damages are sought, because probabilities are really the basis for the award." ' At the time of trial, the precise medical costs a plaintiff will incur in the future are not known. Nor is it known how a plaintiff will necessarily pay for such expenses. It is unknown, for example, what, if any, insurance a plaintiff will have at any given time or what rate an insurer will have negotiated with any given medical provider for a particular service at the time and location the plaintiff will require the medical care. The fact finder is entrusted with the tasks of evaluating the probabilities based on the evidence presented and arriving at a reasonable result." (*Cuevas, supra,* 11 Cal.App.5th at p. 182, internal citations omitted.)

- "[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 (11th ed. 2017~~10th ed. 2005~~) Torts, § ~~1670~~1846 et seq.

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)

3903C. Past and Future Lost Earnings (Economic Damage)

[*Insert number, e.g.,* "3."**] [Past] [and] [future] lost earnings.**

[To recover damages for past lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/wages] that [he/she] has lost to date.]**

[To recover damages for future lost earnings, [*name of plaintiff***] must prove the amount of [***insert one or more of the following:* **income/earnings/salary/wages] [he/she] will be reasonably certain to lose in the future as a result of the injury.]**

New September 2003

Directions for Use

This instruction is not intended for use in employment cases.

Sources and Authority

- "We know of no rule of law that requires that a plaintiff establish the amount of his actual earnings at the time of the injury in order to obtain recovery for loss of wages although, obviously, the amount of such earnings would be helpful to the jury in particular situations." (*Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 656 [151 Cal.Rptr. 399].)

- " '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.)

- ~~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.)

- "Requiring the plaintiff to prove future economic losses are reasonably certain 'ensures that the jury's fixing of damages is not wholly, and thus impermissibly, speculative.' " (*Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 738 [214 Cal.Rptr.3d 113].)

- "[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, 171 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, §§ ~~1666~~1842, ~~1667~~1843

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.39–1.41

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* (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

1 California Civil Practice: Torts, § 5:15 (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].)

- "The trial court based its restitution order on the fair market value method, but it abused its discretion by also awarding the cost to [plaintiff] to repair the truck … . Having fully recovered the decrease in fair market value, [plaintiff] was not entitled to also recover the cost of repair because repairing the truck made it more valuable. Put another way, before the crime, [plaintiff] owned a truck that was worth more than $20,000. After the crime, Smith was left with a truck that was worth not much more than $3,000. [Plaintiff] was compensated for this decrease in fair market value. However, if the truck is repaired, the value of the truck goes up, even though it does not go all the way up to the former fair market value. Therefore, adding the cost of repair improperly alters the results of the fair market value formula." (*People v. Sharpe* (2017) 10 Cal.App 5th 741, 747 [216 Cal.Rptr.3d 744].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, §§ 1~~718, 1719~~865–1871

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)

3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress/[***insert other damages***]].**

No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[To recover for future [*insert item of pain and suffering***], [***name of plaintiff***] must prove that [he/she] is reasonably certain to suffer that harm.**

For future [*insert item of pain and suffering***], determine the amount in current dollars paid at the time of judgment that will compensate [***name of plaintiff***] for future [***insert item of pain and suffering***]. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]]**

New September 2003; Revised April 2008, December 2009, December 2011

Directions for Use

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

If future noneconomic damages are sought, include the last two paragraphs. Do not instruct the jury to further reduce the award to present cash value. (See CACI No. 3904A, *Present Cash Value,* and CACI No. 3904B, *Use of Present-Value Tables*.) The amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].) Include the last sentence only if the plaintiff is claiming both future economic and noneconomic damages.

Sources and Authority

- "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856, 500 P.2d 880], internal citations and footnote omitted.)

- "[N]oneconomic damages do not consist of only emotional distress and pain and suffering. They also

consist of such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 [213 Cal.Rptr.3d 82].)

- " ' " '[T]here is no fixed or absolute standard by which to compute the monetary value of emotional distress,' " ' and a ' "jury is entrusted with vast discretion in determining the amount of damages to be awarded … ." [Citation.]' " (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602 [146 Cal.Rptr.3d 585].

- "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)

- "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13, 426 P.2d 173], internal citations omitted.)

- "[W]here a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate as a matter of law." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933 [64 Cal.Rptr.3d 920].)

- " '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.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future

damages will be considered to be stated in terms of their present or current value." (*Salgado, supra*, 19 Cal.4th at pp. 646–647.)

- "[R]ecovery for emotional distress caused by injury to property is permitted only where there is a preexisting relationship between the parties or an intentional tort." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 203 [147 Cal.Rptr.3d 41].)

- "[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]'s act of intentionally striking [plaintiff's dog] with a bat." (*Plotnik, supra*, 208 Cal.App.4th at p. 1608 [under claim for trespass to chattels].)

- "Furthermore, 'the *negligent* infliction of emotional distress—anxiety, worry, discomfort—is compensable without physical injury in cases involving the tortious interference with *property rights* [citations].' Thus, if [defendant]'s failure to repair the premises constitutes a tort grounded on negligence, appellant is entitled to prove his damages for emotional distress because the failure to repair must be deemed to constitute an injury to his tenancy interest (right to habitable premises), which is a species of property." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1299 [173 Cal.Rptr.3d 159], original italics, internal citation omitted.)

- "[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests." (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 156 [184 Cal.Rptr.3d 26].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, §§ ~~1671~~1850–~~1675~~1854

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:140 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.68–1.74

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.01–51.14 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.145 et seq. (Matthew Bender)

1 California Civil Practice Torts, § 5:10 (Thomson Reuters)

3927. Aggravation of Preexisting Condition or Disability

[*Name of plaintiff*] is not entitled to damages for any physical or emotional condition that [he/she] had before [*name of defendant*]'s conduct occurred. However, if [*name of plaintiff*] had a physical or emotional condition that was made worse by [*name of defendant*]'s wrongful conduct, you must award damages that will reasonably and fairly compensate [him/her] for the effect on that condition.

New September 2003

Sources and Authority

- "[A] tortfeasor may be held liable in an action for damages where the effect of his negligence is to aggravate a preexisting condition or disease. Plaintiff may recover to the full extent that his condition has worsened as a result of defendant's tortious act.~~A tortfeasor may be held responsible where the effect of his negligence is to aggravate a preexisting condition or disease.~~" (*Sanchez v. Kern Emergency Medical Transportation Corp.* (2017) 8 Cal.App.5th 146, 168 [213 Cal.Rptr.3d 830]~~*Hastie v. Handeland* (1969) 274 Cal.App.2d 599, 604 [79 Cal.Rptr. 268], internal citations omitted~~.)

- ~~"Plaintiff may recover to the full extent that his condition has worsened as a result of defendant's tortious act." (*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 255 [142 Cal.Rptr. 69], internal citations omitted, overruled on another ground in *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 574 [34 Cal.Rptr.2d 607, 882 P.2d 298].)~~

- "It is by no means self-evident that an act which precipitates a flare-up of a preexisting condition should be considered a 'cause which, in natural and continuous sequence, produces the injury.' Thus, general instructions on proximate cause were not sufficient to inform the jury on the more specific issue of aggravation of preexisting conditions." ((*Ng v. Hudson* (1977) 75 Cal.App.3d 250, 255~~5~~6 [142 Cal.Rptr. 69], internal citations omitted, overruled on another ground in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574 [34 Cal.Rptr.2d 607, 882 P.2d 298].~~)~~~~*Ng, supra,* 75 Cal.App.3d at p. 256~~.)

- "[An instruction on preexisting condition] is proper only where the injured is the claimant seeking compensation for his injuries. That is not the case here in a wrongful death action." (*Vecchione v. Carlin* (1980) 111 Cal.App.3d 351, 358 [168 Cal.Rptr. 571].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts, § ~~1676~~1855

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.86

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, § 51.23[3] (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort* (Matthew Bender)

2 California Civil Practice: Torts, § 5:11 (Thomson Reuters)

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, *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].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[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 (11th ed. 2017~~10th ed. 2005~~) Torts, §§ ~~1581~~1752~~–1585~~1756

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)

3944. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase)

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. At this time, you must decide whether [***name of plaintiff***] has proved by clear and convincing evidence that [***name of employee/agent***] engaged in that conduct with malice, oppression, or fraud. The amount of punitive damages, if any, will be decided later.**

"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 decision making such that his or her decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005

Directions for Use

CACI No. 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)* may be used for the second phase of a bifurcated trial.

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. 3948, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)*. When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, and managing agents, use CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, ~~*More Likely True*~~*Highly Probable—Clear and Convincing Proof.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

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."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Deferral of Financial Condition Evidence to Second Stage. Civil Code section 3295(d).
- "[E]vidence of ratification of [agent's] actions by [defendant], 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].)
- "[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].)
- "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.)

- "[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].)

- "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. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "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].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[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.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756
~~6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585~~

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13-14.14, 14.23

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,* § 64.24 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, *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.)

- "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].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- "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 (11th ed. 2017) Torts, §§ 1752–1756
~~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)

3946. Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase)

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 amount, if any, of punitive damages will be an issue decided later.**

At this time, you must decide whether [*name of plaintiff***] has proved 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 decision making such that his or her decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005

Directions for Use

CACI No. 3942, *Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)* may be used for the second phase of a bifurcated trial.

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, and managing agents. When the plaintiff is seeking to hold an employer or principal liable for the conduct of a specific employee or agent, use CACI No. 3944, *Punitive Damages Against Employer or Principal For Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase).* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3948, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase).*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, ~~*More Likely True*~~*Highly Probable—Clear and Convincing Proof.*

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

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."

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].)
- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."
- "[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.)

- "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. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "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].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[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.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756
~~6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585~~

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.13-14.14, 14.23

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[17] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* § 64.24 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, *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].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[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 (11th ed. 2017) Torts, §§ 1752–1756
~~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)

3948. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase)

If you decide that [*name of individual defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of individual defendant***] and, if so, against [***name of corporate defendant***]. The amount, if any, of punitive damages will be an issue decided later.**

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.**

"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***].**

You may also award punitive damages against [*name of corporate defendant***] based on [***name of individual***]'s conduct if [***name of plaintiff***] proves [one of] the following by clear and convincing evidence:**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of corporate defendant***] who was acting on behalf of [***name of corporate defendant***] at the time of the conduct constituting malice oppression or fraud; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of corporate 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 [***name of individual defendant***]'s conduct constituting malice, oppression, or fraud was authorized by an officer, a director, or a managing agent of [***name of corporate defendant***]; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] knew of [***name of individual defendant***]'s conduct constituting malice, oppression, or**

fraud and adopted or approved that 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 decision making such that his or her decisions ultimately determine corporate policy.

New September 2003; Revised April 2004, December 2005

Directions for Use

Use CACI No. 3949, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase),* for the second phase of a bifurcated trial.

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When damages are sought only against a corporate defendant, use CACI No. 3944, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase),* or CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).* When damages are sought against individual defendants, use CACI No. 3941, *Punitive Damages--Individual Defendant—Bifurcated Trial (First Phase).*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, ~~*More Likely True*~~*Highly Probable—Clear and Convincing Proof.*

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.

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."

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Deferral of Financial Condition Evidence to Second Stage. Civil Code section 3295(d).
- "[E]vidence of ratification of [agent's] actions by [defendant] 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].)

- "[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.)

- "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. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "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 decision making 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].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[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.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756
~~6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585~~

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.13-14.14, 14.23

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[17] (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.24 et seq. (Matthew Bender)

4560. Recovery of Payments to Unlicensed Contractor (Bus. & Prof. Code, § 7031(b))

[*Name of plaintiff***] claims that [***name of defendant***] did not have a valid contractor's license during all times when [***name of defendant***] was performing services for [***name of plaintiff***] under their contract. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That there was a contract between [***name of plaintiff***] and [***name of defendant***] under which [***name of defendant***] was required to perform services for [***name of plaintiff***];**

2. **That a valid contractor's license was required to perform these services; and**

3. **That [***name of plaintiff***] paid [***name of defendant***] for contractor services that [***name of defendant***] performed as required by the contract;**

[*Name of defendant***] must then prove that at all times while performing these services, [he/she/it] had a valid contractor's license as required by law.**

New June 2016

Directions for Use

Give this instruction in a case in which the plaintiff seeks to recover money paid to an unlicensed contractor for service performed for which a license is required. (Bus. & Prof. Code, § 7031(b).) It may be modified for use if an allegedly unlicensed contractor brings a claim for payment for services performed. (See Bus. & Prof. Code, § 7031(a).)

The burden of proof to establish licensure or proper licensure is on the licensee. Proof must be made by producing a verified certificate of licensure from the Contractors' State License Board. When licensure or proper licensure is controverted, the burden of proof to establish licensure or proper licensure is on the contractor. (Bus. & Prof. Code, § 7031(d).)

A corporation qualifies for a contractor's license through a responsible managing officer (RMO) or responsible managing employee (RME) who is qualified for the same license classification as the classification being applied for. (Bus & Prof. Code § 7068(b)(3).) The plaintiff may attack a contractor's license by going behind the face of the license and proving that a required RMO or RME is a sham. The burden of proof remains with the contractor to prove a bona fide RMO or RME. (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 385−387 [70 Cal.Rptr.2d 427].) Whether an RMO or RME is a sham can be a question of fact. (*Jeff Tracy, Inc. v. City of Pico Rivera* (2015) 240 Cal.App.4th 510, 518 [192 Cal.Rptr.3d 600].)

Sources and Authority

- Action to Recover Compensation Paid to Unlicensed Contractor. Business and Professions Code section 7031(b).

- Proof of Licensure. Business and Professions Code section 7031(d).

- "Contractor" Defined. Business and Professions Code section 7026.

- "The purpose of the licensing law is to protect the public from incompetence and dishonesty in those who provide building and construction services. The licensing requirements provide minimal assurance that all persons offering such services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business." (*Hydrotech Systems, Ltd. v. Oasis Waterpark* (1991) 52 Cal.3d 988, 995 [277 Cal.Rptr. 517, 803 P.2d 370], internal citations omitted.)

- "Because of the strength and clarity of this policy, it is well settled that section 7031 applies despite injustice to the unlicensed contractor. 'Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business *outweighs any harshness between the parties*, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of this state. [Citation.] . . .' " (*Hydrotech Systems, Ltd., supra*, 52 Cal.3d at p. 995, original italics.)

- "The current legislative requirement that a contractor plaintiff must, in addition to proving the traditional elements of a contract claim, also prove that it was duly licensed at all times during the performance of the contract does not change this historical right to a jury trial." (*Jeff Tracy, Inc., supra*, 240 Cal.App.4th at p. 518, fn. 2.)

- "[T]he courts may not resort to equitable considerations in defiance of section 7031." (*Lewis & Queen v. N. M. Ball Sons* (1957) 48 Cal.2d 141, 152 [308 P.2d 713].)

- "In 2001, the Legislature complemented the shield created by subdivision (a) of section 7031 by adding a sword that allows persons who utilize unlicensed contractors to recover compensation paid to the contractor for performing unlicensed work. Section 7031(b) provides that 'a person who utilizes the services of an unlicensed contractor may bring an action in any court of competent jurisdiction in this state to recover all compensation paid to the unlicensed contractor for performance of any act or contract' unless the substantial compliance doctrine applies." (*White v. Cridlebaugh* (2009) 178 Cal.App.4th 506, 519 [100 Cal.Rptr.3d 434], internal citation omitted.)

- "It appears section 7031(b) was designed to treat persons who have utilized unlicensed contractors consistently, regardless of whether they have paid the contractor for the unlicensed work. In short, those who have not paid are protected from being sued for payment and those who have paid may recover all compensation delivered. Thus, unlicensed contractors are not able to avoid the full measure of the CSLL's civil penalties by (1) requiring prepayment before undertaking the next increment of unlicensed work or (2) retaining progress payments relating to completed phases of the construction." (*White, supra*, 178 Cal.App.4th at p. 520.)

- "In most cases, a contractor can establish valid licensure by simply producing 'a verified

certificate of licensure from the Contractors' State License Board which establishes that the individual or entity bringing the action was duly licensed in the proper classification of contractors at all times during the performance of any act or contract covered by the action.' [Contractor] concedes that if this was the only evidence at issue, 'then—perhaps—the issue could be decided by the court without a jury.' But as [contractor] points out, the City was challenging [contractor]'s license by going behind the face of the license to prove that [license holder] was a sham RME or RMO. (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518.)

- "[T]he determination of whether [contractor] held a valid class A license involved questions of fact. '[W]here there is a conflict in the evidence from which either conclusion could be reached as to the status of the parties, the question must be submitted to the jury. [Citations.] This rule is clearly applicable to cases revolving around the disputed right of a party to bring suit under the provisions of Business and Professions Code section 7031.' " (*Jeff Tracy, Inc., supra,* 240 Cal.App.4th at p. 518.)

- "We conclude the authorization of recovery of '*all* compensation paid to the unlicensed contractor for performance of any act or contract' means that unlicensed contractors are required to return all compensation received without reductions or offsets for the value of material or services provided." (*White, supra,* 178 Cal.App.4th at pp. 520−521, original italics, internal citation omitted.)

- "[A]n unlicensed contractor is subject to forfeiture even if the other contracting party was aware of the contractor's lack of a license, and the other party's bad faith or unjust enrichment cannot be asserted by the contractor as a defense to forfeiture." (*Judicial Council of California v. Jacobs Facilities, Inc.* (2015) 239 Cal.App.4th 882, 896 [191 Cal.Rptr.3d 714].)

- "Nothing in section 7031 either limits its application to a particular class of homeowners or excludes protection of 'sophisticated' persons. Reading that limitation into the statute would be inconsistent with its purpose of ' "deterring unlicensed persons from engaging in the contracting business." ' " (*Phoenix Mechanical Pipeline, Inc. v. Space Exploration Technologies Corp.* (2017) 12 Cal.App.5th 842, 849-850 [219 Cal.Rptr.3d 775].)

- "[Contractor] has not alleged one contract, but rather a series of agreements for each separate task that it was asked to perform. It may therefore seek compensation under those alleged agreements that apply to tasks for which no license was required." (*Phoenix Mechanical Pipeline, Inc., supra,* 12 Cal.App.5th at p. 853.)

Secondary Sources

1 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2010~~2017) Contracts, § ~~489~~ 491~~et seq.~~

12 California Real Estate Law and Practice, Ch. 430, *Licensing of Contractors,* § 430.70 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts,* § 104.83 (Matthew Bender)

5 California Points and Authorities, Ch. 50A, *Contracts: Performance, Breach, and Defenses*, § 50A.52 et seq. (Matthew Bender)

29 California Legal Forms, Ch. 88, *Licensing of Contractors*, § 88.18 (Matthew Bender)

5012. Introduction to Special Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form[s] in the order they appear. After you answer a question, the form tells you what to do next. At least 9 of you must agree on an answer before you can move on to the next question. However, the same 9 or more people do not have to agree on each answer.

All 12 of you must deliberate on and answer each question regardless of how you voted on any earlier question. Unless the verdict form tells all 12 jurors to stop and answer no further questions, every juror must deliberate and vote on all of the remaining questions.

When you have finished filling out the form[s], your presiding juror must write the date and sign it at the bottom [of the last page] and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2004, October 2008, December 2009, December 2014

Directions for Use

This instruction should be given if a special verdict form is used.

Sources and Authority

- General and Special Verdict Forms. Code of Civil Procedure section 624.
- Special Verdicts; Requirements for Award of Punitive Damages. Code of Civil Procedure section 625.
- " 'The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.' (Code Civ. Proc., § 624.)" (*J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 338 [181 Cal.Rptr.3d 286].)
- "It is true that, in at least some respects, a special verdict—if carefully drawn and astutely employed—may improve the quality of the factfinding process. It can focus the jury's attention on the relevant questions, incorporating the pertinent legal principles, and guiding the jury away from irrelevant or improper considerations. It can also expose defects in the jury's deliberations when they occur, providing an opportunity for the court to seek correction through further deliberations." (*Ryan*

v. Crown Castle NG Networks, Inc. (2016) 6 Cal.App.5th 775, 795 [211 Cal.Rptr.3d 743].)

- " 'This procedure presents certain problems: " 'The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. "[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings … ." [Citation.]' [Citation.]" ' 'A special verdict is "fatally defective" if it does not allow the jury to resolve every controverted issue.' "(*J.P., supra,* 232 Cal.App.4th at p. 338, internal citations omitted.)

- "All litigation is ultimately a matter of striking a reasonable compromise among competing interests, particularly the interest in resolving cases fairly and that of utilizing public and private resources economically. A special verdict is unlikely to serve either of these objectives unless it is drawn with considerable care." (*Ryan, supra,* 6 Cal.App.5th at p. 796.)

- "When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors' votes on other special verdict questions." (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 255 [92 Cal.Rptr.3d 862, 206 P.3d 403], original italics.)

- "Appellate courts differ concerning the use of special verdicts. In one case the court said, 'we should utilize opportunities to force counsel into requesting special verdicts.' In contrast, a more recent decision included the negative view: 'Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.' Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result." (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)

- "[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil 'cause of action' to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved." (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243, footnote omitted.)

- "In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, … we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved." (*Stoner, supra,* 46 Cal.App.4th at p. 1002.)

- "[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury's further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve

persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of 'the right to a jury of 12 persons deliberating on all issues.' Permitting any nine jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue." (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827, 685 P.2d 1178], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 342–346

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.21 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 318, *Judgments*, § 318.49 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.11 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.11 et seq.

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) § 15.14 (Cal CJER 2010)

Item number: 04

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Approve**

RUPRO Meeting: October 24, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Approve Four Additional Annual Online-Only Releases

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: NA (not a project)
Project description from annual agenda:

If requesting July 1 or out of cycle, explain:
NA

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
Releases would be only for matters not requiring Judicial Council approval; i.e., those matters for which RUPRO has been delegated final authority to approve.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue • San Francisco, California 94102-3688
Telephone 415-865-4200 • Fax 415-865-4205 • TDD 415-865-4272

MEMORANDUM

Date
September 15, 2017

To
Judicial Council Rules and Projects Committee

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

Subject
Additional CACI Releases - Online Only

Action Requested
Approve additional online-only CACI releases

Deadline
November 2017

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

Executive Summary
The Judicial Council Advisory Committee on Civil Jury Instructions (CACI), of which I am chair, proposes that additional releases[1] be added to the annual CACI updating calendar.[2] These releases would be online only, and would include only revisions that do not require approval of the Judicial Council, but may be approved by RUPRO only.

Past Council and RUPRO Actions
At the October 20, 2006, Judicial Council meeting, the Judicial Council approved authority for RUPRO to:

[1] Each time that the advisory committee presents a proposed update to the council, it is called a "release." CACI is currently working on Release 31.

[2] See Cal. Rules of Court, Rule 10.58, charging the advisory committee with keeping CACI up to date.

Review and approve nonsubstantive technical changes and corrections and minor substantive changes unlikely to create controversy to Judicial Council of California Civil Jury Instructions (CACI) and Criminal Jury Instructions (CALCRIM).

Under the implementing guidelines that RUPRO adopted on December 19, 2006, titled Jury Instructions Corrections and Technical and Minor Substantive Changes, RUPRO has final approval authority over the following:

(a) Additions of cases and statutes to the Sources and Authority; [3]

(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; [4]

(c) Additions or changes to the Directions for Use;[5]

(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; [6] 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.[7]

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[3] Most of the revisions that are currently approved by RUPRO fall into this category. The majority of the proposed online release content would be additional case excerpts for the Sources and Authority.

[4] This category is now moot as CACI no longer includes the statutory language of relevant statutes.

[5] The committee only treats nonsubstantive changes to the Directions for Use as amenable to RUPRO's final approval. Substantive changes to the Directions for Use are posted for public comment and presented to the council for approval.

[6] The proposed January online-only release would incorporate any legislative-compelled changes. With the change of the Judicial Council meetings calendar, the full-edition release that used to be approved in December is now approved in November. Given that the Governor's signing deadline is in mid-October, it is now impossible to get legislatively compelled changes into the new print edition.

[7] Also, additional online-only releases would allow for:

Correcting any production errors. For example, once an entire anti-trust instruction was inadvertently dropped from CACI for several releases;

Cleanup: things like typos, format errors (e.g., unpaired brackets), and other technical errors.

Current CACI Release Cycles

Currently CACI is updated with only two annual releases, which are presented to RUPRO and to the Judicial Council in November and May.[8] This limited schedule is driven by two factors. First, the time and expense required for LexisNexis, the official CACI publisher, to produce print editions (i. e., books) limits the number of print releases.[9] Second, the council's internal processes required to present a release for approval cannot be completed in less than six months.[10]

Problem—Currency Delayed

The result of having only two release cycles is that content is often delivered to our consumers (bench and bar) some significant time after it is effective. For example, in April, the California Supreme Court held that there is no right to a jury trial under Health and Safety Code section 1278.5.[11] There is currently a jury instruction relating to claims under this code section, CACI No. 4606, which is now unnecessary in light of the court's decision. Under our current process, the instruction will not be revoked and disappear from CACI until the 2018 edition, eight months after the Supreme Court made it inapplicable.

Proposal

In this century of instant information, the amount of time that it now takes for information to become available to the world is virtually instantaneous. So it seems like there should be a way of getting certain CACI content to consumers in a much more expedited time frame. CACI, of course, is available online as well as in print.[12] Therefore, the committee proposes adding online only releases in January, March, July, and September. These releases would include only revisions that are within the authority of RUPRO to approve without additional full Judicial Council action.[13]

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[8] For many years, CACI releases were approved in December and June. The elimination of even-month council meetings in 2017 required the committee to move CACI releases up one month.

[9] The release that the council approves in November leads to a new CACI edition for the following year. Thus, Lexis will publish the 2018 print edition of CACI after the November council meeting. Lexis will publish the midyear supplement in print after the 2018 May council meeting.

[10] The process begins with working group meetings in June and December, followed by two full committee meetings in January and July; then a five or six week public comment period, followed by reports and comment charts, then presentation to RUPRO and finally to the Judicial Council for approval.

[11] See *Shaw v. Superior Court* (2017) 2 Cal.5th 983. The section provides whistleblower protection for certain persons making complaints against a health care facility.

[12] It is made available on the California Court website: see http://www.courts.ca.gov/partners/317.htm . LexisNexis also licenses CACI for LexisAdvance online, and Thomson Reuters licenses CACI for Westlaw online. CACI is also provided in Lexis's document assembly program built on the HotDocs platform, which is delivered to subscribers on CD.

[13] These instructions are not posted for public comment.

No change is proposed at this time to the six-month release cycles ending in May and November that include substantive changes that must be posted for public comment and approved by the council.[14]

Impact on RUPRO
Currently, the revisions subject to RUPRO approval are collected and presented to RUPRO twice a year. Essentially, this proposal would spread them out over the year by adding four more releases. Thus, RUPRO would review proposals from the advisory committee six times a year instead of the current two times a year. And four of the proposals would involve only those things that RUPRO can approve without the concurrence of the full Judicial Council. The committee's reports on these proposals currently are quite brief and take little time to read and understand. Staff to RUPRO and the advisory committee will work together to bring the additional CACI proposals to RUPRO when RUPRO is also meeting for other purposes.

Official CACI Content
One result of this proposal would be that CACI in print would now trail CACI online. Currently, the print edition and supplement is the official CACI content. With this proposal, the official CACI content would be that which appears on the California Courts website and on LexisAdvance.[15] Some notice in the front matter to the print volumes would be needed to direct consumers to CACI online for the most recent updates.

Official Publisher Buy-In
The committee has consulted closely with Lexis, and this proposal has its support. Lexis will do what is necessary to implement it and get the additional releases to CACI consumers.

[14] Sometimes, the changes are compelled by development that render the current instruction no longer completely accurate. In these situations, it would be good to get the revised instruction to consumers as expeditiously as possible. However, at this time, the committee is not proposing any change to the time frame in which these substantive changes are currently processed.

[15] The CACI file on the California Courts website is created by Lexis and is an exact replica of their coded manuscript.

Advisory Committee on Criminal Jury Instructions
Annual Agenda—2018
Approved by RUPRO:

I. COMMITTEE INFORMATION

Chair:	Hon. Rene August Chouteau
Staff:	Robin Seeley, Legal Services Office

Committee's Charge: Make recommendations to the Judicial Council to update, revise, and add topics to the Judicial Council criminal jury instructions (CALCRIM) [Rule 10.59]

Committee Membership: 13 (see Rule 10.59);
2 appellate court justices;
6 trial court judges;
2 attorneys whose primary area of practice is criminal defense;
2 attorneys whose primary area of practice is representing the People of the State of California in criminal matters;
1 law school professors whose primary area of expertise is criminal law.

Subcommittees/Working Groups:
The committee has one subcommittee consisting of six local members who meet to pre-vet all materials before they go to the full committee for review.

Committee's Key Objectives for 2018:
1. Revise criminal jury instructions (CALCRIM) as required by developments in the law to ensure that they remain current at all times;
2. Respond to all queries, comments, and suggestions from the bench and bar with regard to CALCRIM;
3. Propose new jury instructions to cover additional subject areas, including possible complete new series; and
4. Provide proposed technical or editorial corrections to the criminal jury instructions.

II. COMMITTEE PROJECTS

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1.	**Maintenance—Case Law and Legislation:** Review case law and new legislation affecting jury instructions to determine whether changes to the criminal jury instructions are required.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.59 Resources: None Key Objective Supported: 1	Ongoing, with delivery to Judicial Council at March and September meetings	Criminal jury instructions
2.	**Maintenance—Comments From Users:** Review comments received from jury instruction users and propose any necessary changes and improvements.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.59 Resources: None Key Objective Supported: 2	Ongoing, with delivery to Judicial Council at March and September meetings	Criminal jury instructions
3.	**New Instructions and Expansion into New Areas:** Review suggestions received from jury instruction users, new legislation, and case law and propose new criminal jury instructions as appropriate.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10. Resources: None Key Objective Supported: 3	Ongoing, with delivery to Judicial Council at March and September meetings	Criminal jury instructions

[1] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

[2] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
4.	**Technical Corrections:** Make any necessary corrections or editing changes to the jury instructions.		Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.59 Resources: None Key Objective Supported: 4	Ongoing, with delivery to Judicial Council at March and September meetings	Criminal jury instructions

III. STATUS OF 2017 PROJECTS:

[List each of the projects that were included in the 2017 Annual Agenda and provide the status for the project.]

#	Project	Completion Date/Status
	Maintenance—Case Law and Legislation: Review case law and new legislation affecting jury instructions to determine whether changes to the criminal jury instructions are required.	**Ongoing. Releases presented to Judicial Council for approval in March 2017 and September 2017.**
	Maintenance—Comments From Users: Review comments received from jury instruction users and propose any necessary changes and improvements.	**Ongoing. Releases presented to Judicial Council for approval in March 2017 and September 2017.**
	New Instructions and Expansion into New Areas: Review new legislation and case law and suggestions received from jury instruction users and propose new criminal jury instructions as appropriate.	**Ongoing. Releases presented to Judicial Council for approval in March 2017 and September 2017.**
	Technical Corrections: Make any necessary corrections or editing changes to the jury instructions.	**Ongoing. Releases presented to Judicial Council for approval in March 2017 and September 2017.**

IV. Subcommittees/Working Groups - Detail

Subcommittees/Working Groups:
Subcommittee or working group name: CALCRIM Subcommittee
Purpose of subcommittee or working group: Pre-vets material before it goes to the full committee
Number of advisory group members: 5 (all local)
Number and description of additional members (not on this advisory group): None
Date formed: 1997
Number of meetings or how often the group meets: Twice per year
Ongoing or date work is expected to be completed: Ongoing

Appellate Advisory Committee
Annual Agenda[1]—2017-2018
Approved by RUPRO: [Date]

I. COMMITTEE INFORMATION

Chair:	*Hon. Louis R. Mauro, Associate Justice of the Court of Appeal, Third Appellate District*
Lead Staff:	*Christy Simons, Attorney, Legal Services*

Committee's Charge/Membership:

Under Rule 10.40 of the California Rules of Court, the Appellate Advisory Committee (AAC) is charged with making recommendations to the Judicial Council for improving the administration of justice in appellate proceedings.

The AAC currently has 21 members. The attached terms of service chart provides the composition of the committee.

Subcommittees/Working Groups:[2]

1. Rules Subcommittee
2. Appellate Division Subcommittee
3. Legislative Subcommittee
4. Joint Appellate Technology Subcommittee
5. Ad Hoc Subcommittee on Privacy Issues in Appellate Court Opinions

[1] The annual agenda outlines the work a committee will focus on in the coming year and identifies areas of collaboration with other advisory bodies and the Judicial Council staff resources.

[2] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

II. COMMITTEE PROJECTS

#	New or One-Time Projects[3] *[Group projects by priority number.]*	
1.	***Privacy protection in appellate opinions***	***Priority 1(e)***[4]
	Project Summary Consider whether to recommend amendments to the rules of court or other actions to better protect the privacy of victims, witnesses, and others who are described in or otherwise affected by appellate opinions. Subcommittee: Ad Hoc Subcommittee on Privacy in Appellate Opinions. ***Status/Timeline*** January 1, 2019 ***Resources/Partners*** JCC Staff Resources: Committee staff, Information Technology staff AC Collaboration: Family and Juvenile Law Advisory Committee, Access and Fairness Advisory Committee, Criminal Law Advisory Committee, Civil and Small Claims Advisory Committee, Joint Appellate Technology Subcommittee, Information Technology Advisory Committee External Stakeholders: N/A	

[3] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

[4] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or Judicial Council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

2.	***Settled statement forms***	***Priority 1(e)*** *See footnote 4*
	Project Summary Consider whether to recommend revisions to forms used in preparing settled statements. The suggestions were submitted as comments on Invitation to Comment SPR17-01, Settled Statements in Unlimited Civil Cases. The Family and Juvenile Law Advisory Committee will take the lead on two suggested forms revisions that pertain to family law appeals. Subcommittee: Rules ***Status/Timeline*** January 1, 2019 ***Resources/Partners*** JCC Staff Resources: Committee staff and Family and Juvenile Law Advisory Committee staff AC Collaboration: Family and Juvenile Law Advisory Committee will take the lead on two of the forms. External Stakeholders: N/A	
3.	***Rules Regarding Oral Argument in Misdemeanor Appeals***	***Priority 1(e)*** *See footnote 4*
	Project Summary Consider whether to amend rule 8.885(a) to clarify that oral argument will not be set when there are no issues. Consider whether to amend rule 8.885(d) to clarify the procedure for waiving oral argument. Origin: suggestions from the presiding judge of a superior court's appellate division and a member of the committee. Subcommittee: Appellate Division ***Status/Timeline*** January 1, 2019 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: N/A External Partners: N/A	

4.	***Rules Regarding Deadlines and Finality in Appellate Division Matters***	***Priority 1(e)*** *See footnote 4*
	Project Summary Conduct a comprehensive review of the rules regarding deadlines and finality of decision in appellate division matters; consider harmonizing with parallel rules for court of appeal matters to address problems with timing of applications for certification, petitions for rehearing, and modification of published opinions (including but not limited to rules 8.888, 8.889, 8.1005). Origin: suggestions from the presiding judge of a superior court's appellate division and a member of the committee. Subcommittee: Appellate Division ***Status/Timeline*** January 1, 2019 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: N/A External Partners: N/A	
5.	***Modernize Appellate Court Rules for E-filing and E-business***	***Priority 2(b)*** *See footnote 4*
	Project Summary Review appellate rules to ensure consistency with e-filing practice; evaluate, identify and prioritize potential rule modifications where outdated policy challenges or prevents e-business. Consider rule modifications to remove requirements for paper versions of documents (by amending individual rules or by introducing a broad exception for e-filing/e-service). Consider potential amendments to rules governing online access to court records for parties, their attorneys, local justice partners, and other government agencies. This will be the third year of work on this multi-year project. Origin: Information Technology Advisory Committee. Subcommittee: Joint Appellate Technology Subcommittee (JATS). <u>Some specific rule projects within the scope of this item</u>: •Formatting of electronic reporters' transcripts: This project is underway. A proposal based on a suggestion from the California Court Reporters' Association, was circulated for public comment this spring. The committee review of the public comments is awaiting action on related pending legislation, AB 1450. •Sealed & Confidential Material: Rules for the handling of sealed or confidential materials that are submitted electronically.	

•Rule amendments re access: This project is underway. An initial draft of possible amendments to address online access to trial court records for parties, their attorneys, local justice partners, and other government agencies. The plan is for JATS to review what is ultimately proposed at the trial court level and use that as a base for developing a companion proposal for access to appellate court records.

•Bookmarking: The 2016 trial court rules modernization changes include a new requirement, added to rule 3.1110(f), that electronic exhibits be electronically bookmarked. This issue was set aside by JATS for 2016, to give those courts new to e-filing (or not yet on e-filing) a chance to gain some experience with e-filing before participating in a decision as to what to require.

•Exhibits: This project has not been started. Creating a requirement that exhibits submitted in electronic form be submitted in electronic volumes, rather than individually.

•Return of lodged electronic records: The trial court rule modernization changes made in 2016 amend rules 2.551(b) and 2.577(d)(4) to give the moving party ten days after a motion to seal is denied to notify the court if the party wants the record to be filed unsealed. If the clerk does not receive notification in ten days, the clerk must return the record, if lodged in paper form, or permanently delete it if lodged in electronic form. Amend rule 3.1302 to allow the court to maintain other lodged materials – and if the court chooses not to do so, to require that they be returned, if on paper, or permanently deleted, if electronic, with a notice of the destruction sent to the party before destruction of the electronic record.

Numbering of materials in requests for judicial notice: Consider amending rule 8.252, which requires numbering materials to be judicially noticed consecutively, starting with page number one. But these materials are attached to a motion and declaration(s) and are electronically filed as one document, making pagination and referring to these materials in the briefs confusing for litigants and the courts.

Status/Timeline Portions of this project are underway. Completion date of January 1, 2019

Resources/Partners

JCC Staff Resources: Committee staff and ITAC staff

AC Collaboration: Members of the Information Technology Advisory Committee who serve on the Joint Appellate Technology Subcommittee

External Partners: N/A

6.	***Branch and Model Court Privacy Policies on Electronic Court Records and Access in the Appellate Courts***	***Priority 2(b)*** *See footnote 4*
	Project Summary (a) Develop a comprehensive statewide privacy policy addressing electronic access to appellate court records and data to align with both state and federal requirements. (b) Develop a model appellate court privacy policy, outlining the key contents and provisions to address within each court's specific policy. Origin: Information Technology Advisory Committee. Subcommittee: JATS. ***Status/Timeline*** Project is underway. Completion date of January 1, 2019. ***Resources/Partners*** JCC Staff Resources: Committee staff and ITAC staff AC Collaboration: Members of the Information Technology Advisory Committee who serve on JATS External Partners: N/A	
7.	***Rules Regarding Certification of Electronic Records, Electronic Signature, and Paper Copies***	***Priority 2(b)*** *See footnote 4*
	Project Summary ITAC is reviewing trial court rules governing certification of electronic records, standards for electronic signatures, and whether parties should have to submit paper copies of documents filed electronically. Some changes will require legislation to amend existing statutory requirements for e-filing, service, and signatures in the trial courts. (See Code Civ. Proc., § 1010.6.) As ITAC moves the project forward, JATS will provide input on changes that will affect the appellate courts. The project may result in rules work for JATS. In addition, after ITAC has resolved these issues for the trial courts, JATS may wish to consider proposing changes to the appellate court rules on these matters. Subcommittee: JATS ***Status/Timeline*** JATS work must wait until ITAC moves forward. Completion date of January 1, 2020. ***Resources/Partners*** JCC Staff Resources: Committee staff and ITAC staff AC Collaboration: Members of the Information Technology Advisory Committee who serve on JATS	

	External Partners: N/A	
8.	***Input on Document Management System***	***Priority 2(b)*** *See footnote 4*
	Project Summary Monitor and provide input on implementation of a new document management system in the appellate courts. Subcommittee: JATS ***Status/Timeline*** January 1, 2020 ***Resources/Partners*** JCC Staff Resources: Committee staff and ITAC staff AC Collaboration: Members of the Information Technology Advisory Committee who serve on the Joint Appellate Technology Subcommittee External Partners: N/A	
9.	***Length of Briefs***	***Priority 2(b)*** *See footnote 4*
	Project Summary Consider whether to recommend shortening the permissible length of briefs (rules 8.204 and 8.360). Subcommittee: Rules ***Status/Timeline*** January 1, 2020 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration:	

	External Partners: N/A	
10.	***Advisement of the Right to Appeal in Juvenile Cases***	***Priority 2(b)*** *See footnote 4*
	Project Summary Consider whether to recommend (1) amendments to the rule relating to advisement of the right to appeal in juvenile cases (rule 5.590) to improve its clarity and accuracy; and/or (2) a form explaining appellate rights that would accompany juvenile court orders. Subcommittee: Rules ***Status/Timeline*** January 1, 2019 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Family and Juvenile Law Advisory Committee External Partners: N/A	
11.	***Appointment of Counsel for Misdemeanor Appeals***	***Priority 2(b)*** *See footnote 4*

	Project Summary Consider amending rule 8.851 to provide for counsel in pre-trial misdemeanor appeals, and consider revising form CR-133 (Request for Lawyer in Misdemeanor Appeal) to clarify a defendant need not be the appellant to use the form and request appointment of counsel. Subcommittee: Appellate Division ***Status/Timeline*** January 1, 2019 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: External Partners: N/A	
12.	***Appellate Division Forms***	***Priority 2(b)*** *See footnote 4*
	Project Summary Consider revisions to various appellate division forms to make them clearer and easier to use. Subcommittee: Appellate Division ***Status/Timeline*** January 1, 2019 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: External Partners:	
13.	***Information Sheet for form APP-103***	***Priority 2(b)*** *See footnote 4*

	Project Summary Consider developing a form to assist litigants with preparing the record in limited civil cases. Subcommittee: Appellate Division ***Status/Timeline*** January 1, 2020 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: External Partners: N/A	
14.	***Format of Motions and Applications in the Appellate Division***	***Priority 2(b)*** *See footnote 4*
	Project Summary Clarify the rules that apply to papers filed in the appellate division (either superior court rules 2.100-2.118 or appellate court rules 8.80, 8.44(b), and 8.204(a), (b)). Subcommittee: Appellate Division ***Status/Timeline*** January 1, 2020 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: External Partners:	
15.	***Application of the Overnight Delivery Rule to Briefs in Appellate Division Cases***	***Priority 2(b)*** *See footnote 4*

	Project Summary Consider amending rule 8.817, which governs service and filing in the appellate division, to clarify the applicability of the rule to amicus briefs. Subcommittee: Appellate Division ***Status/Timeline*** January 1, 2020 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: External Partners: N/A	
16.	***Criminal Appeals: Time to Keep Reporter's Transcripts and Mandate Digital Copy***	***Priority 2(b)*** *See footnote 4*
	Project Summary Consider amending rule 10.1028 to extend the time for keeping the RT beyond 20 years and mandate a digital copy. [Note that AB 1450, which would amend CCP section 271 regarding the provision of an electronic RT, is currently on the Governor's desk for signature.] Subcommittee: Rules ***Status/Timeline*** January 1, 2020 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: External Partners: N/A	
17.	***Notice to Court Reporter of Appeal from Order Dismissing or Denying Petition to Compel Arbitration***	***Priority 2(b)*** *See footnote 4*

	Project Summary Consider amending rule 8.714 to provide a time frame for the trial court clerk to notice the reporter of an appeal from an order dismissing or denying a petition to compel arbitration. This would address the problem of delay in preparation of the reporter's transcript that is caused by lack of notice. Also consider amending rule 8.714(1)(A) to include the notice of appeal and rule 8.714(2)(A) to include the notice of filing of the notice of appeal. ***Status/Timeline*** January 1, 2020 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: External Partners:	
18.	***Separate Service Copy for the Court of Appeal of a Petition for Review***	***Priority 2(b)*** *See footnote 4*
	Project Summary The Supreme Court's e-filing includes the receipt by the court of appeal of a filed/endorsed copy of the petition. Consider amending rule 8.500(f)(1) to eliminate the requirement that a separate copy of a petition for review by served on the court of appeal. Subcommittee: Rules ***Status/Timeline*** January 1, 2020 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: External Partners: N/A	
19.	***Rule Regarding the Normal Record in Civil Commitment Cases***	***Priority 2(b)*** *See footnote 4*

	Project Summary Consider adding a rule for the normal record and its content in civil commitment cases. Subcommittee: Rules ***Status/Timeline*** January 1, 2020 ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: External Partners:	

#	**Ongoing Projects and Activities** *[Group projects by priority number.]*	
1.	***Improve Rules and Forms***	***Priority 1*** *See footnote 4*
	Project Summary Working through the Rules Subcommittee, review case law changes that impact appellate courts and appellate procedure and suggestions from committee members, judicial officers, court staff, the bar, and the public concerning appellate rules and forms and appellate administration. Make recommendations to the Judicial Council for necessary changes to appellate rules, standards, and forms (rule 10.21). ***Status/Timeline*** Ongoing ***Resources/Partners*** Include JCC (staff/fiscal) resources, committee/other group collaboration, external partners, and other relevant resource needs. JCC Staff Resources: Committee staff AC Collaboration: External Stakeholders:	
2.	***Review Pending Legislation***	***Priority 1*** *See footnote 4*
	Project Summary Working through the Legislative Subcommittee, review pending legislation affecting appellate procedure and court administration and make recommendations to the Policy Coordination and Liaison Committee as to whether the Judicial Council should support or oppose the legislation (rule 10.34). ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs AC Collaboration: External Stakeholders:	

3.	***Legislative Implementation***	***Priority 1*** *See footnote 4*
	Project Summary Review all enacted legislation referred to the committee by the Judicial Council's Governmental Affairs office that may have an impact on appellate procedure and court administration, and, where appropriate, propose to the Judicial Council rules and forms to implement the legislation or to bring rules and forms into conformity with it. ***Status/Timeline*** Ongoing ***Resources/Partners***. JCC Staff Resources: Committee staff, Governmental Affairs AC Collaboration: External Stakeholders:	

III. LIST OF 2017 PROJECT ACCOMPLISHMENTS:

[Provide highlights and achievements of completed projects that were included in the 2017 Annual Agenda.]

#	**Project Highlights and Achievements** *[Provide brief, broad outcome(s) and completed date.]*
1.	**Privacy Protection**. Pilot program approved and started September 1, 2017, to test adding an instruction to the unpublished opinions page of the California courts website directing search engines not to index the opinions on that page. Pilot program ending date is March 31, 2018.
2.	**Settled Statements**. Rule and form changes to address the difficulties in the timely preparation of these statements. Approved by the Judicial Council on September 15, 2017; changes take effect January 1, 2018.
3.	**Record Designation in Limited Civil Appeals**. Rule and form changes to address concerns about frequent defaults by appellants. Approved by the Judicial Council on September 15, 2017; changes take effect January 1, 2018.
4.	**Verification of Writ Petitions**. Rule changes regarding writ petitions to consistently reflect statutory requirements for verification of petitions. Approved by the Judicial Council on September 15, 2017; changes take effect January 1, 2018.
5.	**Service of Briefs**. Changes to the rule on service of briefs in misdemeanor appeals to make it more consistent with the rule relating to briefs in felony appeals. Approved by the Judicial Council on September 15, 2017; changes take effect January 1, 2018.
6.	**Payment for Transcripts in Abandoned Appeals**. Rule changes to clarify the payment for partially prepared transcripts in misdemeanor appeals. Approved by the Judicial Council on September 15, 2017; changes take effect January 1, 2018.
7.	**Review Pending Legislation**. The Legislative Subcommittee considered three bills, including AB 1450 relating to court reporter's transcripts in electronic format.
8.	**Legislative Implementation**. The committee recommended rules to implement two bills, one on expedited review of the denial of a motion to compel arbitration in certain cases, and one relating to expedited review in CEQA cases. The committee also provided input on implementation of a bill relating to judicial review of law enforcement decisions not to remove a person's name from a gang database.

Item number: 07

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: October 24, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Appellate Procedure: Format for Reporter's Transcripts Delivered in Electronic Form

Committee or other entity submitting the proposal:
Appellate Advisory Committee

Staff contact (name, phone and e-mail): Christy Simons, 415-865-7694, christy.simons@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: Reporter's transcripts: Consider whether to recommend/support amendments to statute requiring that the original reporter's transcript be in paper format. Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5 Origin of Project: Suggestion received from Court of Appeal Justice Resources: Governmental Affairs staff assistance in working with appropriate constituencies on proposal and in presenting recommendations to PCLC. Key Objective Supported: 1. Completion Date: January 1, 2018.

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: November 17, 2017

Title
Appellate Procedure: Format for Reporter's Transcripts Delivered in Electronic Form

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 8.124, 8.130, 8.144, 8.336, 8.409, 8.416, 8.613, 8.619, 8.622, 8.625, 8.834, 8.838, 8.866, 8.919

Recommended by
Appellate Advisory Committee
Louis R. Mauro, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2018

Date of Report
October 20, 2017

Contact
Christy Simons, Attorney, 415-865-7694
christy.simons@jud.ca.gov

Executive Summary

To implement recent legislation, the Appellate Advisory Committee recommends amending the rule that governs the format of reporter's transcripts to incorporate requirements for transcripts that are delivered in electronic form and to reorganize the provisions so that the formatting requirements applicable to all transcripts and those in paper form are easier to find. The committee also recommends amending several other rules to conform to the new legislation and to correct cross-references in the rules.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective January 1, 2018:

1. Amend California Rules of Court, rule 8.144 to:

a. Add a new subdivision addressing requirements for reporters' transcripts in delivered in electronic form, including that the transcript:

   - Be in a full-text searchable PDF or other searchable format approved by the court;
   - Include an electronic bookmark to each heading, subheading, and specified components of the transcript; and
   - Permit users to copy and paste, keeping the original formatting.

b. Consolidate the current subdivisions which establish general formatting requirements for reporters' and clerks' transcripts into new subdivision (b);

c. Consolidate the current provisions that specifically relate to transcripts that are in paper form in a new subdivision (c); and

d. Make other nonsubstantive changes.

2. Amend California Rules of Court, rules 8.124, 8.130, 8.336, 8.409, 8.416, 8.613, 8.619, 8.622, 8.625, 8.834, 8.838, 8.866 and 8.919 to:

   a. Delete language which is inconsistent with newly-amended Code of Civil Procedure section 271.

   b. Change references to transcripts in computer-readable form to instead refer to transcripts delivered in electronic form, to be consistent with newly-amended Code of Civil Procedure section 271.

   c. Correct cross-references to the proposed amended version of rule 8.144.

The amended rules are attached at pages 8-22.

Previous Council Action

The Judicial Council adopted the predecessor to rule 8.144, rule 9, as part of the Rules on Appeal effective July 1, 1943. This rule has been amended and renumbered many times since its adoption. Most recently, as part of a proposal to modernize the appellate rules and forms, the Judicial Council, effective January 1, 2017, amended rule 8.144 to add a provision requiring that computer-readable copies of a reporter's transcript be in a text-searchable format approved by the reviewing court.

Rationale for Recommendation

Amended Rule 8.144

Current Code of Civil Procedure section 271 (section 271) authorizes courts and parties to receive, on request, copies of reporters' transcripts in "computer-readable form." Subdivision (b) of this statute establishes default standards for the format of such transcripts, but provides that

these defaults apply "[e]xcept as modified by standards adopted by the Judicial Council." Subdivision (a) of the statute requires that "an original transcript shall be on paper."

Recent legislation, AB 1450, repealing and replacing section 271, was signed into law on October 6, 2017, and takes effect January 1, 2018. New section 271 eliminates the default formatting provisions and instead requires compliance with formatting requirements established by the California Rules of Court. The new section also requires that the reporter's transcript be delivered in electronic form unless any of the specified exceptions apply. One of these exceptions is if, prior to January 1, 2023, the court reporter lacks the technical ability to deliver an electronic transcript that meets the rule requirements.

Rule 8.144 generally addresses the format of the record on appeal, including the format of reporters' transcripts. Currently, this rule contains only the following provision regarding the format of computer-readable reporters' transcripts:

> A computer-readable copy of a reporter's transcript must be in a text-searchable format approved by the reviewing court while maintaining original document formatting.

(Cal. Rules of Court, rule 8.144(a)(4).)

To implement the amendments to section 271, the committee recommends amending rule 8.144 to provide additional guidance regarding the format for reporters' transcripts that are delivered in electronic form. To make the overall rule clearer, the committee is also proposing reorganizing some of the existing provisions. The main amendments include:

- Adding a new subdivision (a) that references section 271.

- Consolidating current subdivisions (a), (b), and (c), which establish general formatting requirements for reporters' and clerks' transcripts, into a single subdivision (b), titled *Format*. This should make it easier for rule users to find all of the general formatting requirements. To make this longer subdivision easier to follow, each paragraph would be given a heading. In addition, a new requirement that each index begin on a separate page would be placed here, as having each index begin on a separate page would be helpful in all transcripts, whether in paper or electronic form.

- Gathering together the current provisions in rule 8.144 that specifically relate to transcripts that are in paper form into a new subdivision (c). This reorganization should make finding these specific formatting requirements easier.

- Adding a new subdivision (d) to address the specific requirements for reporters' transcripts in electronic form, including that the transcript:

    - Be in a full-text searchable PDF or other searchable format approved by the court;

- Include an electronic bookmark to each heading, subheading, and other specified components of the transcript; and

- Permit users to copy and paste, keeping the original formatting.

This new subdivision would include separate paragraphs for both general requirements and special requirements for multireporter or multivolume transcripts that are in electronic format. As with proposed subdivisions (b) and (c), this structure should make it easier for rule users to find all of the requirements relating to reporters' transcripts delivered in electronic form in one place.

The committee is also recommending other nonsubstantive changes to the rule.

Amended Rules 8.124, 8.130, 8.336, 8.409, 8.416, 8.613, 8.619, 8.622, 8.625, 8.834, 8.838 8.866, and 8.919

A number of current rules contain language that is no longer consistent with the amended version of section 271 or cross-references to subdivisions of rule 8.144 that will no longer be consistent with the amended version of rule 8.144. The committee is recommending non-substantive, technical amendments to these rules to bring them into conformity with the amended statute and rule.

Current rules 8.130, 8.336, 8.409, 8.416, 8.834, 8.866, and 8.919 provide that on request, and unless a court orders otherwise, the reporter must provide a copy of the reporter's transcript in computer-readable format, and that the copy must comply with the requirements of rule 8.144(a)(4). This language is inconsistent with newly amended Code of Civil Procedure section 271, which, as noted above, provides that the reporter's transcript will be delivered in electronic form unless any of the specified exceptions apply. The committee recommends deleting this outdated language from all of these rules.

Current rules 8.613, 8.619, 8.622, and 8.625 refer to reporter's transcripts in computer-readable form. However, the amended version of section 271 no longer refers to computer-readable transcripts. Instead, the statute now refers to transcripts delivered in electronic form. The committee therefore recommends replacing the references to computer-readable transcripts in all of these rules with references to transcripts delivered in electronic form.

Current rules 8.124, 8.613, 8.619, 8.625, and 8.838 contain cross-references to rule 8.144(a)-(c). However, the committee is recommending that rule 8.144 be reorganized and these subdivisions would be changed. Moreover, in most cases, the references to specific subdivisions of rule 8.144 are not necessary. The committee recommends amending all of these rules to either refer simply to the applicable requirements of rule 8.144 or to correct these cross-references to refer to the appropriate subdivisions.

Comments, Alternatives Considered, and Policy Implications

External comments

This proposal was circulated for public comment from February 27 to April 28, 2017 as part of the regular spring comment cycle. Thirteen individuals or organizations submitted comments on this proposal. Four commentators agreed with the proposed changes, four agreed with the proposed changes if modified, two did not indicate a position on the proposed changes but provided comments, and three did not agree with the proposed changes. A chart with the full text of the comments received and the committee's responses is attached at pages 23–42.

Court reporters' ability to comply with new requirements

Court reporters raised a number of concerns about their ability to comply with the new format requirements or the cost of compliance. However, newly-amended section 271 provides a five-year grace period, until January 1, 2023, for court reporters to comply with the electronic transcript formatting requirements. Moreover, section 271 explicitly states that no particular vendor or product is required. The committee understands that computer-aided transcription (CAT) software vendors are aware that enhanced functionality will be required, and plan to upgrade their products accordingly. The committee will seek feedback from court reporters and their representatives over the next several years regarding upgrades in CAT software and other developments that impact the court reporters' ability to meet the rule's requirements.

Several court reporters and their representatives expressed specific concerns about meeting some of the new requirements for electronic transcripts, including bookmarking, merging, and paginating. Based on these comments, the committee made several changes to simplify and clarify the requirements for electronic transcripts, such as specifying the components of the transcript that require bookmarks, deleting hyperlinks as a requirement, and deleting the requirement that multiple transcripts be merged into a single document. The committee concluded that the remaining functionality required by the rule is necessary for courts and attorneys to obtain the full benefit of the electronic format.

In the portion of the rule addressing multivolume or multireporter transcripts delivered in electronic form, the committee originally proposed language regarding a master index for a merged transcript. The committee deleted this provision from the proposed rule, however, because separate provisions regarding indexes for multivolume or multireporter electronic transcripts are unnecessary and would be confusing. Indexes are addressed in subdivision (b)(5), which applies to transcripts in both paper and electronic form. The subdivision (b)(5) provisions contemplate master indexes in that they require that the first volume of a reporter's transcript contain an index or indexes that list the volume, where applicable, and page of specified content. These provisions addressing indexes are contained in current rule 8.144; they have not substantively changed, other than the addition of a requirement that each index begin on a separate page. The committee intends that the indexes generated for electronic transcripts be the same as those generated for paper transcripts.

Several commenters also expressed concern that the new requirements will create more work for court reporters without additional compensation. Once CAT software capabilities are upgraded and court reporters gain experience with producing transcripts in electronic form with the functionality required by the rule, the committee anticipates that any increase in workload will abate. In addition, deleting the requirement that the original transcript must be in paper form will save time, effort, and money.

Exception for electronic transcript or court reporter unavailability

The committee received two comments regarding the requirement for an electronic transcript that it be generated electronically and must not be created from a scanned document. The commenters suggested adding an exception to allow for creating a transcript in electronic form from a scanned document when the electronic transcript is no longer available. The committee agreed with adding the exception, based on its understanding that the unavailability of a court reporter is an issue for courts and that the electronic functionality required by the rule can be incorporated into scanned transcripts.

Electronic or digital signatures

In the invitation to comment, the committee sought feedback on whether to require electronic signatures or digital signatures, or both. Six individuals or organizations submitted responses, with four supporting electronic signatures only, one supporting digital signatures only, and one recommending electronic signatures for individual reporters and digital signatures for primary reporters submitting merged transcripts containing volumes generated by multiple reporters.[1] The committee determined that, based on current technology and the different purposes served by digital and electronic signatures, requiring both digital and electronic signatures would best meet the needs of courts, litigants, and court reporters. This provision includes an exception for court reporters who lack the technical ability to provide a digital signature; then only an electronic signature is required.

Consistency with other rules

When the committee was reviewing the proposal after the public comment period, one of the comments raised the issue of ensuring that the proposed amendments to rule 8.144 were not inconsistent with other rules governing reporter's transcripts, including rule 8.130. The committee realized that rule 8.130(f)(4) is inconsistent with new section 271 and that it was not necessary in light of the proposed amendments to rule 8.144. Further inquiry revealed a number of rules requiring amendment in light of the amendments to rule 8.144. Because the need for these amendments came to light after the public comment period, they did not circulate for public comment with the rest of the proposal. However, the amendments to rules 8.124, 8.130, 8.336, 8.409, 8.416, 8.613, 8.619, 8.622, 8.625, 8.834, 8.838, 8.866, and 8.919 to delete the outdated text or correct cross-references are technical amendments and need not be circulated. See California Rules of Court, rule 10.22(d)(2).

[1] As noted above, the committee has deleted from the proposed amendments a requirement that primary reporters submit merged transcripts.

Alternatives

In addition to the alternatives considered in connection with the comments received, which are discussed above, the committee considered not proposing amendments to rule 8.144. The committee concluded, however, that providing more guidance on the format of reporters' transcripts in electronic form would be helpful. The committee therefore concluded that it was appropriate to recommend these amendments for adoption.

Implementation Requirements, Costs, and Operational Impacts

The committee expects that implementation of this proposal will require training for court reporters and court staff, but this could be done in conjunction with communication and/or training regarding new Code of Civil Procedure section 271. Because section 271 provides both courts and court reporters with a five-year grace period to fully comply with the rule amendments, no other appreciable implementation requirements, costs, or operational impacts are anticipated.

Relevant Strategic Plan Goals and Operational Plan Objectives

These proposed rule revisions support Judicial Council Operational Plan Objective 5 to develop and implement effective trial and appellate case management practices.

Attachments and Links

1. Amended rules 8.124, 8.130, 8.144, 8.336, 8.409, 8.416, 8.613, 8.619, 8.622, 8.625, 8.834, 8.838, 8.866, and 8.919 at pages 8-22
2. Chart of comments, at pages 23-42

Title 8. Appellate Rules

Division 1. Rules Relating to the Supreme Court and Courts of Appeal

Chapter 2. Civil Appeals

Article 2. Record on Appeal

Rule 8.124. Appendixes

(a)-(c) * * *

(d) Form of appendix

(1) An appendix must comply with the requirements of rule 8.144~~(a)–(c)~~ for a clerk's transcript.

(2)-(3) * * *

(e)-(g) * * *

Advisory Committee Comment

Subdivision (a) * * *

Subdivision (b). Under subdivision (b)(1)(A), a joint appendix or an appellant's appendix must contain any register of actions that the clerk sent to the parties under subdivision (a)(2). This provision is intended to assist the reviewing court in determining the accuracy of the appendix. The provision is derived from rule 30-1.3(a)(ii) of the United States Circuit Rules (9th Cir.).

In support of or opposition to pleadings or motions, the parties may have filed a number of lengthy documents in the proceedings in superior court, including, for example, declarations, memorandums, trial briefs, documentary exhibits (e.g., insurance policies, contracts, deeds), and photocopies of judicial opinions or other publications. Subdivision (b)(3)(A) prohibits the inclusion of such documents in an appendix when they are not necessary for proper consideration of the issues raised in the appeal. Even if a document is otherwise includable in an appendix, the rule prohibits the inclusion of any substantial *portion* of the document that is not necessary for proper consideration of the issues raised in the appeal. The prohibition is intended to simplify and therefore expedite the preparation of the appendix, to reduce its cost to the parties, and to relieve the courts of the burden of reviewing a record containing redundant, irrelevant, or immaterial documents. The provision is adapted from rule 30-1.4 of the United States Circuit Rules (9th Cir.).

Subdivision (b)(3)(B) prohibits the inclusion in an appendix of transcripts of oral proceedings that may be made part of a reporter's transcript. (Compare rule 8.130(e)(3) [the reporter must not copy into the reporter's transcript any document includable in the clerk's transcript under rule 8.122].) The prohibition is intended to prevent a party filing an appendix from evading the requirements and safeguards imposed by rule 8.130 on the process of designating and preparing a reporter's transcript, or the requirements imposed by rule 8.144~~(d)~~(e) on the use of daily or other transcripts instead of a reporter's transcript (i.e., renumbered pages, required indexes). In addition, if an appellant were to include in its appendix a transcript of less than all the proceedings, the respondent would not learn of any need to designate additional proceedings (under rule 8.130(a)(3)) until the appellant had served its appendix with its brief, when it would be too late to designate them. Note also that a party may file a certified transcript of designated proceedings instead of a deposit for the reporter's fee (rule 8.130(b)(3)).

Subdivision (d)-(g) * * *

Rule 8.130. Reporter's transcript

(a)-(e) * * *

(f) Filing the transcript; copies; payment

(1)-(3) * * *

~~(4) On request, and unless the superior court orders otherwise, the reporter must provide the Court of Appeal or any party with a copy of the reporter's transcript in computer-readable format. Each computer-readable copy must comply with the requirements of rule 8.144(a)(4).~~

(g)-(h) * * *

Advisory Committee Comment

Subdivision (a)-(e) * * *

Subdivision (f). Subdivision (f)(1) requires the reporter to prepare and file additional copies of the record "if multiple appellants equally share the cost of preparing the record. . . ." The reason for the requirement is explained in the comment to rule 8.147(a)(2).

~~Subdivision (f)(4) is intended to implement Code of Civil Procedure section 271, which allows any court, party, or other person entitled to a reporter's transcript to request that it be delivered in computer-readable format (except that an original transcript must be on paper) and requires the reporter to provide the transcript in that format upon request if the proceedings were produced utilizing computer-aided transcription equipment. This subdivision establishes procedures~~

~~relating to such requests and procedures for court reporters to apply to the superior court for relief from this requirement if the proceedings were not produced utilizing computer-aided transcription equipment. Government Code section 69954 establishes the fees for reporter's transcripts in computer-readable format.~~

Rule 8.144. Form of the record

(a) The provisions of this rule must be applied in a manner consistent with Code of Civil Procedure section 271.

~~(a)~~(b)~~Paper and~~ Format

(1) *Application to electronic and paper clerks's and reporter's transcripts*
The requirements for clerk's and reporter's transcripts in this subdivision apply to clerk's and reporter's transcripts delivered in electronic form and in paper form.

(2) *General*
In the clerk's and reporter's transcripts:

(A) All documents filed must have a page size of 8½ by 11 inches~~. If filed in paper form, the paper must be white or unbleached and of at least 20-pound weight~~;

(B) The text must be reproduced as legibly as printed matter;

(C) The contents must be arranged chronologically;

(D) The pages must be consecutively numbered, except as provided in ~~(e)~~(f), beginning with volume one's cover as page 1 and continuing throughout the transcript, including the indexes, certificates, and cover pages for subsequent volumes, and using only Arabic numerals (e.g., 1, 2, 3); and

(E) The margin must be at least 1¼ inches from the left edge.

~~(2) If filed in paper form, in the clerk's transcript only one side of the paper may be used; in the reporter's transcript both sides may be used, but the margins must then be 1¼ inches on each edge.~~

(3) *Line numbering*

In the reporter's transcript the lines on each page must be consecutively numbered and must be double-spaced or one-and-a-half-spaced; double-spaced means three lines to a vertical inch.

~~(4) A computer-readable copy of a reporter's transcript must be in a text-searchable format approved by the reviewing court while maintaining original document formatting.~~

~~(5)~~(4) *Sealed and confidential records*

The clerk's and reporter's transcripts must comply with rules 8.45–8.47 relating to sealed and confidential records.

~~(b)~~(5) *Indexes*

Except as provided in rule 8.45~~, at the beginning of the first volume of each~~:

~~(1)~~(A) The clerk's transcript must contain, at the beginning of the first volume, alphabetical and chronological indexes listing each document and the volume, where applicable, and page where it first appears;

~~(2)~~(B) The reporter's transcript must contain, at the beginning of the first volume:

(i) A~~a~~lphabetical and chronological indexes listing the volume, where applicable, and page where each witness's direct, cross, and any other examination~~,~~ begins; and

~~(3)~~(ii) ~~The reporter's transcript must contain a~~An index listing the volume, where applicable, and page where any exhibit is marked for identification and where it is admitted or refused. The index must identify each exhibit by number or letter and a brief description of the exhibit.

~~(D)~~(C) Each index prepared under this paragraph must begin on a separate page.

(6) *Volumes*

Clerks' and reporters' transcripts must be produced in volumes of no more than 300 ~~sheets~~pages.

~~(c)~~(5)(7) **~~Binding and~~** *Cover*

~~(1) If filed in paper form, clerk's and reporter's transcripts must be bound on the left margin in volumes of no more than 300 sheets.~~

~~(2)~~(A) The cover of each volume of the clerk's and reporter's transcripts ~~Each volume's cover~~ must state the title and trial court number of the case, the names of the trial court and each participating trial judge, the names and addresses of appellate counsel for each party, the volume number, the total number of volumes in the transcript, and the inclusive page numbers of that volume.

~~(3)~~(B) In reporter's transcripts, in addition to the information required by ~~(2)~~(A), the cover of each volume ~~of the reporter's transcript~~ must state the dates of the proceedings reported in that volume.

(c) Additional requirements for record in paper form

In addition to complying with (b), if the ~~record~~ clerk's or reporter's transcript is filed in paper form:

(1) The paper must be white or unbleached and of at least 20-pound weight;

(2) In the clerk's transcript only one side of the paper may be used; in the reporter's transcript both sides may be used, but the margins must then be 1¼ inches on each edge.

(3) Clerks' and reporters' transcripts must be bound on the left margin.

(d) Additional requirements for reporter's transcript delivered in electronic form

(1) *General*

In addition to complying with (b), a reporter's transcript delivered in electronic format must:

(A) Be generated electronically; it must not be created from a scanned document unless ordered by the court.

(B) Be in full text-searchable PDF (portable document format) or other searchable format approved by the court.

(C) Ensure that the electronic page counter in the ~~a~~ PDF file viewer matches the transcript page numbering.

(D) Include an electronic bookmark to each heading and subheading, all sessions or hearings (date lines), all witness examinations where each

witness's direct, cross, and any other examination begins, all ~~the~~ indexes, and all exhibits where any exhibit is marked for identification and where it is admitted or refused. All bookmarks, when clicked, must retain the user's currently selected zoom settings.

(E) Be digitally and electronically signed by the court reporter, unless the court reporter lacks the technical ability to provide a digital signature, in which case only an electronic signature is required.

(F) Permit users to copy and paste, keeping the original formatting, but with headers, footers, line numbers, and page numbers excluded.

(G) Permit courts to electronically add filed/received stamps.

(2) *Multivolume or multireporter transcripts*

In addition to the requirements in (1), for multivolume or multireporter transcripts delivered in electronic format, each individual reporter must provide a digitally and electronically signed certificate with his or her respective portion of the transcript. If the court reporter lacks the technical ability to provide a digital signature, then only an electronic signature is required.

(3) *Additional functionality or enhancements*

Nothing in this rule prohibits courts from accepting additional functionality or enhancements in reporters' transcripts delivered in electronic form.

~~(d)~~(e) * * *

~~(e)~~(f) Pagination in multiple reporter cases

(1) In a multiple reporter case, each reporter must estimate the number of pages in each segment reported and inform the designated primary reporter of the estimate. The primary reporter must then assign beginning and ending page numbers for each segment.

(2) If a segment exceeds the assigned number of pages, the reporter must number the additional pages with the ending page number, a hyphen, and a new number, starting with 1 and continuing consecutively.

(3) If a segment has fewer than the assigned number of pages, on the last page of the segment, before the certificate page, the reporter must ~~add a hyphen to the~~

~~last page number used, followed by the segment's assigned ending page number, and state in parentheses "(next volume and page number is ____)."~~ state in parentheses "(next volume and page number is ____)," and on the certificate page, the reporter must add a hyphen to the last page number used, followed by the segment's assigned ending page number.

~~(f)~~(g) * * *

Advisory Committee Comment

Subdivisions ~~(a) and~~ (b). Paragraph (1) of subdivision (b) clarifies that the format requirements for reporter's transcripts, including the requirements for indexes, volumes, and covers, which previously applied to transcripts delivered in paper form now apply to transcripts delivered in both paper and electronic form.

~~Subdivision (a)(4) is adopted under Code of Civil Procedure section 271(b), which allows the Judicial Council to adopt format requirements for computer-readable copies of a reporter's transcript.~~ ~~Subdivisions (a)(5)~~ Paragraphs (4) and ~~(b)~~(5) of subdivision ~~(a)~~(b) refer to special requirements concerning sealed and confidential records established by rules 8.45–8.47. Rule 8.45(c)(2) and (3) establishes special requirements regarding references to sealed and confidential records in the alphabetical and chronological indexes to clerks' and reporters' transcripts.

Chapter 3. Criminal Appeals

Article 2. Record on Appeal

Rule 8.336. Preparing, certifying, and sending the record

(a)–(c) * * *

(d) Reporter's transcript

(1) * * *

(2) The reporter must prepare an original and the same number of copies of the reporter's transcript as (c) requires of the clerk's transcript, and must certify each as correct. ~~On request, and unless the trial court orders otherwise, the reporter must provide the Court of Appeal and any party with a copy of the reporter's transcript in computer-readable format. Each computer-readable copy must comply with the requirements of rule 8.144(a)(4).~~

(3)–(5) * * *

(e)–(h) * * *

Advisory Committee Comment

Subdivision (a) * * *

~~**Subdivision (d).** This subdivision is intended to implement Code of Civil Procedure section 271, which allows any court, party, or other person entitled to a reporter's transcript to request that it be delivered in computer-readable format (except that an original transcript must be on paper) and requires the reporter to provide the transcript in that format upon request if the proceedings were produced using computer-aided transcription equipment. This subdivision establishes procedures relating to such requests and procedures for court reporters to apply to the superior court for relief from this requirement if the proceedings were not produced using computer-aided transcription equipment. Government Code section 69954 establishes the fees for reporter's transcripts in computer-readable format.~~

Subdivision (f)-(g) * * *

Chapter 5. Juvenile Appeals and Writs

Article 2. Appeals

Rule 8.409. Preparing and sending the record

(a)–(b) * * *

(c) Preparing and certifying the transcripts

Within 20 days after the notice of appeal is filed:

(1) * * *

(2) The reporter must prepare, certify as correct, and deliver to the clerk an original of the reporter's transcript and the same number of copies as (1) requires of the clerk's transcript. ~~On request, and unless the trial court orders otherwise, the reporter must provide the Court of Appeal and any party with a copy of the reporter's transcript in computer-readable format. Each computer-readable copy must comply with the requirements of rule 8.144(a)(4).~~

(d)–(e) * * *

Advisory Committee Comment

Subdivision (a)-(b) * * *

~~**Subdivision (c)(2).** This subdivision is intended to implement Code of Civil Procedure section 271, which allows any court, party, or other person entitled to a reporter's transcript to request that it be delivered in computer-readable format (except that an original transcript must be on paper) and requires the reporter to provide the transcript in that format upon request if the proceedings were produced using computer-aided transcription equipment. This subdivision establishes procedures relating to such requests and procedures for court reporters to apply to the superior court for relief from this requirement if the proceedings were not produced using computer-aided transcription equipment. Government Code section 69954 establishes the fees for reporters' transcripts in computer-readable format.~~

Subdivision (e) * * *

Rule 8.416. Appeals from all terminations of parental rights; dependency appeals in Orange, Imperial, and San Diego Counties and in other counties by local rule

(a)–(b) * * *

(c) Preparing, certifying, and sending the record

(1) Within 20 days after the notice of appeal is filed:

(A) * * *

(B) The reporter must prepare, certify as correct, and deliver to the clerk an original of the reporter's transcript and the same number of copies as (A) requires of the clerk's transcript. ~~On request, and unless the trial court orders otherwise, the reporter must provide the Court of Appeal and any party with a copy of the reporter's transcript in computer-readable format. Each computer-readable copy must comply with the requirements of rule 8.144(a)(4).~~

(2)–(3) * * *

(d)–(h) * * *

Chapter 10. Appeals From Judgments of Death

Article 2. Record on Appeal

Rule 8.613. Preparing and certifying the record of preliminary proceedings

(a)–(h) * * *

(i) ~~Computer-readable copies~~ Transcript delivered in electronic form

(1) When the record of the preliminary proceedings is certified as complete and accurate, the clerk must promptly notify the reporter to prepare five ~~computer-readable~~ copies of the transcript in electronic form and two additional ~~computer-readable~~ copies in electronic form for each codefendant against whom the death penalty is sought.

(2) Each ~~computer-readable copy~~ transcript delivered in electronic form must comply with the applicable requirements of rule 8.144~~(a)(4)~~ and any additional requirements prescribed by the Supreme Court, and must be further labeled to show the date it was made.

(3) A ~~computer-readable~~ copy of a sealed transcript delivered in electronic form must be placed on a separate disk and clearly labeled as confidential.

(4) The reporter is to be compensated for ~~computer-readable~~ copies delivered in electronic form as provided in Government Code section 69954(b).

(5) Within 20 days after the clerk notifies the reporter under (1), the reporter must deliver the ~~computer-readable~~ copies in electronic form to the clerk.

(j) Delivery to the superior court

Within five days after the reporter delivers the ~~computer-readable~~ copies in electronic form, the clerk must deliver to the responsible judge, for inclusion in the record:

(1) The certified original reporter's transcript of the preliminary proceedings and the copies that have not been distributed to counsel, including the ~~computer-readable~~ copies in electronic form; and

(2) * * *

(k)–(*l*) * * *

Rule 8.619. Certifying the trial record for completeness

(a)–(d) * * *

(e) ~~Computer-readable copies~~ Transcript delivered in electronic form

(1) When the record is certified as complete, the clerk must promptly notify the reporter to prepare five ~~computer-readable~~ copies of the transcript in electronic form and two additional ~~computer-readable~~ copies in electronic form for each codefendant sentenced to death.

(2) Each ~~computer-readable~~ copy delivered in electronic form must comply with the applicable requirements of rule 8.144~~(a)(4)~~ and any additional requirements prescribed by the Supreme Court, and must be further labeled to show the date it was made.

(3) A ~~computer-readable~~ copy of a sealed transcript delivered in electronic form must be placed on a separate disk and clearly labeled as confidential.

(4) The reporter is to be compensated for ~~computer-readable~~ copies delivered in electronic form as provided in Government Code section 69954(b).

(5) Within 10 days after the clerk notifies the reporter under (1), the reporter must deliver the ~~computer-readable~~ copies in electronic form to the clerk.

(f) * * *

(g) Sending the certified record

When the record is certified as complete, the clerk must promptly send:

(1) To each defendant's appellate counsel and each defendant's habeas corpus counsel: one paper copy of the entire record and one ~~computer-readable~~ copy of the reporter's transcript in electronic form. If either counsel has not been retained or appointed, the clerk must keep that counsel's copies until counsel is retained or appointed.

(2) To the Attorney General, the Habeas Corpus Resource Center, and the California Appellate Project in San Francisco: one paper copy of the clerk's

transcript and one ~~computer-readable~~ copy of the reporter's transcript in electronic form.

(h) * * *

Rule 8.622. Certifying the trial record for accuracy

(a)-(b) * * *

(c) Computer-readable copies

(1) When the record is certified as accurate, the clerk must promptly notify the reporter to prepare six ~~computer-readable~~ copies of the reporter's transcript in electronic form and two additional ~~computer-readable~~ copies in electronic form for each codefendant sentenced to death.

(2) In preparing the ~~computer-readable~~ copies, the procedures and time limits of rule 8.619(e)(2)–(5) must be followed.

(d) * * *

(e) Sending the certified record

When the record is certified as accurate, the clerk must promptly send:

(1) To the Supreme Court: the corrected original record, including the judge's certificate of accuracy, and a ~~computer-readable~~ copy of the reporter's transcript in electronic form.

(2) To each defendant's appellate counsel, each defendant's habeas corpus counsel, the Attorney General, the Habeas Corpus Resource Center, and the California Appellate Project in San Francisco: a copy of the order certifying the record and a ~~computer-readable~~ copy of the reporter's transcript in electronic form.

(3) * * *

Rule 8.625. Certifying the record in pre-1997 trials

(a) * * *

(b) Sending the transcripts to counsel for review

(1) * * *

(2) The copies of the reporter's transcript sent to the California Appellate Project and the Habeas Corpus Resource Center must be ~~computer-readable copies~~ delivered in electronic form complying with the applicable requirements of rule 8.144~~(a)(4)~~ and any additional requirements prescribed by the Supreme Court, and must be further labeled to show the date it was made.

(3) * * *

(c)–(e) * * *

Division 2. Rules Relating to the Superior Court Appellate Division

Chapter 2. Appeals and Records in Limited Civil Cases

Article 2. Record in Civil Appeals

Rule 8.834. Reporter's transcript

(a)–(c) * * *

(d) Filing the reporter's transcript; copies; payment

(1)–(3) * * *

~~(4) On request, and unless the trial court orders otherwise, the reporter must provide the reviewing court or any party with a copy of the reporter's transcript in computer-readable format. Each computer-readable copy must comply with the requirements of rule 8.144(a)(4).~~

(e)–(f) * * *

Advisory Committee Comment

~~**Subdivision (d)(4).** This subdivision is intended to implement Code of Civil Procedure section 271, which allows any court, party, or other person entitled to a reporter's transcript to request~~

~~that it be delivered in computer-readable format (except that an original transcript must be on paper) and requires the reporter to provide the transcript in that format upon request if the proceedings were produced utilizing computer-aided transcription equipment. This subdivision establishes procedures relating to such requests and procedures for court reporters to apply to the superior court for relief from this requirement if the proceedings were not produced utilizing computer-aided transcription equipment. Government Code section 69954 establishes the fees for reporter's transcripts in computer-readable format.~~

Rule 8.838. Form of the record

(a) Paper and format

Except as otherwise provided in this rule, clerk's and reporter's transcripts must comply with the ~~paper and format~~ requirements of rule 8.144~~(a)~~(b)(1)-(4), (c), and (d).

(b)–(c) * * *

Chapter 3. Appeals and Records in Misdemeanor Cases

Article 2. Record in Misdemeanor Appeals

Rule 8.866. Preparation of reporter's transcript

(a)–(c) * * *

(d) When preparation must be completed

~~(1)~~ The reporter must deliver the original and all copies to the trial court clerk as soon as they are certified but no later than 20 days after the reporter is required to begin preparing the transcript under (a). Only the presiding judge of the appellate division or his or her designee may extend the time to prepare the reporter's transcript (see rule 8.810).

~~(2) On request, and unless the trial court orders otherwise, the reporter must provide the reviewing court or any party with a copy of the reporter's transcript in computer-readable format. Each computer-readable copy must comply with the requirements of rule 8.144(a)(4).~~

(e)–(f) * * *

Chapter 5. Appeals in Infraction Cases

Article 2. Record in Infraction Appeals

Rule 8.919. Preparation of reporter's transcript

(a)–(c) * * *

(d) When preparation must be completed

~~(1)~~ The reporter must deliver the original and all copies to the trial court clerk as soon as they are certified but no later than 20 days after the reporter is required to begin preparing the transcript under (a). Only the presiding judge of the appellate division or his or her designee may extend the time to prepare the reporter's transcript (see rule 8.810).

~~(2) On request, and unless the trial court orders otherwise, the reporter must provide the reviewing court or any party with a copy of the reporter's transcript in computer-readable format. Each computer-readable copy must comply with the requirements of rule 8.144(a)(4).~~

(e)–(f) * * *

ITC SPR17-01

Appellate Procedure: Format for Reporter's Transcripts Delivered in Electronic Form)

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

	Commentator	Position	Comment	DRAFT Committee Response
1.	Dana Belloli Official Court Reporter Turlock Ca	N	Having been a working reporter for the past 30 years, both freelance and official, I believe this proposal is bad law. It will require additional costs to working reporters to be paid to software company(s), with no benefit to the public. Court reporters can already provide the services presently required, and the only benefit will be to these people/company(s) who court reporters will be required to pay a monthly fee to. It will especially adversely effect those reporters who work part-time yet still must pay the month fee as required by these software company(s). Thank you.	The committee appreciates the commenter's concerns. The proposed rule amendments are intended to implement the recent amendments to Code of Civil Procedure (CCP) section 271 which generally provide for delivery of reporter's transcripts in electronic form in compliance with the Rules of Court. The requirements for reporter's transcripts delivered in electronic form in subdivision (d) are intended to ensure that courts and attorneys can fully utilize the benefits of electronic transcripts. The rule does not require court reporters to use a particular vendor, and newly-amended CCP section 271 provides a period of five years for compliance.
2.	California Appellate Court Clerks Association (CACCA) by Daniel P. Potter, President San Jose, CA	A	The Clerks Association agrees with amending of rule 8.144 as proposed with one addition. That the rule requires that transcripts submitted by court reporters not be password protected. To the advisory committee's questions: *Is it necessary for the rule to require the court reporter to both digitally and electronically sign a transcript that is delivered in electronic form? If only one requirement were included, which would be preferable?* It doesn't seem necessary to require both. Digital signatures obviously offer more protection for the court reporters, but depending on the digital certificates being used for the digital signature and the encryption level, it might make things more difficult for the court in terms of electronically filing, flattening and	The committee thanks the commenter, and notes the CACCA's support for the proposal. The committee declines to add a prohibition on password protecting transcripts at this time, but would consider it in the future if it appears to be needed. The committee appreciates the commenter's input on this question. At this time, the committee has decided to require both electronic and digital signatures, unless the court reporter lacks the technical ability to provide the latter. The committee will reconsider this in the future if the needs of courts, litigants, and court reporters

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

	Commentator	Position	Comment	DRAFT Committee Response
			encrypting (in the case of sealed electronic documents) than if those documents had just been electronically signed. It seems like requiring electronic signatures might be the least cumbersome option for the courts. *Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?* Yes.	change. No response required.
3.	California Court Reporters Association (CCRA) By Brooke Ryan and Erin Spence	AM	On behalf of California's court reporters, the California Court Reporters Association ("CCRA") wishes to thank the Judicial Council and the Appellate Advisory Committee for proposing these important amendments to California Rules of Court, rule 8.144. CCRA endorses the use of electronic transcripts and agrees with the forward-looking concept of proposed Rule 8.144. We believe that the proposed rule will be improved with some minor changes. We believe the requirements of subdivisions (a)(1)(D) and (c)(1)(C), concerning page numbering, should be harmonized. The former provides only that transcripts should contain pages which are consecutively numbered. However, the latter provides more detail, but fails to state the pages must be numbered consecutively. CCRA proposes that the requirements of these two subdivisions be merged into a single paragraph, which would be contained in subdivision (a) and thus be	The committee thanks the CCRA for its comments and notes its support for the proposal if modified. The committee agrees with the commenter that the more detailed pagination requirements should be placed in subdivision (b) and has made that change to the proposal.

	Commentator	Position	Comment	DRAFT Committee Response
			applicable to electronic transcripts through the introductory sentence of subdivision (c)(1) ["In addition to complying with (a) …"].	
			CCRA suggests that an additional section, (3)(A), possibly entitled Page Numbering, be added with respect to transcript page numbering for both paper and electronic transcriptions. CCRA proposes that transcripts of confidential proceedings (e.g., Marsden hearings) be consecutively numbered within the context of the entire transcript (as opposed to being set out in a separately numbered transcript). CCRA believes this amendment will provide needed guidance to court reporters and uniformity of practice throughout the state. To that end, CCRA proposes this language be included within the rule as adopted: "The reporter's sealed and confidential transcripts must be redacted from the main transcript while maintaining consecutive page numbers using only Arabic numerals (e.g. 1, 2, 3) throughout the document, including indices and certificates, and must be filed under separate cover."	The suggested additional language would be a substantive addition to the proposal. Under California Rules of Court, rule 10.22, substantive changes to the rules need to circulate for public comment before being recommended for adoption by the Judicial Council. The committee will retain the suggestion for consideration in conjunction with its project to develop rules for the handling of sealed or confidential materials that are submitted electronically.
			On Page 2, line 39, a section (a)(6) could be added to list the order of the transcript, such as Appellate Cover, Superior Court Cover, Indices Sessions, Witnesses, Exhibits. CCRA believes that it is important that all transcripts be filed in a consistent order, especially since reporters will be filing a one-volume reporters' transcript on appeal.	This suggestion would also constitute a substantive change to the proposal, which would have to be circulated for public comment. The committee will retain it for future consideration.

	Commentator	Position	Comment	DRAFT Committee Response
			Under current law [(a)(3)], confidential and sealed transcripts are delivered in a secure envelope. CCRA proposes that the amended rule provide electronic transcripts be delivered securely by encrypted transmission. Encryption technology is readily available and widely used in numerous industries and applications. This technology would allow the courts to control who has access to the confidential transcripts by furnishing a password to those authorized persons. Sealed and confidential electronically filed transcripts should be required to follow the guidelines currently set for paper transcripts.	Please see the response above to the suggestion regarding pagination of sealed and confidential transcripts.
			CCRA believes that (5)(1) relating to 300 sheets needs to remain because the ability to bind more than 300 pages is unwieldy. We also believe that that section should be specifically excluded if filing electronically. Suggest it is added to (c)(2)(B).	The provision specifying volumes of no more than 300 sheets has been moved from subdivision (c)(3) to subdivision (b)(6), clarifying that this requirement applies to both electronic and paper forms of the transcripts.
			CCRA suggests that the reference to "the cover page required by (a)(3)" in proposed subdivision (c)(2)(A) should refer to subdivision (a)(5).	The committee thanks the commenter for pointing out this typographical error. It has been corrected.
			An additional correction for consideration is Page 3, line 29 – (D) is inconsistent with page 2, line 5 "(4) Indexes." In (4), reporters filing paper transcripts must have an index for witnesses and exhibits. In (D) reporters must have a separate index for sessions, witnesses and exhibits. CCRA suggests that indexing, whether on paper or electronic, should be	The committee agrees that indexing should be identical for transcripts in paper form and electronic form, and has modified the text of proposed (b)(5)(C) to clarify that it does not create a new requirement for separate indexes for witness testimony and exhibits. The other requirements regarding indexes in (b)(5) are unchanged from the current rule, with the addition

	Commentator	Position	Comment	DRAFT Committee Response
			identical, especially since reporters are having to print transcripts that are currently being filed electronically on appeal to the appellate lawyers. Also, CCRA recommends that the last phrase of proposed subdivision (c)(2)(A) be modified to read, (A) Each individual reporter must include the cover page required by (a)(5), the indexes required by (a)(4), and an electronically signed certificate in their respective portion of the transcript." This change is necessary because in those instances in which several reporters contribute to a transcript, each will sign a certificate as to his or her portion. The proposed rule establishes the practice as to each reporter's portion of the entire transcript. We also suggest adding a section (D) "The primary reporter must digitally sign the single electronic document." CCRA believes that the above changes are necessary for clarity to the reporters preparing the electronic transcripts. The need to have digital and electronic signatures separate is the fact that once a transcript is digitally signed it cannot have any changes made to it, such as merging volumes together to make one electronic document, making a master index from all volumes. Each reporter still needs to electronically sign their respective certificate page in their transcript. In reference to (c)(1)(A) regarding scanned documents, CCRA would suggest an additional sentence such as "except as ordered by the	of a requirement that each index must begin on a separate page. The committee appreciates the commenter's input on this question. At this time, the committee has decided to require both digital and electronic signatures, unless the court reporter lacks the technical ability to provide the latter. The committee will reconsider this in the future if the needs of courts, litigants, and court reporters change.

	Commentator	Position	Comment	DRAFT Committee Response
			court." There are certain instances (death of a reporter, computer crashes) where a scanned copy of a previously prepared transcript is the only way to add it to an appeal. Thank you for the opportunity to offer these suggestions. CCRA remains available to lend its technical experience as the proposed rule takes final form.	The committee agrees and has made this change.
4.	Court Reporter's Office, Superior Court of Orange County By Sean E. Lillywhite	A	The Court Reporters Office in Orange County recommends the committee consider requiring only one signature type, not both; and recommends the rule require an electronic signature. This court is not currently e-filing court reporter transcripts. However, this court recently launched a pilot project for e-filing of court reporter transcripts on civil and probate appeals with the DCA. Adding an e-signature component and formatting requirements would not appreciably increase cost or implementation. Since our court is not currently e-filing court reporter transcripts, we will have sufficient time to work the new requirements into our implementation.	The committee thanks the commenter for its feedback on the questions asked in the invitation to comment. Based on this and other comments, the committee has modified the proposal to require both an electronic and a digital signature unless the court reporter lacks the technical ability to provide the latter.
5.	Albert De La Isla Principal Administrative Analyst IMPACT Team – Criminal Operations Superior Court of Orange County	NI	The amendment has to do with addressing specific requirements when a court reporter's transcript is delivered in electronic form. The proposed amendment to the rule would make the formatting requirements easier to follow.	The committee thanks the commenter for responding to the specific questions raised in the invitation to comment and for the input on how implementing the rule amendments would impact the court.

	Commentator	Position	Comment	DRAFT Committee Response
			This would have more impact to CRIS than Operations. I believe CRIS is at the moment still preparing hard copy transcripts for Criminal Appeals but there have been recent talks about changing this as they have already implemented electronic transcripts with Civil. If electronic transcripts are implemented in felony appeals, then the Felony Appellate procedures would have to be modified and an interface developed to be able to receive electronically and file stamp electronically. *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?* Response: Minimal if we are just receiving the document electronically by an electronic means. However, if we choose to build an interface so that they are loaded in the CMS and electronically filed stamped, the requirements are unknown. *Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?* Response: Operationally, yes if we do not build an interface.	
6.	Jennifer Hicks	NI	In response to the suggested proposal, a	The committee thanks the commenter for

	Commentator	Position	Comment	DRAFT Committee Response
			majority of court reporters, at the present moment, are capable of providing full text-searchable PDF (portable document format) at no additional cost to the court or to the court reporter. What hinders the court reporters from going forward in providing such productivity is the following: 1. Bookmarking and hyperlinks EXPLANATION: Bookmarking and hyperlinks – The proposed code section obligates the reporter to interpret or assume what the court or end user wants by bookmarking and attaching hyperlinks. The Court Reporter's position is to preserve the integrity of the record. By a Court Reporter taking on the role and deciding what should be hyperlinked or bookmarked for the end user assumes or could be perceived as being biased. Though it may seem minute of a task to do, it is disingenuous in asking the reporter to produce said product to prevent the Court Reporter from being in violation with the Court Reporters Board's Tenet of Ethics and/or Professional Conduct. In regards to exhibits being hyperlinked, this would be a very tedious task. There are some cases where counsel and the court make a clean record of marking and receiving exhibits. But there are more times, than not, that exhibits are marked and never used; they are marked in one section and then used several days later; they are misidentified, relabeled, portions redacted,	providing input on this proposal. To avoid any confusion about whether the proposed language of subdivision (d)(1)(D) requires the court reporter to interpret or make assumptions about what bookmarks should be included, the committee has modified the text of the proposed rule to eliminate any implication that the list of items to be bookmarked is non-exclusive and subject to interpretation. In addition, the language of this subdivision has been modified to mirror that of subdivision (b)(5), the index requirements for witness examinations and exhibits. These requirements already exist in the rule, and court reporters are already required to include these items in an index. The committee has deleted the requirement for hyperlinks.

	Commentator	Position	Comment	DRAFT Committee Response
			and so on, to have to go through and hyperlink all these areas is difficult. This, again, requires the reporter to interpret what the court and counsel's intentions are or were during the proceedings which violates the neutrality of the Court Reporter's position. Preparing any type of transcript, whether it's lengthy or short, is time consuming and oftentimes is filed on the due date, depending on a reporter's workload. Requiring a reporter to now bookmark and hyperlink a transcript, especially with the above-mentioned scenario, is quite cumbersome that reporters will not be able to meet their deadlines and file for extensions which would prolong the appeal process. This is not only a detriment to the reporter, because it's frowned upon, but also to the court. The Court Reporters are capable of processing and accommodating the following procedure as proposed but request clarification. 1. Conflicting codes. 2. To volume or not to volume 3. Block numbering/larger pagination 4. Cost a. Digital signature/electronic signature b. program EXPLANATION: When the reporter is mandated or ordered to prepare a transcript he/she would follow several codes which work together to come up with the end result of a transcript. By changing only one	It is the committee's understanding that currently-available software facilitates the process. As these new requirements are adopted, the committee anticipates that any court-reporting software that does not currently include this functionality will likely be updated to make bookmarking easier.

	Commentator	Position	Comment	DRAFT Committee Response
			of the codes, the reporter falls in detriment of not following codes properly because the reporter will have mixed information in the process of preparing a transcript which would result in a transcript that's useless to the end user. 1. Conflicting Code(s) - An official reporter meets those obligations without ever having to interpret what the court needs are. There is a clear understanding of what is expected of an official reporter. By implementing the suggested code section would counter existing rules and codes that reporters follow in preparing transcripts that indicate the term "Paper" or "Printed Copy." Further inquiry with the Court Reporters Board and legislation need to be made to ensure all existing rules be changed so there is a consistency and that there is no confusion amongst the reporters as to which rule they must follow and will the rules coincide with one another as intended. i.e. 69950(a), 271(a) and (b), CCP 2025, 8.130(f)4) and Government Code 69954(b). If Section 8.144 is allowed to be changed as proposed, a Court Reporter could be in violation of the above code sections and putting their license in jeopardy. 2. To Volume or not to volume – The language on this particular procedure needs to be clarified or redefined. Due to one's own	The committee appreciates the commenter's raising this issue and citing specific rules and statutes that pertain to court reporters and reporter's transcripts. CCP section 271 has just been revised to provide that the default format for reporter's transcripts is electronic form, with specified exceptions. The proposed rule amendments are intended to implement this legislation. Subdivision (d) of section 271 expressly states that nothing in the section is intended to change any requirement set forth in sections 69950 or 69954 of the Government Code, regardless of whether a transcript is delivered in electronic or paper form. Code of Civil Procedure sections 2025.510-2025.570 regarding transcripts or recordings of oral depositions, are not inconsistent with rule 8.144. Subdivision (f)(4) of rule 8.130, which is inconsistent with newly amended CCP section 271, and other rules that cross-reference rule 8.144 or use language from the old version of CCP section 271, will be amended. The provision specifying volumes of no more than 300 sheets has been moved from the subdivision

	Commentator	Position	Comment	DRAFT Committee Response
			interpretation this may not be seen as intended and there could be some confusion. Under the new subsection (a)(5) Cover, (A) "Each volume's cover," originally under this section "Binding" it defined what a volume consisted of, 300 pages. (We are assuming this remains the same.) But the suggested proposal's language has been stricken and there is no definition of what a volume consist of for electronic format. A volume is defined as 300 pages only if the transcript remains in paper form. We cannot assume that is what is wanted for electronic format. The rule needs to specify that volumes will continue to consist of 300 pages and will be merged together as a whole (1 file) upon submission.	regarding requirements for the record in paper form to the subdivision regarding general requirements that apply to both paper and electronic forms of the transcripts.
			3. Block numbering/larger pagination – Is or could this section be optional? Some court reporters stride to paginate their pages (transcripts) consecutively so it's one smooth flowing transcript. Easy for the end user. If it's wished that the reporters use block numbering, this would create large page numbering and more volumes than if the pages of the transcript were done consecutively. For the end user it may feel choppy rather than flowing like a book. This procedure is more of a detriment to the primary reporters because they are focusing their attention on coordinating and setting block	The rule contains pre-existing requirements for block numbering in multiple reporter cases. The only change to the existing requirements is moving the hyphenated page number (hyphen added to the last number used, followed by the segment's assigned ending page number) to the certificate page to accommodate computer aided transcription software. Any modification to make block numbering optional would be a substantive change that would need to circulate for public comment. The committee will retain this suggestion for future consideration.

	Commentator	Position	Comment	DRAFT Committee Response
			numbers rather than directing their attention to preparing the transcript at hand or other obligations they may have. Where on the other hand, if paginated consecutively, the primary reporter will be notified as each reporter finishes their portion and provide a page number to the next court reporter in the segment and collaborates indexes instead of multiple pages of witness lists and exhibit pages. When block numbering is utilized there will be occasions when blurbs are used because all designated pages were not filled with text. When the transcript is uploaded into a program, any program, the pagination will not correspond respectively because it cannot read that "Pages 485-600 were intentionally left blank." This will violate the proposed language under (c)(1)(C) indicating, "The electronic page counter in a PDF file viewer must match the transcript page numbering." The end result is that the transcript is assembled in a book-style format so the end user is able to navigate throughout the pages with ease. 4. Cost a. Digital signature/electronic signature – It is preferred to have a digital signature. There is an ongoing cost to the Court Reporter, during the reporter's career as well as in their retirement to continue to meet their obligations. b. Program – As indicated, the	The committee recognizes this issue, and has added language to the rule, following the rule number and title, to make explicit that the provisions of the rule will be applied in a manner consistent with CCP section 271. This includes the five-year grace period for non-compliance due to technical limitations. As described above, the committee has decided to require both electronic and digital signatures unless the court reporter lacks the technical ability to provide the latter. These rule amendments are intended to implement

	Commentator	Position	Comment	DRAFT Committee Response
			introduction of these rules were suggested by a reporter's association who endorses a program that will provide all the suggested changes in 8.144. Regardless if that specific plan is used or not, there is a cost to the reporter to use a program to meet the need of bookmarking and hyperlinking should that language remain in. JCC is informed it's at no cost to them or the courts because the burden is on the court reporters. If this rule is implemented, it will force reporters to use a program to meet the guidelines, not only during their career, but also for ten years after they retire. Without going into details, this is a detriment to the reporters financially during their career as well as into retirement. Court Reporters can produce and accommodate the transcripts right now -- at no cost to the court and no additional cost to the court reporter -- by uploading the transcripts in PDF format. With the elimination of bookmarking and hyperlinking requirements and with making all court reporter codes consistent with computer-readable format language, this will eliminate the court reporter interpreting what the end user wants and protect the court reporter from violating codes and Tenets of Ethics and focus on preserving the integrity of the record. Specific comments: Implementation requirements for the court:	the recent statutory amendments to CCP section 271. The statute provides for a grace period for court reporters in light of potential costs. The committee is mindful that there may be costs to upgrade equipment or software, but this is necessary to maximize the capabilities of the electronic format. The legislation specifically provides that reporters shall not be required to use a specific vendor, technology, or software to comply with the statute. The committee appreciates this input on

	Commentator	Position	Comment	DRAFT Committee Response
			Training and preparation will be needed to ensure staff understands the protocol thoroughly, i.e., uploading, processing, digitally file stamping, notifying parties. This applies to both the clerks and the reporters. From the reporter's standpoint, not all reporters are tech savvy, and so this might be challenging for some. This will be another task that the court reporter supervisor/manager will have to monitor to ensure no delays in the process. It's foreseen that the transcripts will have more typographical errors and/or format errors on them because those are usually caught when the court reporter prints out the final copies to submit. Some even rely on their supervisor to catch the errors during processing of the transcript. That process will be eliminated.	implementation requirements for the court and agrees that training and preparation will be required. If transcripts contain more errors, proofreading training should be pursued.
7.	Jeannette Jessup Official Reporter Monterey, CA	N	We are a very small county and do not use lead reporters. Some of our software also does not have the ability to bookmark. So the change for bookmarking by a lead reporter and merging all volumes in one document will be difficult if not impossible.	The committee appreciates the commenter's input. The separate requirements at subdivision (d)(2)(B) and (C) for merging volumes and different indexes for transcripts in electronic format have been deleted. The existing requirements for preparing indexes now in 8.144(b) are retained and will apply to reporter's transcripts in both electronic and paper format [see proposed 8.144(b)(5) in the amended rule]. Upgrading equipment and software to comply with the rule's requirements may include costs, but CCP section 271 includes a grace period until January 1, 2023.

	Commentator	Position	Comment	DRAFT Committee Response
8.	Orange County Bar Association By Michael L. Baroni	A	No specific comment	The committee appreciates the comment and notes the support for the proposal.
9.	Service Employees International Union by Kimberly Rosenberger California Labor Federation by Caitlin Vega IFPTE 21 by Shane Gusman Laborers International Union of North America, by Liberty Sanchez America, Locals 777 & 792 Orange County Employees Association by Patrick Moran American Federation of State County and Municipal Employees by Joshua Golka	N	We the undersigned organizations representing trial court employees write in opposition to the proposed amendment to the California Rules of Court, rule 8.144. We strongly urge the Appellate Advisory Committee to abandon proposals to change the rule of court, as they are too restrictive, inhibit technological advancements, and impose an unfair and expensive burden on court reporters. The majority of Computer-Aided Transcription (CAT) software is unable to comply with the requirements proposed, specifically the proposals found in sections (c)(1)(C), (c)(1)(D), (2)(B) and (2)(C). The transition to modern technology has been costly and often unsuccessful in the public sector and especially in the judicial branch. However, the most successful use of technology in the judicial branch has been that of the court reporters. Advancements have allowed for real time captioning, electronic transcripts, and so much more. This is directly due to the reporters being the owners, as well as the operators of the technology they use. The proposed amendments to the rule of court take away that autonomy and monopolize the CAT software field. The proposed rules impose requirements that only one vendor at this time provides.	The committee thanks the commenters and notes their opposition to the proposal. The proposed rule amendments are intended to implement the recent amendments to CCP section 271 which generally provide for delivery of reporter's transcripts in electronic form in compliance with the Rules of Court. The committee is mindful that there may be costs to upgrade equipment or software, but this is necessary to maximize the capabilities of the electronic format for courts and attorneys. The statute provides a grace period for court reporters until January 1, 2023. The committee expects that, during the grace period, there will be advances in the software and equipment used to produce electronic transcripts in order to meet the rule requirements. Moreover, the legislation specifically provides that reporters shall not be required to use a specific vendor, technology, or software to comply with the statute.

	Commentator	Position	Comment	DRAFT Committee Response
			Court reporters are in a unique position where they not only are the target demographic for use of the technology, but they are also the customer. This has given the reporters purchasing power that has allowed them to directly influence the field. Court reporters have continued to evolve in the technology they use, investing in CAT software that improves the access and availability to transcripts for the courts and the public. This technology comes directly out of the pocket of the reporters, despite their rates having stagnated for over a quarter of a century. Additionally, section 2(B) requires multiple volumes to be merged into a single electronic document. Currently this is performed by court clerks in the Internal Appeals Division and accounts for a large bulk of their work. The division is responsible for collecting transcripts, tracking deadlines, and merging the total document as one unit for the Court of Appeals. To shift this work entirely on to court reporters is problematic for a number of reasons. The additional workload proposed not only creates an untenable amount of work for the reporter, but it would also result in a merging of job classifications without meeting or notifying the unions that represent these workers. Furthermore, it greatly increases the workload of reporters without any compensation. This proposal will likely result in increased backlog and delayed access to justice, as the deadlines will remain the same despite requiring new	The requirement that multi-volume or multi-reporter transcripts must be merged into a single electronic document has been deleted.

	Commentator	Position	Comment	DRAFT Committee Response
			technology and new duties. The proposed rules place a costly onus on court reporters and also create a monopoly in the industry that discourages innovation and competition. Court reporters are supportive of efforts to shift to electronic transcripts, despite the cost and additional work placed on them. However, the proposed changes approach evolving technology in the wrong way. We oppose the proposed Rule of Courts changes, and instead urge the committee to consider language that allows for the advancement of technology rather than burdensome limitations.	
10.	Superior Court of Los Angeles County	AM	Suggested modification: Rule 8.144 (c) (1) (E) - It would not be necessary to have both an electronic and digital signature on electronically transmitted transcripts. Once the mechanism is in place, digital signatures are fairly easy to handle or maintain. The court's concern would be validity and authentication. If the transcripts are submitted via an electronic portal or by email, there is a high certainty that it actually came from the court reporter. Electronic signature would be easier and cheaper. *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*	The committee thanks the commenter and notes its support for the proposal if modified. Based on this and other comments, the committee has modified the proposal to require both an electronic and a digital signature unless the court reporter lacks the technical ability to provide the latter.

	Commentator	Position	Comment	DRAFT Committee Response

			management systems?
			• Staff training and communication
			  o Transcript Auditors (6) 4-6 hours
			  o Court Reporters (450+) 4 hours
			• Update Court Reporter Manual 16 hours
			• Update Court website information re transcript formatting, including examples 16 hours
			
			Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?
			Yes, three months is sufficient for implementation.
				The committee appreciates these responses to the questions presented in the invitation to comment.
				
				No response required.

11.	Superior Court of Riverside County By Susan D. Ryan	AM	Only copies can be in electronic format. At this time, the original must be a hard copy. Recommend the following additions: Page 6 line 10. (c) Add the words "copies of the" after the word for. (c) Additional requirements for copies of the reporter's transcript delivered in electronic form Page 7 line 3 under the heading (2) Multivolume or multi-reporter transcripts In addition to the requirements in (1), copies of multivolume or multi-reporter transcripts delivered in electronic format must comply with the following requirements:	The committee thanks the commenter for this input and notes the agreement with the proposal if modified. Recent amendments to CCP section 271 include removing the requirement that the original reporter's transcript be on paper and providing instead that, except as specified, an electronic transcript is deemed to be an original transcript. In light of these amendments to CCP section 271, the committee declines to make the suggested changes.
12.	Superior Court of San Diego County By Mike Roddy	A	*In addition to comments on the proposal as a whole, the advisory committee is interested in comments on the whether it is necessary for the rule to require the court reporter to both*	The committee appreciates the responses to its questions and notes the commenter's agreement with the proposal.

	Commentator	Position	Comment	DRAFT Committee Response
			digitally and electronically sign a transcript that is delivered in electronic form? If only one requirement were included, which would be preferable? No comment. *What would the implementation requirements be for courts?* No impact on appeals clerks. *Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?* Yes, as far as appeals clerks are concerned.	
13.	Superior Court of Ventura County by Nan L Richardson	AM	**Digital vs. Electronic signature:** • Electronic – indicates a person's intent to sign a record and is legally binding • Digital – encrypts a data associated with a document. Does not legally bind a signature to a document Preference: All reporter transcripts be electronically signed **Implementation:** • Training official court reporters – 3 to 4 hours per official reporter; 2 hours per contract reporter **Three months for implementation sufficient?** • Six months preferred Title 8. Appellate Rules: Rule 8.144. Form of	The committee thanks the commenter for the responses to questions asked in the invitation to comment, and notes the commenter's agreement with the proposal if modified. Based on this and other comments, the committee has modified the proposal to require both an electronic and a digital signature unless the court reporter lacks the technical ability to provide the latter. The committee appreciates this feedback. The amendments to CPP section 271 take effect on January 1, 2018. Thus, the amendments to rule 8.144, which implement these changes, must also be effective as of January 1, 2018.

	Commentator	Position	Comment	DRAFT Committee Response
			the Record (c)(1)(A) "Be generated electronically; it must not be created from a scanned document." • Court reporters may need to scan a transcript if the paper transcript is available and has been previously prepared, but the electronic transcript is no longer available due to reporter unavailability or technological issues that prevent access to the electronic transcript o Suggested change: "Be generated electronically; it may be scanned if electronic generation unavailable." • (2)(A) "Each individual reporter must include the cover page required by (a)(3)" … should read (a)(5)	The committee agrees and has added an exception if ordered by the court. See response to California Court Reporters Association (CCRA), above. The committee thanks the commenter for pointing out this typographical error. It has been corrected.

Advisory Committee on Civil Jury Instructions
Annual Agenda—2018
Approved by RUPRO: _____

I. COMMITTEE INFORMATION

Chair:	Hon. Martin J. Tangeman
Staff:	Bruce Greenlee, Legal Services

Committee's Charge: Make recommendations to the Judicial Council to update, revise, and add topics to the Judicial Council civil jury instructions (CACI) [Rule 10.58]

Committee Membership: 22 (see Rule 10.58);
5 appellate court justices (including the chair);
7 trial court judges;
9 attorneys whose primary area of practice is civil litigation;
1 law school professor whose primary area of expertise is civil law.

Subcommittees/Working Groups:
The committee has three subcommittees (referred to internally as working groups). Each working group reviews a third of the proposed meeting agenda before the full committee meeting and makes recommendations to the committee regarding each proposal.

Committee's Key Objectives for 2018:
1. Revise civil jury instructions (CACI) as required by developments in the law to ensure that they remain current at all times;
2. Respond to all queries, comments, and suggestions from the bench and bar with regard to CACI;
3. Propose new jury instructions to cover additional subject areas, including possible complete new series; and
4. Provide proposed technical or editorial corrections to the civil jury instructions.

II. COMMITTEE PROJECTS

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1.	**Maintenance—Case Law:** Review new case law affecting jury instructions to determine whether changes to any civil jury instructions are required.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.58 Resources: None Key Objective Supported: 1	Ongoing, with delivery of any changes requiring Judicial Council approval to the council at its May and November meetings; and delivery of any changes requiring only RUPRO approval to RUPRO every other month starting in January.[3]	Civil jury instructions
2.	**Maintenance—Legislation:** Review new legislation affecting jury instructions to determine whether changes to any civil jury instructions are required.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.58	Ongoing, with delivery of any changes requiring Judicial Council approval to the council at its May and November meetings; and delivery of any changes requiring only	Civil jury instructions

[1] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

[2] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

[3] 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 "(d) Changes to instruction text that are nonsubstantive and unlikely to create controversy; (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." Any such revocation would be presented to RUPRO in the month following the finality of the case or effective date of the statute making the instruction no longer good law.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Resources: None Key Objective Supported: 1	RUPRO approval to RUPRO in January[4]	
3.	**New Instructions and Expansion into New Areas:** Review suggestions received from jury instruction users, new legislation, and case law and propose new civil jury instructions as appropriate.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.58 Resources: None Key Objective Supported: 3	Ongoing, with delivery to Judicial Council at May and November meetings	Civil jury instructions
4.	**Maintenance—Sources and Authority** Add excerpts from new cases and statutes to Sources and Authority sections as appropriate once source is final.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.58 Resources: None Key Objective Supported: 1	Ongoing, with delivery to RUPRO every other month[5]	Civil jury instructions

[4] See footnote 3.

[5] 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 "(a) Additions of cases and statutes to the Sources and Authority."

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
5.	**Maintenance—Comments From Users:** Review comments received from bench and bar jury instruction users and propose any necessary changes and improvements.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.58 Resources: None Key Objective Supported: 2	Ongoing, with delivery to Judicial Council at May and November meetings	Civil jury instructions
6.	**Technical Corrections:** Make any necessary corrections or editing changes to the jury instructions.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.58 Resources: None Key Objective Supported: 4	Ongoing, with delivery to RUPRO every other month	Civil jury instructions

III. STATUS OF 2017 PROJECTS:

[List each of the projects that were included in the 2017 Annual Agenda and provide the status for the project.]

#	Project	Completion Date/Status
	Maintenance—Case Law and Legislation: Review case law and new legislation affecting jury instructions to determine whether changes to the civil jury instructions are required.	Ongoing. Releases presented to Judicial Council for approval on May 19, 2017 and November 17, 2017.
	Maintenance—Comments From Users: Review comments received from jury instruction users and propose any necessary changes and improvements.	Ongoing. Releases presented to Judicial Council for approval on May 19, 2017 and November 17, 2017.
	New Instructions and Expansion into New Areas: Review new legislation and case law and suggestions received from jury instruction users and propose new civil jury instructions as appropriate.	Ongoing. Releases presented to Judicial Council for approval on May 19, 2017 and November 17, 2017.
	Technical Corrections: Make any necessary corrections or editing changes to the jury instructions.	Ongoing. Releases presented to Judicial Council for approval on May 19, 2017 and November 17, 2017.

IV Subcommittees/Working Groups - Detail

Subcommittees/Working Groups:

Subcommittee or working group name: **Working Group 12**

Purpose of subcommittee or working group: **Review one-third of proposed agenda for full committee meeting and make recommendations to the full committee as to whether to approve or reject each agenda item**

Number of advisory group members: **7**

Number and description of additional members (not on this advisory group): **None**

Date formed: **September 2003**

Number of meetings or how often the group meets: **Twice a year in June and December**

Ongoing or date work is expected to be completed: **Ongoing**

Subcommittee or working group name: **Working Group 34**

Purpose of subcommittee or working group: **Review one-third of proposed agenda for full committee meeting and make recommendations to the full committee as to whether to approve or reject each agenda item**

Number of advisory group members: **7**

Number and description of additional members (not on this advisory group): **None**

Date formed: **September 2003**

Number of meetings or how often the group meets: **Twice a year in June and December**

Ongoing or date work is expected to be completed: **Ongoing**

Subcommittee or working group name: **Working Group 56**

Purpose of subcommittee or working group: **Review one-third of proposed agenda for full committee meeting and make recommendations to the full committee as to whether to approve or reject each agenda item**

Number of advisory group members: **7**

Number and description of additional members (not on this advisory group): **None**

Date formed: **September 2003**

Number of meetings or how often the group meets: **Twice a year in June and December**

Ongoing or date work is expected to be completed: **Ongoing**

Civil and Small Claims Advisory Committee
Annual Agenda[1]—2017-2018
Approved by RUPRO: [Date??]

I. COMMITTEE INFORMATION

Chair:	Hon. Ann I. Jones, Judge, Superior Court of Los Angeles County
Lead Staff:	Anne M. Ronan, Attorney, Legal Services

Committee's Charge/Membership:

Under rule 10.41 of the California Rules of Court, the Civil and Small Claims Advisory Committee (C&SCAC) is charged with making recommendations to the Judicial Council for improving the administration of justice in civil and small claims proceedings.

C&SCAC currently has 27 voting members and 2 advisory members. The attached term of services chart provides the composition of the committee.

Subcommittees/Working Groups:[2]

Standing Subcommittees:

- Alternative Dispute Resolution Subcommittee
- Legislative Subcommittee
- Protective Orders Subcommittee
- Rules and Forms Subcommittee (formerly Small Claims and Limited Case Subcommittee)[3]
- Futures Recommendations Subcommittee (formerly Unlimited Case and Complex Litigation Subcommittee)

Ad Hoc Working Groups:

- Ad Hoc Working Group on AB 2298 (Gang Database)

[1] The annual agenda outlines the work a committee will focus on in the coming year and identifies areas of collaboration with other advisory bodies and the Judicial Council staff resources.

[2] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

[3] For this year, C&SCAC is reorganizing two of its five standing subcommittees, to allow one to focus on the implementation of the Future Commission recommendations, and another to continue the ongoing work of moving forward with rules, forms, and best practices for small claims and civil courts.

- Ad Hoc Working Group on Small Claims Court Interpreters

II. COMMITTEE PROJECTS

#	New or One-Time Projects[4] *[Group projects by priority number.]*
1.	**New Civil Tiers and Streamlined Litigation** ***Priority 1*** *[at direction of Chief Justice]* ***Project Summary*** Assess and develop recommendations as outlined in Report of the Commission on Future of California's Court System (Futures Commission) for: • Advancing a legislative proposal for increasing the maximum jurisdictional dollar amounts for limited civil cases to $50,000, and creating a new intermediate civil case track with a maximum jurisdictional dollar amount of $250,000. • Developing streamlined methods for litigating and managing all types of civil cases, including o legislative proposal revising discovery statutes to make discovery proportional to amount at issue (based on tiers), require mandatory early disclosures, and expand expert disclosure timelines o amended case management rules and statutes, and amended forms to implement same o legislative proposal to allow partial summary judgments in unlimited cases o legislative proposal, rules, and best practices relating to remote access in certain civil proceedings o increased ADR in all case levels, including, potentially, online ADR for small claims cases • After initial statutory changes to tiers enacted, developing: o new rules and forms as appropriate to facilitate new discovery scheme o amendments and revisions to rules and forms where needed to reflect existence of new intermediate tier o statutory clean-up proposal to reflect new intermediate tier as appropriate, where statutes refer to limited and/or unlimited tiers. Per direction from Chief Justice: Work with various bar groups and legal aid providers to ensure the fairness and equity of any proposals and work with trial court leadership to ensure the courts' ability to implement such changes. ***Status/Timeline*** New project; goal of having first set of statutory and rule proposals, re tiers, discovery, and case management, ready for public comment in spring 2019 and to council at end of 2019; additional rules, forms, and legislation to follow as new law enacted. Proposals re ADR to be worked on in coming year, with more detailed project descriptions to be provided in next year's annual agenda. ***Resources/Partners*** JCC Staff Resources: Committee staff; Finance Division and Office of Court Research (for assistance on filing fee and court statistics issues)

[4] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
	AC Collaboration: Trial Court Presiding Judges Advisory Committee; Court Executives Advisory Committee, Information Technology Advisory Committee, Committee on Providing Access and Fairness External Partners: Stakeholders, including plaintiff and defense bar, insurance industry representatives, in-house counsel and business groups, and legal aid organizations; organizations using online ADR; National Center for State Courts staff.
2.	**Interpreters in Small Claims Court** ***Priority 1(a) and 1(c)*** *[see footnote 5]* [5] ***Project Summary*** Partner with the Language Access Plan Implementation Task Force to address implementation issues that will result from legislation to require court interpreters and eliminate the current informal interpreting option in small claims proceedings. A revised legislative proposal has been developed, and is currently circulating for comment. If enacted, rules of court regarding temporary interpreters will need to be amended to fully implement the law. Various Small Claims forms will be revised or developed to inform parties on the change in law and to facilitate their requesting interpreters as early as possible in the proceedings. ***Status/Timeline*** Legislative proposal to council in January 2018; amended rules of court and revised forms in year following enactment. ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Language Access Plan Implementation Task Force; Court Interpreters Advisory Panel; Court Executives Advisory Committee External Partners: Small Claims Advisors and court staff

[5] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
3.	**Gang Database Procedures** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** New legislation, effective January 1, 2017, established a procedure for a person designated in a shared gang database who has contested that designation with the local law enforcement agency and whose challenge has been denied to bring an action in the superior court. New procedural rules and a form were developed on an expedited basis to enable members of the public to utilize the procedure and the courts to implement the legislation. Clean up legislation (Assembly Bill 90) requires some further revision to the rules and forms to conform to law. Comments received in a post-adoption circulation will be addressed at the same time. ***Status/Timeline*** Rules and forms were adopted by council in January 2017; technical amendments to rules to reflect new statute will be submitted to council in November 2017, and further amendments and revisions to rules and forms may be ready for council action spring 2018 ***Resources/Partners*** JCC Staff Resources: Committee staff; Governmental Affairs office AC Collaboration: ad hoc joint working group with Family and Juvenile Law Advisory Committee; Criminal Law Advisory Committee. External Partners: N/A
4.	****[6]Gender Identity and Name Change Forms** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Senate Bill 179 adds a third gender alternative for California residents: nonbinary in addition to male or female, and amends the procedures for seeking name changes to conform to gender (Code Civ. Proc. § 1277.5) and the procedures and legal requirements for seeking changes of gender on birth certificates (Health and Safety Code § 103430). The new law will require revisions to several of the council's Name Change forms, both to add the nonbinary option and to reflect the amendments to procedures for obtaining name changes to reflect gender and changes to birth certificates. Senate Bill 310 will also require amending Name Change forms, to remove the items re status of petitioner being under jurisdiction of Department of Corrections and Rehabilitation and to add information about the additional service of documents that will now be required of those under that jurisdiction. Pending issues regarding Name Change forms that the committee will consider at the same time, include the following:

[6] ** indicates that legislation is not yet final.

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
	• Whether form NC-220 should be revised to include language from Code of Civil Procedure section 1277(a)(1) directing interested persons to file in writing any objections to the granting of the petition (suggested by court research attorney) • Whether form NC-110 should be revised to correct an ambiguity in the declaration box, to address a recurring problem for clerks in processing the form (suggested by judicial officer) • Whether date of birth should be removed from the petition form, addressing privacy concerns (suggested by an attorney). ***Status/Timeline*** Statute has September 2018 operative date. Forms to circulate in Winter comment cycle. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office AC Collaboration: Family and Juvenile Advisory Committee External Partners: Transgender Law Center
5.	****Exemptions from Enforcement of Money Judgements** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Assembly Bill 688 provides for a new exemption, for contributions to ABLE bank accounts, which will need to be added to the forms which list exemptions and amounts of exemptions. ***Status/Timeline*** Statute has September 2018 operative date. Forms to circulate in Winter comment cycle. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office AC Collaboration: External Partners:
6.	****Wage Garnishment for Student Loan Debt** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Senate Bill 16 decreases the amount of wage garnishment for judgments arising from certain type of student loans (decreases maximum withholding to 15%--rather than 25%--of wages at certain income levels. The application form (form WG-002) will

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
	need to be revised to identify judgments from student loan; a new earnings-withholding order for those types of judgments may need to be developed, with new instructions for employers; and the instructions for employees (form WG-003) should be revised. ***Status/Timeline*** Statute has September 2018 operative date. Forms to circulate in Winter comment cycle. ***Resources/Partners*** JCC Staff Resources: Committee staff; Governmental Affairs office AC Collaboration: External Partners:
7.	**Confidentiality in Cyber Retaliation Cases** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Senate Bill 157 amends Civil Code 1708.85 to expand rights of privacy for plaintiff in cases alleging cyber retaliation (sexually explicit materials), expanding the types of materials for which redactions of confidential information required. Current form MC-125 (confidential cover sheet) may need to be revised. The bill assumes rules of court may be appropriate, and provides until January 2019 for their adoption by the council. ***Status/Timeline*** Statute sets January 2019 date for rules and forms. Spring comment cycle planned. ***Resources/Partners*** JCC Staff Resources: Committee staff; Governmental Affairs office AC Collaboration: External Partners:
8.	**Consumer Gender Discrimination forms** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Assembly Bill 1615 requires notices be sent out in advance of filing claims based on consumer's being charged different prices for similar services. Council is mandated to publish the notice in several languages. The bill also requires development of draft answer form.

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
	Status/Timeline Statute has January 2019 deadline for forms. Notices can be submitted without circulation. New answer form would be on Spring comment cycle. ***Resources/Partners*** JCC Staff Resources: Committee staff; translation services AC Collaboration: External Partners:
9.	**Exemptions from Mandatory E-filing** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Assembly Bill 976 amends numerous statutes to facilitate e-business in the courts. Among other provisions, it mandates a new form to allow a party to seek an exemption from mandatory electronic filing and service (Code Civ. Proc. §1010.6d(3).) ***Status/Timeline*** No deadline stated in statute; Spring 2018 comment cycle planned. ***Resources/Partners*** JCC Staff Resources: Committee staff; ITAC committee staff AC Collaboration: Information Technology Advisory Committee External Partners:
10.	****Privacy of Minor's Information in Protective Orders** ***Priority 1(b)****[see footnote 5]* ***Project Summary*** Assembly Bill 953 authorizes a minor or a minor's guardian to petition the court to keep all information regarding the minor that was submitted to the court for issuance of a civil harassment or domestic violence protective order in a confidential case file, if the court expressly finds that the minor's right to privacy overcomes the right of public access to the information and no less restrictive means exist to protect the minor's privacy. The confidential information includes the minor's name, address, and the circumstances surrounding the protective order with respect to that minor. Forms to implement these provisions would likely include a petition, information sheet, and possibly an order form.

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
	Status/Timeline While the statute does not mandate the forms, in light of the concerns addressed, goal would be to have forms go out in the normal comment cycle, with January 1, 2019 effective date. ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Joint Protective Order Working Group, Family and Juvenile Advisory Committee External Partners:
11.	**Remote Access to Court Records for Parties, Attorneys and Justice Partners.** ***Priority 1*** *[see footnote 5]* ***Project Summary*** Participate in newly formed joint working group to develop rules, standards, and guidelines for online access to court records for parties, their attorneys, local justice partners, and other government agencies. ***Status/Timeline*** ongoing; January 2019 goal for proposed rules. One member of advisory committee taking part in ad hoc committee. ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Information Technology Advisory Committee, Family and Juvenile Advisory Committee, Probate and Mental Health Advisory Committee, Criminal Advisory Committee, Traffic Advisory Committee, Advisory Committee on Providing Access and Fairness External Partners:
12.	***Civil Subject Matter Resource for Futures Commission Recommendations*** ***Priority 1*** *[at direction of Chief Justice]* ***Project Summary*** Provide consultation and review of civil and small claims procedural matters to other advisory committees working on implementation of recommendations of the Futures Committee, per direction of Chief Justice in May 2017 letter. The advisory committee has been expressly asked to review the proposed traffic court procedures as they are changed to a civil model. It may also be asked to review proposals for providing for video remote appearances in non-criminal matters, and for developing educational programs for self-represented litigants in civil matters.

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
	Status/Timeline as needed ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Traffic Futures Working Group; Information Technology Advisory Committee, Advisory Committee on Providing Access and Fairness
13.	**CLRC Mediations Confidentiality Recommendations** ***Priority 2*** *[see footnote 5]* ***Project Summary*** Review and submit further comments on the California Law Revision Commission's (CLRC) recommendation regarding amendments to the mediation confidentiality statutes. The recommended changes could adversely impact court-related ADR programs, as well as ultimately increasing judicial actions relating to mediation proceedings. ***Status/Timeline*** Initial comments were completed in September 2017; further comments may be submitted in December 2017 based on recent hearings. If further recommendations circulate in 2018, additional comments may be appropriate. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office AC Collaboration: External Partners: California Law Revision Commission
14.	**Informing Mediation Participants About Confidentiality** ***Priority 2(b)*** *[see footnote 5]* ***Project Summary*** Consider whether to recommend rule amendments to address what further information, if any, should be provided to court-related ADR program participants regarding mediation confidentiality, considering CLRC work on this matter. ***Status/Timeline*** January 2019 planned effective date. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
	AC Collaboration: External Partners:
15.	**Meet and Confer Forms for Motions to Strike/Judgment on Pleadings** ***Priority 2(b)*** *[see footnote 5]* ***Project Summary*** Assembly Bill 644 requires attorneys to meet and confer prior to filing motions to strike or judgments on the pleadings, and to file declarations with the court that the requirements have been met, or that more time is needed, similar to the requirements relating to demurrers, for which parties may use forms CIV-140 and CIV-141. Those forms should be revised to apply to these additional motions as well. The invitation to comment on the forms will seek the information RUPRO requested be gathered as to how helpful courts are finding the current forms. Form CIV-140 language should also be revised to more closely conform to the statutory provisions regarding deadlines. ***Status/Timeline*** The statute does not mandate that forms be adopted. Goal is to send out in normal comment cycle with effective date of January 1, 2019, to ensure that the reference to deadlines on current CIV-140 is corrected. ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: External Partners:
16.	**Description of Ammunition in Protective Orders** ***Priority 2(b)*** *[see footnote 5]* ***Project Summary*** Examine whether description of ammunition in protective orders should be expanded to expressly include "high volume magazines." Proposal is suggestion of employee of Department of Justice. ***Status/Timeline*** When Joint Protective Order Working Group is meeting to work on forms to facilitate new minors' privacy rights bill, the group can also consider this issue. Expected January 1, 2020 end date. ***Resources/Partners*** JCC Staff Resources: Committee staff

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
	AC Collaboration: Joint Protective Order Working Group, Family and Juvenile Advisory Committee External Partners: Department of Justice

#	**Ongoing Projects and Activities** *[Group projects by priority number.]*
17.	**Review Suggestions** ***Priority 1*** *[see footnote 5]* ***Project Summary*** As mandated by rule 10.21(c), review suggestions from members of the judicial branch and the public for improving civil practice and procedure, court-connected ADR, and case management and recommend actions by the council or one of its committees. ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: as appropriate based on proposal received. External Partners:
18.	**Review of Pending Legislation** ***Priority 1*** *[see footnote 5]* ***Project Summary*** Review pending legislation on civil procedure and court administration and make recommendations to the council's Policy Coordination and Liaison Committee, as required by Rule 10.34(a)(3) ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office AC Collaboration: External Partners:
19.	**Review of Enacted Legislation** ***Priority 1*** *[see footnote 5]* ***Project Summary*** Review all enacted legislation referred to the committee by the Judicial Council's Governmental Affairs office office that may have an impact on issues within the advisory committee's purview and, where appropriate, propose to the council rules and forms to implement the legislation or to bring rules and forms into conformity with it. ***Status/Timeline*** Ongoing

	Resources/Partners JCC Staff Resources: Committee staff; Governmental Affairs office AC Collaboration: External Partners:
20.	**Provide Subject Matter Expertise** ***Priority 2(b)*** *[see footnote 5]* ***Project Summary*** Serve as subject matter resource for other advisory groups to avoid duplication of efforts and contribute to the development of recommendations for council action. Such efforts may include providing civil and small claims procedural expertise and review to working groups, advisory committees, and subcommittees as needed ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: as appropriate for project on which advice or consultation requested. External Partners:
21.	**Rules Modernization Project** ***Priority 2(b)*** *[see footnote 5]* ***Project Summary*** Assist Information Technology Advisory Committee (ITAC) it its Rules Modernization Project, a collaborative multi-year effort to comprehensively review and modernize statutes and rules so that they will be consistent with and foster modern e-business practices. ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Information Technology Advisory Committee

	External Partners:
22.	**Update Deskbook on the Management of Complex Civil Litigation** ***Priority 2*** *[see footnote 5]* ***Project Summary*** Implementation project; charge for work was made to CSCAC by the council at October 22, 1999 meeting in which the council received the report of the Complex Civil Litigation Task Force and voted to adopt the Task Force's recommendations (see attached; item 3 from the minutes, beginning at page 17). ***Status/Timeline*** Ongoing; substantial revision currently underway, expected to be completed in 2018. ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration External Partners:

III. LIST OF 2017 PROJECT ACCOMPLISHMENTS:

highlights and achievements of projects that were included in the 2017 Annual Agenda

#	**Project Highlights and Achievements** *[Provide brief, broad outcome(s) and completed date.]*
	Enforcement of Judgment Forms. Revised Writ of Execution and Memo of Costs After Judgment, and developed new information sheet (form MC-012), to clarify for parties how to calculate credits for partial payment and apply post-judgment interest. Forms will go into effect January 1, 2018.
	Default in Consumer Credit Cases. In order to clarify procedures for parties and courts, created new Request for Entry of Default and Default Judgment, to be used only in cases brought under the Fair Debt Collections Act, which have different requirements for default than other civil cases. Forms will go into effect January 1, 2018.
	Civil Protective Order Forms. The committee made significant improvements to Civil Harassment (CH), Elder Abuse (EA), Private Postsecondary School Violence (SV), and Workplace Violence (WV) sets of forms. New forms were developed in each form set for the modification and termination of protective orders. Response forms were amended to provide space for the respondent to state why he or she disagrees with the orders requested by the petitioner. The temporary restraining order form in each set was amended to provide for certain exceptions to the firearms surrender provisions. In addition, a new legislative proposal was developed to clarify the court procedures for issuing Gun Violence Prevention Emergency Protective Orders
	Consideration of Case Management Rules. Current emergency exemption to statewide rules and procedures (rule 3.720(b)) will sunset at the end of 2019. During the past year, the committee began to review and evaluate the procedures being employed by those courts currently exempted from the case management rules, along with the benefits and burdens of the current statewide rules, in order to be prepared to make a recommendation as to whether the council should continue to permit exemptions, return to statewide case management rules, amend the current rules, or take other action. This project will be folded into the new Civil Tiers and Streamlined Litigation project.
	Legislative Proposal Regarding Small Claims Court Interpreters. The committee worked with the Language Access Plan Implementation Task Force to address implementation issues that would result from proposed legislation to require court interpreters and eliminate the informal interpreting option in small claims proceedings. The group gathered information from courts that already provide court interpreters in small claims proceedings, considered other models that may provide guidance (such as traffic), and worked with courts as stakeholders and partners in the process. The two groups have worked out revisions to the proposed litigation which they think will provide improved quality of interpretation for small claims parties with limited English proficiency, without making the process so burdensome that the parties loose realistic access to the courts. The proposed legislation is out for comment and expected to go to the council in January 2019.

Advisory Committee on Criminal Jury Instructions
Annual Agenda—2018
Approved by RUPRO:

I. COMMITTEE INFORMATION

Chair:	Hon. Rene August Chouteau
Staff:	Robin Seeley, Legal Services Office

Committee's Charge: Make recommendations to the Judicial Council to update, revise, and add topics to the Judicial Council criminal jury instructions (CALCRIM) [Rule 10.59]

Committee Membership: 13 (see Rule 10.59);
2 appellate court justices;
6 trial court judges;
2 attorneys whose primary area of practice is criminal defense;
2 attorneys whose primary area of practice is representing the People of the State of California in criminal matters;
1 law school professors whose primary area of expertise is criminal law.

Subcommittees/Working Groups:
The committee has one subcommittee consisting of six local members who meet to pre-vet all materials before they go to the full committee for review.

Committee's Key Objectives for 2018:
1. Revise criminal jury instructions (CALCRIM) as required by developments in the law to ensure that they remain current at all times;
2. Respond to all queries, comments, and suggestions from the bench and bar with regard to CALCRIM;
3. Propose new jury instructions to cover additional subject areas, including possible complete new series; and
4. Provide proposed technical or editorial corrections to the criminal jury instructions.

II. COMMITTEE PROJECTS

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1.	**Maintenance—Case Law and Legislation:** Review case law and new legislation affecting jury instructions to determine whether changes to the criminal jury instructions are required.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.59 Resources: None Key Objective Supported: 1	Ongoing, with delivery to Judicial Council at March and September meetings	Criminal jury instructions
2.	**Maintenance—Comments From Users:** Review comments received from jury instruction users and propose any necessary changes and improvements.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.59 Resources: None Key Objective Supported: 2	Ongoing, with delivery to Judicial Council at March and September meetings	Criminal jury instructions
3.	**New Instructions and Expansion into New Areas:** Review suggestions received from jury instruction users, new legislation, and case law and propose new criminal jury instructions as appropriate.	1	Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10. Resources: None Key Objective Supported: 3	Ongoing, with delivery to Judicial Council at March and September meetings	Criminal jury instructions

[1] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

[2] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
4.	**Technical Corrections:** Make any necessary corrections or editing changes to the jury instructions.		Judicial Council Direction: Draft and maintain jury instructions that accurately and understandably state the law. Origin of Project: Ongoing charge from Judicial Council per Rule 10.59 Resources: None Key Objective Supported: 4	Ongoing, with delivery to Judicial Council at March and September meetings	Criminal jury instructions

III. STATUS OF 2017 PROJECTS:

[List each of the projects that were included in the 2017 Annual Agenda and provide the status for the project.]

#	Project	Completion Date/Status
	Maintenance—Case Law and Legislation: Review case law and new legislation affecting jury instructions to determine whether changes to the criminal jury instructions are required.	**Ongoing. Releases presented to Judicial Council for approval in March 2017 and September 2017.**
	Maintenance—Comments From Users: Review comments received from jury instruction users and propose any necessary changes and improvements.	**Ongoing. Releases presented to Judicial Council for approval in March 2017 and September 2017.**
	New Instructions and Expansion into New Areas: Review new legislation and case law and suggestions received from jury instruction users and propose new criminal jury instructions as appropriate.	**Ongoing. Releases presented to Judicial Council for approval in March 2017 and September 2017.**
	Technical Corrections: Make any necessary corrections or editing changes to the jury instructions.	**Ongoing. Releases presented to Judicial Council for approval in March 2017 and September 2017.**

IV. Subcommittees/Working Groups - Detail

Subcommittees/Working Groups:
Subcommittee or working group name: CALCRIM Subcommittee
Purpose of subcommittee or working group: Pre-vets material before it goes to the full committee
Number of advisory group members: 5 (all local)
Number and description of additional members (not on this advisory group): None
Date formed: 1997
Number of meetings or how often the group meets: Twice per year
Ongoing or date work is expected to be completed: Ongoing

Criminal Law Advisory Committee
Annual Agenda—2018
Approved by RUPRO:

I. ADVISORY BODY INFORMATION

Chairs:	Hon. Tricia A. Bigelow, Chair; Hon. Richard Couzens (Ret.), Vice Chair
Staff:	Sarah Fleischer-Ihn, Attorney, Criminal Justice Services Office

Advisory Body's Charge: The Criminal Law Advisory Committee makes recommendations to the Judicial Council for improving the administration of justice in criminal proceedings. (Cal. Rules of Court, rule 10.42(a).)

Advisory Body's Membership: The committee has 20 members: 2 appellate court justices, 7 judges, 3 court administrators, 3 prosecutors, 3 defense attorneys, and 2 probation officers.

Subgroups/Working Groups:

Subcommittees (including only CLAC members):

Limited Duration/Ad Hoc Subcommittee on Use of Risk Needs Assessment Information at Sentencing

Advisory Body's Key Objectives for 2018:

1. Provide recommendations to the Judicial Council to improve the administration of the criminal justice system.
2. Provide recommendations to the Judicial Council for approval of various rule and form proposals to promote timely, consistent, and effective criminal case processing.
3. Assist Governmental Affairs staff in developing Judicial Council-sponsored legislation involving criminal court administration, and responding to proposed legislative developments.

II. ADVISORY BODY PROJECTS

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1.	**Recently enacted legislation:** Review enacted legislation 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. Specific proposals to consider developing include: AB 1115 (Jones-Sawyer): Convictions: expungement Would allow a defendant sentenced to state prison for a felony that, if committed after the 2011 Realignment Legislation, would have been eligible for sentencing to a county jail to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty, after the lapse of one or 2 years following the defendant's completion of the sentence, as specified, provided that the defendant is not under supervision as specified, and is not serving a sentence for, on probation for, or charged with the commission of any offense. SB 239 (Wiener): Infectious and communicable diseases: HIV and AIDS: criminal penalties.	2(a), 2(b)	Judicial Council Direction: Strategic Plan Goal 3: Modernization of Management and Administration. Operational Plan Objective *5*: Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases.[3] Origin of Project: Governmental Affairs Key Objectives Supported: 1, 2.	Ongoing	Recommendations for rules, forms, and/or legislation.

[1] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

[2] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

[3] Much of the work by the Criminal Law Advisory Committee falls within this pair of Strategic/Operational Plan Goals. This pair of goals is referred to through the rest of this agenda as "Strategic Plan Goal 3, Operational Plan Objective 5."

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Would repeal felony and misdemeanor laws related to HIV. Would make the intentional transmission of an infectious or communicable disease, as defined, a misdemeanor. Would impose various requirements upon the court in order to prevent the public disclosure of the identifying characteristics, as defined, of the complainant and the defendant. Would repeal Penal Code section 647f, felony prostitution, and vacate any conviction, dismiss any charge, and legally deem that an arrest under the provision never occurred. Would authorize a person serving a sentence as a result of a violation of the provision to petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case. Would require a court to vacate the conviction and resentence the person to any remaining counts while giving credit for any time already served.	1(a), 1(b)			
2.	**Criminal Law Legislation:** Review and recommend Judicial Council positions on pending criminal law legislation and assist Governmental Affairs staff in pursuing Judicial Council-sponsored legislation developed by the committee in 2017.	1	Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5. Origin of Project: Governmental Affairs; legislative proposals were originally developed at the request of judges and/or court administrators.	Ongoing	Recommendations for rules, forms, and/or legislation.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Resources: Governmental Affairs. Key Objectives Supported: 3.		
3.	**Mental Health Issues:** Consider and implement recommendations originally developed by the Mental Health Implementation Task Force to improve the resolution of mental health issues during criminal proceedings, and consider other mental health-related proposals. Specific proposals to consider developing include: • Potential amendments to Penal Code section 1369 et seq. to address the confidentiality of court records of competency proceedings. • Development of optional forms to administer psychotropic medications to minors tried as adults.	2 2(a), 2(b)	Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5. Origin of Project: Mental Health Implementations Task Force; judges. Resources: Collaborative Justice Courts Advisory Committee. Key Objective Supported: 1, 2.	Ongoing	Recommendations for rules, forms, and/or legislation.
4.	**Continued Implementation of Propositions 47, 57, 63, 64:** Monitor implementation of four recently enacted propositions and assist courts with any required implementation: a) Proposition 47, enacted November 5, 2014, which reduced the classification of many nonserious and nonviolent property and drug crimes from a felony to a misdemeanor, as well as its extension to November 4, 2022 under Assembly Bill 2765 (Weber, Stats. 2016, ch. 767);	2(a), 2(b) 2(a), 2(b)	Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5. Origin of Project: Initiative measures. Resources: Family and Juvenile Law Advisory Committee Key Objectives Supported: 1.	January 1, 2019	Recommendations for adoption of rules and forms; incorporating information in education and training programs.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	b) Proposition 57, enacted November 8, 2016, which changed rules governing parole and the granting of custody credits to state prison inmates and restructured the process for transfer of jurisdiction from juvenile to criminal court; c) Proposition 63, enacted November 8, 2016, which includes a firearms relinquishment procedure for defendants convicted of specified offenses; and d) Proposition 64, enacted November 8, 2016, which decriminalized or reduced the penalty for most marijuana offenses and allows for prior offenses to be reclassified accordingly.	2(a), 2(b) 2(a), 2(b)			
5.	**MC-275, Petition for Writ of Habeas Corpus, and Rule 4.551, Habeas Corpus Proceedings:** Amendments to rule 4.551, form MC-275, and/or other rules and forms regarding standard of review for writs of habeas corpus and post-conviction relief (see S.B. 1134, Habeas corpus: new evidence: motion to vacate judgment: indemnity; A.B. 813, Criminal procedure: post-conviction relief).	1(b)	Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5. Origin of Project: Legal and legislative changes. Resources: Not applicable. Key Objectives Supported: 2.	January 1, 2019	Recommendations to amend rules and forms.
6.	**Modernize Trial Court Rules to Support E-Business:** In conjunction with the Court Technology Advisory Committee, develop rule, form, and legislative proposals to promote e-business in criminal court proceedings.	1(d)	Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5.	Ongoing	Recommendations for rules, forms, and/or legislation.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Origin of Project: Court Technology Advisory Committee; judges, advisory committee members. Resources: Information Technology Advisory Committee. Key Objective Supported: 2.		
7.	**Update Criminal Rules of Court**: Develop amendments to rules of court to reflect best practices and promote fairness and efficiency. Specific proposals to consider developing include: • Potential amendment to rule 4.111 to allow a court to consider the failure to serve and file an opposition pleading within the time permitted or the failure to file an opposition pleading at all as an admission that a moving party's pretrial motion is meritorious. • Potential amendment to rule 4.113 to apply to noticed pretrial motions.	1(b)	Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5. Origin of Project: Advisory committee member. Resources: Not applicable. Key Objectives Supported: 2(b).	January 1, 2019	Recommendations for rules.
8.	**Commission on the Future of California's Court System:** In 2017, the Futures Commission made recommendations for criminal law reform. If those recommendations are referred to the committee, it would review them and determine the next steps needed for implementation. Criminal law recommendations:	1	Judicial Council Direction: Letter from Chief Justice to Judicial Council internal committee chairs, May 17, 2017 Origin of Project:	Ongoing	Recommendations for rules, forms, and/or legislation.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	a) Reduction of continuances in criminal cases b) Reduction of certain misdemeanors to infractions c) Refining the adjudication and settlement of fines, fees, and assessments		Commission on the Future of California's Court System Resources: Not applicable Key Objectives Supported: 1, 2.		
9.	**Pretrial Detention Reform Workgroup:** The Pretrial Detention Reform Workgroup is scheduled to make recommendations to the Chief Justice by December 2017. If those recommendations are referred to the committee, it would review them and determine the next steps needed for implementation.	1	Judicial Council Direction: Anticipated referral from Chief Justice; Strategic Plan Goal 3, Operational Plan Objective 5. Origin of Project: Pretrial Detention Reform Workgroup, Governmental Affairs Resources: Not applicable Key Objectives Supported: 1, 2.	Ongoing	Recommendations for rule, form, and/or legislative proposals; incorporating information in education and training programs.

III. STATUS OF 2017 PROJECTS:

Item[4]	Project	Completion Date/Status
1	**Implementation of Proposition 64**	Effective July 1, 2017, the Judicial Council approved forms CR-400, 401, 402, and 403.
2	**Implementation of Proposition 57**	Proposition 57 memo updated May 2017. The committee declined to develop a proposal for amendments to rules of court including rule 4.480 regarding sentencing judge's statement under Penal Code section 1203.01.
3	**Continued Implementation of Proposition 47**	Proposition 47 memo updated May 2017. The committee did not develop a proposal for potential amendments to Gov. Code section 68152(c).
4	**Omnibus Rules Proposal**	At its September 2017 meeting, the Judicial Council approved amendments to the felony sentencing rules in Cal. Rules of Court, rules 4.403, 4.405, 4.406, 4.408, 4.409, 4.410, 4.411, 4.411.5, 4.412, 4.413, 4.415, 4.420, 4.421, 4.423, 4.425, 4.428, 4.433, 4.435, 4.437, 4.447, 4.451, and 4.452. The committee did not develop a proposal for amendments to rule 4.551, form MC-275, and/or other rules and forms regarding standard of review for writs of habeas corpus and post-conviction relief (see S.B. 1134, Habeas corpus: new evidence: motion to vacate judgment: indemnity; A.B. 813, Criminal procedure: post-conviction relief.)
5	**Evidence-Based Practices**	At its September 2017 meeting, the Judicial Council approved Cal. Standards of Judicial Administration, standard 4.35, use of risk/needs assessments at sentencing; and amendments to the felony sentencing rules to provide guidance to courts on the use of risk/needs assessments.
6	**Mental Health Issues**	At its September 2017 meeting, the Judicial Council approved amendments to Cal. Rule of Court 4.130, Court-Appointed Expert's Report in Mental Competency Proceedings.

[4] Number corresponds with item number of 2017 Annual Agenda.

		The committee reviewed proposed DSH and DDS regulations regarding competency related issues. It submitted public comments in response to the proposed DDS regulations. The committee put on hold potential amendments to Penal Code section 1370(c)(2) to authorize courts to order a conservatorship investigation for Lanterman-Petris-Short conservatorships other than Murphy conservatorships.
7	**Revise Plea Form, With Explanations and Waiver of Rights – Felony (Criminal), CR-101**	At its September 2017 meeting, the Judicial Council approved amendments to CR-101.
8	**Criminal Law Legislation – pending legislation**	The committee provided subject matter expertise on numerous pending criminal law bills in 2017. It is anticipated that at its November 2017 meeting, the Judicial Council will approve proposed Judicial Council sponsored legislation to amend Penal Code sections 817 and 1526 to address telephonic confirmation requirement for law enforcement affidavits.
9	**Criminal Law Legislation – enacted legislation**	At its September 2017 meeting, the Judicial Council approved CR-210, to implement provisions of Proposition 63, and MC-245 and MC-246, to implement Penal Code section 1473.7.
10	**Modernize Trial Court Rules to Support E-Business**	Staff participated in a remote access work group. The committee did not develop potential amendments to rules 2.250 - 2.261 relating to electronic filing. (See A.B. 1867, Evidence: judicial notice: official records of conviction.) It is anticipated that at its November 2017 meeting, the Judicial Council will approve proposed Judicial Council sponsored legislation to amend Penal Code sections 817 and 1526 to address telephonic confirmation requirement for law enforcement affidavits.
11	**Bail and Fines/Fees in Non-Traffic Infraction and other Criminal Cases**	Collaborated with other advisory committees to develop an ability to pay form for traffic and non-traffic infractions.

		The committee did not develop potential amendments to Penal Code section 1237.2 or rules of court to expand appellate court remand of issues concerning imposition of fine or fees.
12	**Victim Restitution Rights Form**	The committee did not develop a proposal.
13	**DNA Expungement Instruction Form**	The committee did not develop a proposal.
14	**Criminal and Dismissal Procedures and for Veteran Defendants**	The committee did not develop a proposal.

IV. Subgroups/Working Groups – Detail

Subgroups/Working Groups:

Ad Hoc/Limited Duration Subcommittee: Use of Risk/Needs Assessments at Sentencing

Purpose of subgroup or working group: The Criminal Law Advisory Committee is working to develop a proposed Standard of Judicial Administration to provide California courts guidance on using risk/needs assessments in criminal proceedings, including sentencing.

Number of advisory body members on the subgroup or working group: Seven members of CLAC work on this subcommittee. The subcommittee has consulted with subject matter experts.

Ongoing or date work is expected to be completed: The Ad Hoc/Limited Duration Subcommittee on the Use of Risk/Needs Assessments at Sentencing developed a standard for judicial administration on the use of risk/needs assessments at sentencing that was approved by the Judicial Council at the Council's September 15, 2017 meeting. The Subcommittee has met its purpose and will no longer be needed.

Family and Juvenile Law Advisory Committee
Annual Agenda—2018
Approved by RUPRO:

I. ADVISORY BODY INFORMATION

Chair:	Hon. Jerilyn Borack and Hon. Mark A. Juhas, Co-chairs
Staff:	Ms. Audrey Fancy and Ms. Tracy Kenny, Co-lead Staff; Ms. Carolynn Bernabe, Administrative Coordinator, Center for Families, Children & the Courts

Advisory Body's Charge: Makes recommendations to the Judicial Council for improving the administration of justice in all cases involving marriage, family, or children. [Rule 10.43]

Advisory Body's Membership: 34 members with 1 appellate court justice; 18 trial court judicial officers; 1 judicial administrator; 1 child custody mediator; 3 lawyers whose primary area of practice is family law; 1 lawyer specializing in governmental child support; 1 domestic violence prevention advocate; 1 chief probation officer; 1 child welfare director; 1 court appointed special advocate director; 1 county counsel assigned to juvenile dependency; 1 district attorney assigned to juvenile delinquency; 1 public-interest children's rights lawyer; 2 lawyer from public or private defender's office whose primary area is juvenile law.

Subgroups/Working Groups[1]:

The following have been established with approval from, or direction by, the Judicial Council or its internal advisory bodies (Rules and Project Committee or Executive and Planning):

- Protective Order Forms Working Group (POWG)
- Violence Against Women Education Program/Victims of Crime Act (VAWEP/VOCA)[2]
- Joint Juvenile Competency Issues Working Group
- AB 1058 Funding Allocation Joint Subcommittee
- Juvenile Dependency: Court-Appointed-Counsel Workload Working Group

[1] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

[2] On August 22, 2014, the Judicial Council approved a recommendation from the Family and Juvenile Law Advisory Committee that VAWEP become a standing subcommittee of the Family and Juvenile Law Advisory Committee. The composition of VAWEP has been guided by grant requirements and advisory committee chair review. A copy of the council report is available here: http://www.courts.ca.gov/documents/jc-20140822-itemE.pdf

Advisory Body's Key Objectives for 2018:

1. Provide recommendations to the Judicial Council on funding and allocation methods for specified legislatively mandated court-related programs.
2. Provide recommendations to the Judicial Council for changes to or new statewide rules and forms to enable the council to fulfill legislative mandates.
3. Coordinate with related advisory groups to fulfill council directives in the area of domestic violence, family law, and juvenile law.

II. ADVISORY BODY PROJECTS

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1.	**Implementation of Legislative Changes from the 2015-2016 Legislative Session** 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 review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration. a) **AB 1299 (Ridley-Thomas) Medi-Cal: specialty mental health services: foster children** *Ch.603, Statutes 2016* Requires that the responsibility under Medi-Cal for providing specialty mental health services must be transferred within forty-eight hours of the child being moved	1(a), (b), or (c)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Legislative mandate. Resources: Legal Services Key Objective Supported: 2, 3	September 1, 2018 or January 1, 2019	Rules and forms, incorporating information in education and training programs, or information and analysis for council on why action on the council's part may or may not be necessary.

[3] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

[4] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	to a new county. In certain situations, this presumptive transfer can be waived. b) **AB 1688 (Rodriguez) Dependent children: out-of-county placement: notice** *Ch. 608, Statutes 2016* Requires the county to provide notice to the child's attorney and to the child if 10 years of age or older prior to moving the child to a placement outside the county and allows for the child to object to the move.				
2.	**Implementation of Legislative Changes from the 2017-2018 Legislative Session** 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 review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration. Family: a) **AB 264 (Low): Protective orders** *Pending in the legislature* Would require the court to consider issuing a protective order restraining the defendant from any contact with a percipient witness to a crime involving domestic violence, a violation of specified sex offenses, or a violation of laws	1(a), (b), or (c)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Legislative mandate. Resources: Legal Services Key Objective Supported: 2, 3	September 1, 2018 or January 1, 2019	Rules and forms, incorporating information in education and training programs, or information and analysis for council on why action on the council's part may or may not be necessary.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	relating to criminal gangs, if it is shown by clear and convincing evidence that the witness has been harassed. b) **AB 270 (Gallagher): Restraining orders: witnesses** *Pending in the legislature* Would require the court to consider issuing an order restraining a criminal defendant who has been convicted of a crime involving domestic violence from any contact with a minor who was not a victim of, but who was physically present at the time of, an act of domestic violence. The bill would provide that the minor, under those circumstances, is a witness. **c) AB 413 (Eggman) Confidential communications: domestic violence** Ch. 191, Stats. of 2017 Authorizes individuals seeking domestic violence restraining orders to record confidential communications if they contain evidence germane to the restraining order request for the sole purpose of providing that evidence in support of the request. d) **AB 712 (Bloom): Civil Actions: change of venue** *Pending in the legislature* Requires a court to retain jurisdiction over emergency orders regarding child custody after a transfer of jurisdiction has been initiated but not assumed by the receiving court. Requires the council, by 1/1/19, to establish timeframes for a court to transfer and to assume jurisdiction. e) **AB 724 (Choi): Foreign adoption: domestication** *Pending in the legislature*				

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Recasts the process by which a foreign adoption is registered in California, including requirement that the clerk of the court notify the State Registrar within 10 business days. f) **AB 953 (Baker): Protective orders: personal information of minors** *Pending in the legislature* Authorizes a minor or a minor's guardian to petition the court to keep all information regarding the minor obtained when issuing a protective order under either of the above provisions, including, but not limited to, the minor's name, address, and the circumstances surrounding the protective order with respect to that minor, in a confidential case file. g) **AB 1396 (Burke): Surrogacy** *Pending in the legislature* Clarifies that the parent and child relationship cannot be established between a child and a surrogate, as defined, by proof of having given birth. Requires the court to issue the judgment or order regarding parentage forthwith, unless specified conditions are met. h) **SB 179 (Atkins): Gender identity: female, male, or nonbinary** *Pending in the legislature* Changes the requirements for getting a new birth certificate issued to reflect a change in gender designation. i) **SB 204 (Dodd): Domestic violence: protective orders** *Ch. 98, Statutes of 2017*				

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Enacts the Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act, which would authorize the enforcement of a valid Canadian domestic violence protection order in a tribunal of this state under certain conditions. j) **SB 273 (Hill): Marriage: minors** *Pending in the legislature* Would require the court, in determining whether to issue an order granting permission to marry, to require Family Court Services to separately interview the parties intending to marry and at least one of the parents or the guardian, as specified, and to require Family Court Services to prepare and submit to the court a written report containing, among other things, recommendations for either granting or denying the parties permission to marry. If Family Court Services knows or reasonably suspects that either party is a victim of child abuse or neglect, the bill would require Family Court Services to submit a report of the known or suspected child abuse or neglect to the county child protective services agency. k) **SB 469 (Skinner D): Child support guidelines: low-income adjustments** *Pending in the legislature* Extends existing low-income adjustment on the net disposable income threshold for child support obligors from 1/1/2018 to 1/1/2021. Juvenile Dependency: l) **AB 404 (Stone): Foster care**				

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Pending in the legislature. Makes changes to procedures relating to the placement of dependent children, including, among other things, by revising the preference to make a placement with specified relatives and, instead, to grant a preference for placement with any relative. m) **AB 604 (Gipson): Nonminor dependents: extended foster care benefits** *Pending in the legislature.* Expands the definition of nonminor dependent to include a nonminor subject to an order vesting temporary placement and care with a county child welfare department. n) **AB 1332 (Bloom): Juveniles: dependents: removal** *Pending in the legislature* Would prohibit the removal of a child from the physical custody of his or her parent with whom the child did not reside at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence that there would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child for the parent to live with the child or otherwise exercise the parent's right to physical custody, and there are no reasonable means available by which the child's physical and emotional health can be protected without removing the child from the child's parent's physical custody. o) **AB 1371 (Stone): Juveniles: ward, dependent, and nonminor dependent parents** *Pending in the legislature*				

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Extends prohibition for program of supervision from being undertaken until the parent has consulted with his or her counsel to a parent who is a nonminor dependent or ward of the juvenile court. p) **AB 1401 (Maeinschein): Juveniles: protective custody warrant** *Pending in the legislature* Would authorize the court to issue a protective custody warrant, without filing a petition in the juvenile court alleging that the minor comes within the jurisdiction of the juvenile court as a dependent, if there is probable cause to believe the minor comes within the jurisdiction of the juvenile court as a dependent, there is a substantial danger to the safety or physical health of the child, and there are no reasonable means to protect the child's safety or physical health without removal. q) **AB 1446 (Cooley): Dependent children: periodic review hearing** *Pending in the legislature* Would require, in any case in which a dependent child or nonminor dependent is detained or placed for more than 15 consecutive calendar days in emergency shelter care, a temporary shelter care facility, or a transitional shelter care facility, as defined, or is inappropriately residing in a place that is not a licensed or approved shelter, home, or facility, the court to periodically review the action taken by the social worker to locate a placement consistent with the case plan for the dependent child or nonminor dependent. The bill would require these periodic reviews to be conducted at least				

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	every 15 days and to include review of efforts made by the social worker to identify and locate adult relatives of the child or nonminor dependent. r) **SB 213 (Mitchell): Placement of children: criminal records check** Prohibits final approval for adoption, placement, and licensure (for foster care providers and resource families) if a person in the house has been convicted of certain crimes. Juvenile Delinquency Law Legislation s) **AB 529 (Stone): Juveniles: sealing of records** *Pending in the legislature* Would require, if a person who has been alleged to be a ward of the juvenile court and has his or her petition dismissed or if the petition is not sustained by the court after an adjudication hearing, the court to seal all records pertaining to that dismissed petition that are in the custody of the juvenile court, and in the custody of law enforcement agencies, the probation department, or the Department of Justice. t) **AB 935 (Stone): Juvenile proceedings: competency** *Pending in the legislature* Revises and recasts the way competency is determined and treated in juvenile delinquency cases. u) **SB 312 (Skinner): Juveniles: sealing of records** *Pending in the legislature*				

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Expands the exception to sealing of juvenile court records to include those cases where a finding on a serious or violent offense is reduced to a misdemeanor. v) **SB 439 (Mitchell): Jurisdiction of the juvenile court** *Pending in the legislature* Limits the ages under which a person may be adjudged a ward of the juvenile court or, for the purposes of WIC §§601 and 602, fall under the jurisdiction of the juvenile court to between 12 and 18 years old, inclusive. w) **SB 462 (Atkins): Juveniles: case files: access** *Pending in the legislature* Expands the list of who can be allowed to access an otherwise sealed juvenile case file to include law enforcement agencies, probation departments, or other specified agencies for the purposes of data collection and research, provided the court is satisfied that identifying information is protected.				

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
3.	**FL-800 Joint Petition for Summary Dissolution** Update to reflect change in cost of living per Family Code section 2400(b) as a technical change.	1(a)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Legislative mandate. Resources: Legal Services Key Objective Supported: 2, 3	Ongoing requirement to adjust every other year, next adjustment to be effective January 1, 2018 (approved by the Judicial Council 3/24/17 in a technical report)	Revised form.
4.	**Family Code section 3027** Proposed form addressing family law cases involving allegations of child abuse to ensure that court ordered evaluations and investigations comply with the statute and the specific directives of the court to obtain information.	1(e)	Judicial Council Direction: Origin of Project: Referral from JC as part of the Elkins work Resources: Probate and Mental Health Advisory Committee	January 1, 2018	New form.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Key Objective Supported:		
5.	**Court coordination and allegations of child abuse and neglect** A proposal to work collaboratively with Probate and Mental Health as well as the Committee on Providing Access and Fairness on issues related to court coordination and allegations of child abuse and neglect in guardianship cases. Initial joint work will include updating an existing pamphlet (JV-350) concerning guardianships established in juvenile court as well as the probate guardianship pamphlet (GC-205), both of which need significant revision.	1	Judicial Council Direction: Origin of Project: Resources: Probate and Mental Health Advisory Committee Key Objective Supported:	Ongoing	Revised guardianship pamphlets for juvenile and probate guardianships
6.	**Proposition 47 & AB 2765, Proposition 57, and Proposition 64** Monitor implementation of three recently enacted proposition and assist juvenile courts with any required implementation:	1	Judicial Council Direction: Statutory mandate and council delegation to the committee.	Ongoing	Rules, forms, or information and analysis for council on why action on the council's part may or may not be necessary.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	a) Proposition 47 enacted November 5, 2014, which reduced the classification of many nonserious and nonviolent property and drug crimes from a felony to a misdemeanor, as well as its extension to November 4, 2022 under Assembly Bill 2765 (Weber, Stats. 2016, ch. 767); b) Proposition 57 enacted November 8, 2016 which restructured the process for transfer of jurisdiction from juvenile to criminal court and eliminated the ability of prosecutors to directly file cases in criminal court; and c) Proposition 64 enacted November 8, 2016 which reduced most marijuana offenses for minors to misdemeanors and allows for prior offenses to be reclassified accordingly.		Origin of Project: Statutory mandate Resources: Criminal Justice Services Key Objective Supported: 2		
7.	**Assembly Bill 1058 Child Support Program Funding** Provide recommendations to the council for allocation of funding pursuant to Family Code sections 4252(b) and 17712.	1	Judicial Council Direction: Legislative mandate and council delegation to the committee. Origin of Project: Legislative mandate Resources: Finance office	Ongoing	Council report with recommendations

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Key Objective Supported: Provide recommendations to the Judicial Council on funding and allocation methods for specified legislatively mandated court-related programs.		
8.	**Access to Visitation Funding and Legislative Report** Provide recommendations to the council for allocation of funding pursuant to Family Code section 3204. Additionally, the committee will provide the council with the statutorily mandated legislative report on the program due every other year.	1	Judicial Council Direction: Legislative mandate and council delegation to the committee. Resources: Judicial Council Finance office Origin of Project: Legislative mandate and Judicial Council direction Key Objective Supported: 1	Ongoing	Council report with recommendations and report to the legislature

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
9.	**Serve as statutorily mandated Advisory Committee to the Judicial Council for the Court Appointed Special Advocates (CASA) grants program (Welf. & Inst. Code, § 100 et seq.)** Recommend annual funding to local programs pursuant to the methodology approved by the Judicial Council in August 2013. Conduct 5-year review of 2013 methodology and recommend changes if necessary.	1	Judicial Council Direction: Committee charge under CRC 10.43; Legislative mandate Origin of Project: Welf. & Inst. Code, § 100 et seq. and Judicial Council direction Resources: Judicial Council Finance office Key Objective Supported: 1	Ongoing	Council report with recommendations
10.	**Blue Ribbon Commission on Children in Foster Care (BRC) recommendations** Review and consider for action, when resources become available, the BRC recommendations related to court reform that have been ongoing, but have not yet been fully implemented because of significant budget challenges. Those recommendations broadly include: 1. Reducing caseloads for judicial officers, attorneys, and social workers; 2. Ensuring a voice in court and meaningful hearings for participants;	1	Judicial Council Direction: Refer by the Judicial Council Origin of Project: Judicial Council Resources: Key Objective Supported: 1	Ongoing	Unknown

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	3. Ensuring adequately trained and resourced attorneys, social workers, and Court Appointed Special Advocates (CASA); and 4. Establish and monitor data exchange standards and information between the courts and child welfare agencies and those to be monitored by the Judicial Council Technology Committee, in consultation with the Family and Juvenile Advisory Committee, develop technical and operational administration standards for interfacing court case management systems and state justice partner information systems.				
11.	**Family Law: Elkins Family Law Task Force recommendations** Continue to provide Judicial Council members input on council accepted recommendations for family law issues addressed by the Elkins Family Law Task Force	1	Judicial Council Direction: Refer by the Judicial Council Origin of Project: Judicial Council Resources: Key Objective Supported: 1	Ongoing	Contribution to education and training content; review of relevant legislation with input for the council's consideration; recommendations, as needed, for rules and forms
12.	**Consider referrals from the Commission on the Future of California's Court System** The Futures Commission made recommendations for significant reform in family and juvenile law. If those recommendations are referred to the committee it would	1	Judicial Council Direction: Letter from Chief Justice to Judicial Council internal committee chairs, May 17, 2017		Request for proposals for pilot mediation projects and legislation to authorize consolidate court pilot project

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	review them and determine the next steps needed for implementation. Family Recommendations: a) Provide mediation without recommendations as the first step in resolving all child custody disputes. b) Explore through pilot projects or otherwise whether additional services, including tiered mediation, would be effective in complex or contentious cases. Juvenile Recommendations: c) Establish a single juvenile court with consolidated jurisdiction over all juvenile court matters. d) Provide courts with jurisdiction over children and parents in all juvenile cases and provide children and parents counsel when appropriate. e) Test these proposals via pilot programs in a diverse set of courts.		Origin of Project: Commission on the Future of California's Court System Resources: Legal Services, Governmental Affairs Office		
13.	**Domestic Violence** Provide recommendations to the council on statewide judicial branch domestic violence issues in the area of family and juvenile law, including projects referred from the work of the Domestic Violence Practice and Procedure Task Force and the Violence Against Women Education Program (VAWEP). Serve as lead committee for Protective Orders Working Group (POWG). Examine the need for statewide guidance on access to the California Courts Protective Order	1	Judicial Council Direction: Referral of projects from the Domestic Violence Practice and Procedure Task Force Origin of Project: Judicial Council	Ongoing	Coordination of activities in subject matter area to avoid duplication of resources and potential conflict in rules, forms, and other areas. Possible rule of

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Registry (CCPOR). Examine need for clarification of restraining order forms regarding different formats of ammunition.		Resources: Criminal Justice Services Key Objective Supported: 3		court to govern access to CCPOR.
14.	**Legislation** As requested by the Judicial Council Policy Coordination and Liaison Committee review and recommend positions on legislation related to family and juvenile law matters.	1	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: PCLC Resources: Governmental Affairs Office Key Objective Supported: 2	Ongoing	Subject matter expertise provided to PCLC so that council may take appropriate action
15.	**Education** Contribute to planning efforts in support of family and juvenile law judicial branch education.	1	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project CJER Governing Committee	Ongoing	Subject matter expertise provided to CFCC, Education Division, and CJER Governing Committee so that content of

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Resources: CJER Key Objective Supported: 2		programs can be coordinated across the branch
16.	**Review approval of training providers under 5.210, 5.225, 5.230, and 5.518.** Training providers/courses are reviewed for compliance with these rules by Judicial Council staff, in consultation with the Family and Juvenile Law Advisory Committee.	1	Judicial Council Direction: Judicial Council Origin of Project: Judicial Council, result of name change (from AOC to JC) and review of delegations Resources: Judicial council Support Services, Legal Services, Key Objective Supported: 2	Ongoing	Approve providers
17.	**Serve as lead/subject matter resource for other advisory groups to avoid duplication of efforts and contribute to development of recommendations for council action.** Such efforts may include providing family and juvenile law expertise and review to working groups, advisory committees, and subcommittees as needed.	2	Judicial Council Direction: Pursuant to the committee's charge under California Rules of Court, rule 10.43 "Makes recommendations	Ongoing	Coordinated rules, forms, and legislative proposals

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			to the Judicial Council for improving the administration of justice in all cases involving marriage, family, or children." Origin of Project: Respective advisory bodies Resources: Key Objective Supported: 2		
18.	**Appellate Rule and Forms** Work with the Appellate Advisory Committee on the development of rules and forms regarding appellate procedures related to juvenile and family law proceedings. For 2018 this may include a family law specific form for preparing a Proposed Statement on Appeal.	2	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: AAC, courts, and members of the bar Resources: Legal Services Key Objective Supported: 2, 3	January 1, 2018	Rules and forms, incorporating information in education and training programs, or information and analysis for council on why action on the council's part may or may not be necessary.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
19.	**Rules Modernization Project and Implementation of AB 976** Each advisory committee was asked to include in their annual agendas for 2015 and 2016 an item providing for the drafting of proposed amendments to modernize the California Rules of Court related to their subject matter areas. This effort was undertaken in coordination with ITAC, which is responsible for developing and completing the overall rules modernization project. Implementation of council sponsored legislation (AB 976 (Berman) Electronic filing and service) that emerged from this project will require rule and form changes.	2(b)	Judicial Council Direction: Pursuant to the committee's charge under California Rules of Court, rule 10.43 "Makes recommendations to the Judicial Council for improving the administration of justice in all cases involving marriage, family, or children." Origin of Project: ITAC Resources: Key Objective Supported: 2	January 1, 2018	Implementation of eight technical changes effective January 1, 2016. Identification of further rule or form changes or necessary legislation.
20.	**Juvenile Dependency: Court-Appointed-Counsel Workload** Begin fulfilling the Judicial Council's charge to "Consider a comprehensive update of the attorney workload data and time standards in the current workload model" by monitoring and assessing the impact of the new funding provided for	2	Judicial Council Direction: As referred by the council Origin of Project: Judicial Council	Ongoing	Judicial Council report

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	court-appointed dependency counsel in the 2017-18 Budget Act. Form subcommittee of Committee members joined by legal services managers, juvenile court judges, court executives, researchers and other stakeholders to guide data collection and analysis, assess impact of the new funding and expanded attorney services, and define outcomes and measures to be used in the update of the current workload model. Report to Committee in September 2018.		Judicial Council Resources: Finance Key Objective Supported: 1		
21.	**Juvenile Law: Intercounty Transfers** Review requests under rule 5.610(g) to approve local collaborative agreements for alternative juvenile court transfer forms in lieu of JV-550.	2(b)	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: Judicial Council. Judicial Branch Administration: Judicial Council Delegations to the Administrative Director of the Courts (October 25, 2013) Resources: Key Objective Supported: 2, 3	Ongoing	Judicial Council report
22.	**Court Coordination and Efficiencies**	2	Judicial Council Direction:	Ongoing	Recommendations to groups and expertise

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Review promising practices that enhance coordination and increase efficient use of resources across case types involving families and children including review of unified court implementation possibilities, court coordination protocols, and methods for addressing legal mandates for domestic violence coordination so as to provide recommendations for education content and related policy efforts.		Committee charge under CRC 10.43 Origin of Project: Committee charge Resources: Key Objective Supported: 3		will be offered to those that request it
23.	**Indian Child Welfare Act Rules and Forms** In conjunction with the Tribal Court-State Court Forum and Probate and Mental Health Advisory Committee review for possible rules or forms new federal regulations governing court proceedings covered by the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 et seq.) which became effective December 12, 2016.	2	Judicial Council Direction: Committee charge Origin of Project: Federal regulations Resources: Legal Services Key Objective Supported: 2	Ongoing	Rules and forms, incorporating information in education and training programs, or information and analysis for council on why action on the council's part may or may not be necessary.
24.	**California ICWA Compliance Task Force Report** Review the recommendations in the California ICWA Compliance Task Force Report to the California Attorney General's Bureau of Children's Justice 2017 and make recommendations for legislative and rules and forms revisions and other implementation steps as appropriate	2	Judicial Council Direction: Strategic Plan Goal II Origin of Project:	TBD	Identification of potential projects within the purview of the committee.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			California ICWA Compliance Task Force Report Resources: Tribal Court-State Court Forum and California Supreme Court's Advisory Committee on the Code of Judicial Ethics Key Objective Supported: 2 & 3		
25.	**Consider Mental Health Issues Implementation Task Force Referrals** Review and consider recommendations referred by the Judicial Council following the task force's final report to the council. Recommend appropriate action within the committee's purview.	2	Judicial Council Direction: As referred by the council Origin of Project: Judicial Council Resources: Legal Services, Criminal Justice Services office Key Objective Supported: 2, 3	Ongoing	Unknown

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
26.	**Juvenile Law: Competency issues** To enrich recommendations to the council and avoid duplication of effort, members of the committee will collaborate with members of the Collaborative Justice Courts Advisory Committee, and former members of the Mental Health Issues Implementation Task Force serving on other advisory bodies, to consider developing recommendations to the Judicial Council to: (1) revise rule 5.645 to define appropriate evaluation tools for use with juveniles, (2) amend legislative language to clarify the presumption of competency, (3) suggest other legislative changes necessary to improve the handling of cases where competency issues are raised, and (4) identify effective practices developed by local courts to address juvenile cases in which competency is a factor. If AB 935 (Stone) Juvenile proceedings: competency is enacted, work will be commenced on implementing the changes in that legislation. Otherwise legislative changes will be pursued.	2	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: Committee members and numerous suggestions from trial court judges in recent years. Resources: Collaborative Justice Courts Advisory Committee Key Objective Supported: 2, 3	January 1, 2018	Rules and form changes to implement AB 935 or if AB 935 is not enacted, legislation
27.	**AB 1058 Funding Allocation Joint Subcommittee:** To enrich recommendations to the council and avoid duplication of effort, members of the committee will continue to collaborate with members of the Trial Court Budget Advisory Committee, the Workload Assessment Advisory Committee, and representatives from the California Department of Child Support Services to reconsider the allocation methodology developed in 1997 and make recommendations to the council for fiscal year 2019-20 allocations. In addition to approving the finalized	Ongoing	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: Legislative mandate Resources:	Ongoing	Judicial Council resolution.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	recommendations on a funding methodology to allocate AB 1058 grant funds, the committee will examine strategies for courts to employ to manage their existing workloads within their future funding allocations to ensure that access to justice in child support matters is not compromised by the reallocation of funds.		Key Objective Supported: 2		
28.	**Dual-Status Youth** Pursuant to Assembly Bill 1911 ([Eggman]; Stats. 2016, ch 637) convene a group of stakeholders to define data elements and outcome tracking for youth involved in the dependency and delinquency system and report to the legislature by January 1, 2018.	1	Judicial Council Direction: Refer by the Judicial Council Origin of Project: Legislature Resources: Key Objective Supported: 2	January 1, 2018	Legislative report.
29.	**Justice Partner Remote Access to Court Records Joint Ad Hoc Subcommittee** To develop an effective set of rules for the council in a timely manner and to avoid duplication of effort, members of the committee will (1) collaborate with members of the Information Technology Advisory Committee and other advisory bodies to develop rules for remote access to court records by parties, their attorneys, and justice partners, and (2) participate in the joint ad hoc subcommittee authorized by the council oversight committees to develop the rules.	1(c)	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: Judicial Council and ITAC	January 1, 2019	Adoption of rules effective January 1, 2019.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Resources: Legal Services and IT staff; staff to other advisory committees Key Objective Supported: 2		
30.	**AB 1058 Program Rule Changes** Consider implementation of rule changes to improve the efficient and effective operation of the AB 1058 child support program in the courts to include: a) a new rule setting forth the minimum qualifications for an AB 1058 child support commissioner. b) Amend rule 5.330 to increase compliance with submission of federally required child support registry form. c) Amend rule 5.305(b) to clarify the requirements and timeframe for Title IV-D cases heard by a judge to be directed to the calendar of a child support commissioner. d) Amend rule 5.275 to require that child support calculators include the low income adjustment range on the first page and to conform fee requirements for child support calculator submission to the Judicial Council with current practice of the council not to accept payment of these fees.	1(d)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Program funder and staff. Resources: Legal Services Key Objective Supported: 2, 3	January 1, 2019	New and amended rules to implement needed changes in the program.

III. STATUS OF 2017 PROJECTS:

[List each of the projects that were included in the 2016 Annual Agenda and provide the status for the project.]

#	Project	Completion Date/Status
1.	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 review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.	
	a.) **AB 424 (Gaines) Court appointed child advocates: wards** *Chapter 71, Statutes of 2015* Summary: Expands the Court Appointed Special Advocate program to allow appointment of CASAs for any minor dependent, nonminor dependent, or ward who is subject to the jurisdiction of the juvenile court.	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Juvenile Law: Court Appointed Special Advocates
	b.) **SB 794 (Comm. on Human Services) Child Welfare Services** Chapter 425, Statues of 2015 Summary: Implements federal legislation that modified title IVE findings that must be made at status review hearings for children in out of home placement.	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Juvenile Law: Title IV-E Findings and Orders
	c.) **AB 1945 (Stone D) Juveniles: sealing of records** *Chapter 858, Statutes of 2016* *Passed by the Assembly and Senate and enrolled to the Governor* Summary: 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.	Completed effective September 1, 2017 Juvenile Law: Sealing of Records
	f.) **AB 2872 (Patterson) Children** *Chapter 702, Statutes of 2016*	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018.

	Summary: Allows an otherwise sealed juvenile case file to be inspected by a court-appointed investigator, acting within the scope of investigative duties of an active case, for the purpose of conducting a stepparent adoption, access to juvenile case files. g.) **SB 1060 (Leno D) Postadoption contact: siblings of dependent children or wards** *Chapter 719, Statutes of 2016* Summary: Requires a county placement agency to convene a meeting with a dependent, the dependent's sibling or siblings. The prospective adoptive parent or parents, and a facilitator, for the purpose of deciding whether to voluntarily execute a postadoption sibling contact agreement. Further requires the court to inquire about the status and results of this meeting at the first six-month review hearing.	Family and Juvenile Law: Stepparent Adoption and Postadoption Contact by Siblings Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Family and Juvenile Law: Stepparent Adoption and Postadoption Contact by Siblings
2.	**Commercially Sexually Exploited Children** Review legislation passed, signed, and chaptered in 2016 related to Commercially Sexually Exploited Children (CSEC) to determine which, if any, of the bills require Rules or Forms. Review to include: AB 1322 (Mitchell), AB 1276 (Santiago), AB 1678 (Santiago), AB 1682 (Stone), AB 1684 (Stone), AB 1702 (Stone), AB 1761 (Weber), AB 2498 (Bonta), SB 823 (Block), SB 1064 (Hancock), SB 1129 (Monning), and AB 2027 (Quirk).	Committee reviewed legislation and determined that no rule or form changes were required to implement the statutory changes.
3.	**Proposition 57** 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.	Completed effective May 22, 2017. Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016
4.	**Proposition 64** Develop rule and form proposal to implement Proposition 64, the "Control, Regulate and Tax Adult Use of Marijuana Act," commonly	Completed effective July 1, 2017 Criminal Procedure and Juvenile Law: Judicial Council Forms Under Proposition 64

	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.	
5.	**FL-800 Joint Petition for Summary Dissolution** Update to reflect change in cost of living per Family Code section 2400(b) as a technical change.	To the Judicial Council proposed to be effective January 1, 2018. Rules and Forms: Technical Amendments
6.	**Family Law: Changes to Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Orders** In continuation of 2015 annual agenda item 1 regarding implementation of AB 1081 (Quirk) effective July 1, 2017, amend rule 5.94 of the California Rules of Court, adopt *Order on Request to Continue Hearing* (form FL-307), and revising two forms, *Declaration Regarding Notice and Service of Request for Temporary Emergency (Ex Parte) Orders* and *Request and Order to Continue Hearing and Extend Temporary Emergency (Ex Parte) Orders*. The proposed changes would respond to specific suggestions from court professionals by increasing efficiencies in processing requests to continue hearings and requests for temporary emergency orders.	Completed effective September 1, 2017. Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Orders
7.	**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.	Completed effective September 1, 2017. Family Law: Simplifying Limited Scope Representation Forms and Procedures
8.	**Revise CRC 5.380** First adopted by the Judicial Council effective January 1, 2014 to implement in California the requirements of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 authorizing federally recognized tribes to develop their own tribal	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Family Law: Transfers of Title IV-D Child Support Cases Between State and Tribal Court

	title IV-D child support programs when the Yurok Tribe became the first California tribe to begin accepting child support cases. Since initial implementation, the need for revisions to streamline and improve the process have been identified and should be undertaken in light of additional tribal title IV-D programs commencing operations in California.	
9.	**Revise CRC 5.552** To conform to the requirements of subparagraph (f) of section 827 of the Welfare and Institutions Code which was added effective January 1, 2015 to clarify the right of an Indian child's tribe to have access to the juvenile court file of a case involving that child. At that time, no changes were made to California Rules of Court rule 5.552 which implements section 827 of the Welfare and Institutions Code. Contrary to section 827 as amended, rule 5.552 continues to require that representatives of an Indian child's tribe petition the juvenile court if the tribe wants access to the juvenile court file. This inconsistency has created confusion	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Indian Child Welfare Act: Tribal Access to Court Records
10.	**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 minor ward 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.	Completed effective September 1, 2017. Juvenile Law: Commitment to Department of Corrections and Rehabilitation
11.	**Juvenile Dependency: Court-Appointed-Counsel Workload** Consider a comprehensive update of the attorney workload data and time standards in the current workload model. Because any updates to the workload data and time standards will uniformly affect all trial courts, this pending work should not slow or delay the remaining three-year phase-in period previously approved by the Judicial Council for implementing the new dependency counsel funding methodology. Rather this recommendation recognizes that a	Completed work on small court dependency workload effective July 1, 2017. Juvenile Dependency: Small Court Dependency Workload Working Group Final Recommendations

	comprehensive update could not be completed within the time frame set by the Judicial Council for final report from the joint committees.	

IV. Subgroups/Working Groups - Detail

Subgroups/Working Groups:

Subcommittee or working group name: **Protective Orders Forms Working Group** (includes representatives from the Civil and Small Claims Advisory Committee and Criminal Law Advisory Committee)

Purpose of subcommittee or working group: This working group was established at the direction of RUPRO to coordinate advisory committees' activities concerning protective orders that prevent domestic violence, civil harassment, elder and dependent abuse, and school place violence. The group assists in ensuring that there is consistency and uniformity, to the extent appropriate, in the different protective orders used in family, juvenile, civil, probate and criminal proceedings. The working group helps advisory committees and the Judicial Council by developing and updating Judicial Council protective order forms. It also reviews pending legislation and suggests new legislation to improve protective orders. It prepares proposals changes to the rules of court on protective orders, as necessary or appropriate. The Council has indicated that this advisory committee is to serve as lead for the Protective Orders Forms Working Group.

Number of advisory group members: 8

The Family and Juvenile Law Advisory Committee has 8 members who participate in the Protective Orders Working Group.

Number and description of additional members (not on this advisory group):

In addition to the 8 members from Family and Juvenile Law Advisory Committee, there are 6 members from other advisory groups on the Protective Orders Working Group: Civil and Small Claims (5), Criminal (1), and Domestic Violence Practice and Procedure Task Force (1). There is one former member of the Civil and Small Claims Advisory Committee (a retired commissioner) who is still participating in the group. There is a vacant position for a member of the Probate and Mental Health Advisory Committee.

Date formed: In 2007, at the direction of RUPRO. The formation of an interdisciplinary group to address protective order issues was originally suggested by the Chair of RUPRO in August 2006.

Number of meetings or how often the group meets:

Approximately 6-8 telephone meetings annually, depending on extent of business. (All meetings are by telephone.)

Ongoing or date work is expected to be completed:

Some core working group activities are ongoing—such as updating Judicial Council forms and reviewing legislation. Other activities—such as developing proposed Judicial Council-sponsored legislation—are projects of a specific duration.

Subcommittee or working group name: **Violence Against Women Education Program and Victims of Crime Act Committee**

Purpose of subcommittee or working group: Per Judicial Council referral, VAWEP/VOCA will continue to provide guidance and evaluation of the VAWEP grant-funded projects and make recommendations to improve court practice and procedure in domestic violence cases as directed by the Family and Juvenile Law Advisory Committee and as approved in the advisory committee's annual agenda.

As indicated by the Judicial Council, VAWEP will request that the chair of the Criminal Law Advisory Committee select one or more members of that advisory committee to serve on VAWEP to help address questions relating to court practice and procedure in criminal domestic violence matters.

In addition, the VAWEP/VOCA Committee will serve as the advisory body for use of an 18 month grant pursuant to the federal Victims of Crime Act that will fund education and assistance for courts in increasing compliance with court orders and implementing Marsy's law.

Date formed: 2003 as a committee; designated as a subcommittee by Judicial Council action, August 22, 2014.

Number of meetings or how often the group meets: 1 in person meeting and 1 teleconference anticipated

Ongoing or date work is expected to be completed: Ongoing.

Subcommittee or working group name: **Joint Juvenile Competency Issues Working Group**

Purpose of subcommittee or working group: To enrich recommendations to the council and avoid duplication of effort, members of the committee will collaborate with members of the Collaborative Justice Courts Advisory Committee, and former members of the Mental Health Issues Implementation Task Force serving on other advisory bodies, to consider developing recommendations to the Judicial Council to: (1) revise rule 5.645 to define appropriate evaluation tools for use with juveniles, (2) amend legislative language to clarify the presumption of competency, (3) suggest other legislative changes necessary to improve the handling of cases where competency issues are raised, and (4) identify effective practices developed by local courts to address juvenile cases in which competency is a factor. If AB 935 (Stone) Juvenile proceedings: competency is enacted, work will be commenced on implementing the changes in that legislation. Otherwise legislative changes will be pursued.

Date formed: designated as a subcommittee by RUPRO in December 2014.

Number of meetings or how often the group meets: Teleconferences as needed

Ongoing or date work is expected to be completed: January 1, 2019 if AB 935 is signed and rules and forms are enacted to implement its provisions..

Subcommittee or working group name: **AB 1058 Funding Allocation Joint Subcommittee**

Purpose of subcommittee or working group: To enrich recommendations to the council and avoid duplication of effort, members of the committee will collaborate with members of the Trial Court Budget Advisory Committee, the Workload Assessment Advisory

Committee, and representatives from the California Department of Child Support Services to reconsider the allocation methodology developed in 1997 and report back at the February 2016 Judicial Council meeting.

Date formed: designated as a subcommittee by RUPRO and E&P June 1, 2015.

Number of meetings or how often the group meets: 1 in person meeting anticipated
Ongoing or date work is expected to be completed: Ongoing

Subcommittee or working group name: •**Juvenile Dependency: Court-Appointed-Counsel Workload Working Group**
Purpose of subcommittee or working group: Begin fulfilling the Judicial Council's charge to "Consider a comprehensive update of the attorney workload data and time standards in the current workload model" by monitoring and assessing the impact of the new funding provided for court-appointed dependency counsel in the 2017-18 Budget Act. Form subcommittee of Committee members joined by legal services managers, juvenile court judges, court executives, researchers and other stakeholders to guide data collection and analysis, assess impact of the new funding and expanded attorney services, and define outcomes and measures to be used in the update of the current workload model.

Date formed: N/A request designation as a subcommittee by RUPRO on October 23, 2017

Number of meetings or how often the group meets: 4 teleconferences anticipated
Ongoing or date work is expected to be completed: Preliminary report to committee in October 2018

PROBATE AND MENTAL HEALTH ADVISORY COMMITTEE
Annual Agenda—2017–2018
Approved by RUPRO: October 23, 2017

I. ADVISORY BODY INFORMATION

Chair:	Hon. John H. Sugiyama, Judge, Superior Court of California, County of Contra Costa
Staff:	Corby Sturges, Attorney, Judicial Council Center for Families, Children & the Courts (CFCC)

Advisory Body's Charge:

California Rules of Court, Rule 10.44:

Probate and Mental Health Advisory Committee

(a) Area of focus

The committee makes recommendations to the council for improving the administration of justice in proceedings involving:

(1) Decedents' estates, trusts, conservatorships, guardianships, and other probate matters; and

(2) Mental health and developmental disabilities issues.

(b) Additional duty

The committee must coordinate activities and work with the Family and Juvenile Law Advisory Committee in areas of common concern and interest.

Advisory Body's Membership: There are currently 17 members of the committee, distributed among the following categories:

(1) Judicial officer with experience in probate: **4 members**

(2) Lawyer or examiner who works for the court on probate or mental health matters: **4 members**

(3) Lawyer whose primary practice involves decedents' estates, trusts, guardianships, conservatorships, or elder abuse law: **3 members; 1 advisory member**

(4) Investigator who works for the court to investigate probate guardianships or conservatorships: **1 member**

(5) Person knowledgeable in mental health or developmental disability law: **2 members**

(6) Person knowledgeable in private management of probate matters in a fiduciary capacity: **1 member**

(7) County counsel, public guardian, or other similar public officer familiar with guardianship and conservatorship issues: **1 member**

Subgroups/Working Groups:

Subgroup or working group name:

- Legislation Subcommittee
- Civil Mental Health Issues Subcommittee
- New Legal Mental Capacity Subcommittee
- New Guardianship Process Subcommittee

Advisory Body's Key Objectives for 2018:

- Make recommendations for improving practice and procedure, access to the courts, court supervision of fiduciaries, and protection of vulnerable persons in court proceedings under the Probate Code and the Lanterman-Petris-Short Act.
- Recommend comprehensive revisions to Judicial Council forms for use in probate guardianship proceedings to simplify judicial practice and procedure and promote meaningful access to the courts for petitioners, children, and parents.
- Recommend revisions to Judicial Council forms used to provide evidence of legal mental capacity in conservatorship proceedings.
- Collaborate with the Information Technology Advisory Committee and the Civil and Small Claims Advisory Committee to develop or amend rules of court to facilitate delivery of notice and other documents by electronic means and to develop rules for remote electronic access to probate court records.
- Continue implementation of the California Conservatorship Jurisdiction Act to facilitate transfers of conservatorships between California and other states.
- Develop recommendations to promote greater efficiency and cost savings in court management and disposition of probate proceedings.

II. ADVISORY BODY PROJECTS

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1.	Proposal for global review and revision of the Judicial Council guardianship forms to simplify them, make them more accessible to self-represented litigants, and allow more effective communication of information to the court. Coordinate with Family and Juvenile Law Advisory Committee, Tribal Court-State Court Forum, and Advisory Committee on Providing Access and Fairness to promote access to, coordination of, and consistency among all proceedings affecting custody of children at risk of abuse, neglect, or abandonment.	1(e)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B1; Goal IV, Policies 3, 4, 5, 8; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Probate Attorneys, Superior Courts of Los Angeles, Orange, Riverside, Sacramento, San Diego, San Joaquin, and Santa Clara Counties *Resources:* Family and Juvenile Law Advisory Committee; Tribal Court-State Court Forum; Advisory Committee on Providing Access and Fairness *Key Objectives Supported:* 1, 2, 6	This is a multiyear project. Review was begun in 2017; proposals for new or revised forms will go forward in stages, and the first set of forms is anticipated to take effect January 1, 2019.	New and revised Judicial Council forms for use in guardianship proceedings. Possible new or amended rules of court. Potential revisions include increased notice to parents of their continuing liability for support and potential adverse consequences of for their parental rights, as well as clarification of jurisdictional requirements for guardianships of the estate.
2.	Proposal to update form GC-205, the probate court *Guardianship Pamphlet*, to reflect current law and increase	1(a), 1(e)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B1; Operational Plan, Goal III, Objective 5a.	September 1, 2018	New and revised forms to provide accurate information to prospective guardians

[1] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

[2] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	accessibility for self-represented petitioners; to develop an analogous informational pamphlet for parents of children who are subject to guardianship petitions to ensure the provision of due process in these proceedings; to coordinate with Family and Juvenile Law Advisory Committee's proposed update of form JV-350, the juvenile court *Guardianship Pamphlet.* Potential related revisions to other guardianship forms.		*Origin of Project:* Assembly Bill 2380 (Stats. 2016, ch. 882); Probate Attorneys, Superior Courts of Los Angeles, Orange, Riverside, and San Joaquin Counties *Resources:* Family and Juvenile Law Advisory Committee; Center for Families, Children & the Courts *Key Objectives Supported:* 1, 2, 6		and parents in guardianship proceedings in both probate court and juvenile court.
3.	Proposal to examine the federal Indian Child Welfare Act (ICWA) regulations (25 CFR § 23 et seq.) that took effect December 12, 2016, and the ICWA Compliance Task Force Report presented to the California Attorney General on March 24, 2017, to identify and implement changes to rules and forms needed to comply with ICWA in probate guardianship proceedings.	1(a), 1(e)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B1; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Federal Bureau of Indian Affairs; Tribal Court/State Court Forum *Resources:* Tribal Court-State Court Forum; Family and Juvenile Law Advisory Committee; Advisory Committee on Providing Access and Fairness; Center for Families, Children & the Courts *Key Objectives Supported:* 1, 2, 6	January 1, 2019	New or revised forms; amended rules

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
4.	Review report of the ICWA Compliance Task Force presented to the Attorney General on March 24, 2017, to determine whether action on any of the report's recommendations is within the committee's purview. Coordinate review with the Family and Juvenile Law Advisory Committee and the Tribal Court-State Court Forum.	2(b)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B1; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Federal Bureau of Indian Affairs; Tribal Court/State Court Forum *Resources:* Tribal Court-State Court Forum; Family and Juvenile Law Advisory Committee; Center for Families, Children & the Courts *Key Objectives Supported:* 1, 2, 6	January 1, 2019	Recommendations for action within the committee's purview to promote better compliance with ICWA's requirements in probate guardianship proceedings.
5.	Proposal to develop new Judicial Council forms to facilitate transfer of conservatorships to and from California under the California Conservatorship Jurisdiction Act (Prob. Code §§ 1980–2033; added by Stats. 2014, ch. 553), to revise and simplify registration forms, and to clarify necessary jurisdictional facts.	1(b)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B2 Operational Plan, Goal III, Objective 5. *Origin of Project:* California Conservatorship Jurisdiction Act, SB 940 (Stats. 2014, ch. 553), probate court attorneys *Resources:* *Key Objective Supported:* 1, 5, 6	New and revised forms anticipated to take effect September 1, 2018.	New forms for transferring conservatorship proceedings to or from California, revised forms for registering out-of-state conservatorships in California.
6.	Proposal to revise *Capacity Declaration—Conservatorship* (form GC-335) and *Dementia Attachment to Capacity Declaration—Conservatorship*	1(a), 1(e)	*Judicial Council Direction:* Strategic Plan, Goal IV, Policy 3; Operational Plan, Goal IV, Objective 1f.	This would be a multi-year project, with consultation of medical experts and legislative analysis continuing	Possible amendment of Probate Code section 811; substantially revised capacity declaration and

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	(form GC-335A) to facilitate completion of the form by clinical psychologists and psychiatrists consistent with law without diminishing its usefulness to the courts. Provide expressly for placement of a submitted form in the confidential portion of the case file. Replace "dementia" with "major neurocognitive disorder" or "MNCD" to conform to SB 413 (Stats. 2017, ch. 122).		*Origin of Project:* Committee Chair, probate judges and court attorneys; psychiatrists and clinical psychologists *Resources:* experts in psychiatry and clinical psychology *Key Objective Supported:* 1, 3, 6	from 2017 and revised forms to take effect no sooner than January 1, 2019.	dementia attachment for use in conservatorships and, possibly, other proceedings.
7.	Proposal to revoke the special fee waiver forms for use in guardianship and conservatorship proceedings and, if necessary, to revise the civil fee waiver forms to accommodate the distinction between the petitioner and the applicant in guardianship and conservatorship proceedings.	1(e)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B1; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Superior Courts of Contra Costa, Orange, Riverside, San Joaquin, Stanislaus Counties *Resources:* JCC Governmental Affairs; Civil and Small Claims Advisory Committee *Key Objective Supported:* 1, 2, 6	January 1, 2019	Revoked fee waiver forms. Possible minor revisions to the civil fee waiver forms to conform to statute.
8.	Review and consider recommendations for changes in law, practice, and procedure in limited conservatorships for the	1(e)	*Judicial Council Direction:* CRC, rule 10.44(a)(1) Strategic Plan, Goal I, Policy 10; Goal IV, Policy 3;	January 1, 2019	Amended rules of court, new or revised Judicial Council forms, including provisions

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	developmentally disabled, including rules of court concerning qualifications and continuing education requirements for counsel appointed by the court in conservatorship proceedings, including counsel for (proposed) limited conservatees.		Operational Plan, Goal I, Objective 3; Goal IV, Objective 1f. *Origin of Project:* This project arose out of a 2014 request from the Disability & Abuse Project of the Spectrum Institute for creation of a limited conservatorship task force modeled after the 2006 Chief Justice's Probate Conservatorship Task Force. The committee considered the request at a public portion of its November 2014 meeting, but did not recommend creating a task force. *Resources:* Governmental Affairs, Advisory Committee on Providing Access and Fairness; Center for Families, Children & the Courts; Center for Judiciary Education and Research *Key Objective Supported:* 1, 3, 6		for training of judicial officers, court staff, and court-appointed counsel in limited conservatorship cases.
9.	Monitor the implementation, in probate guardianship proceedings, of the directives in section 155 of the Code of Civil Procedure (added by Stats. 2014, ch. 685, § 1) and section 1510.1 of the Probate Code (added by Stats. 2015, ch. 694) concerning	1(b)	*Judicial Council Direction:* Strategic Plan, Goal IV, Policy 3; Operational Plan, Goal IV, Objectives 1d and 1f. *Origin of Project:* Legislation enacted in response to wave of unaccompanied immigrant	Ongoing. Monitoring Supreme Court review of *Bianka M. v. Superior Court* (S233757) to identify any necessary rule amendments or form revisions.	Possible amended rules of court and revised Judicial Council forms to the extent needed to conform to changes to the law and to help courts process petitions for SIJ findings in

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	judicial findings to support (proposed) wards' petitions for Special Immigrant Juvenile (SIJ) status in federal immigration proceedings.		children entering California. When appropriate, implementation will be in collaboration with the Family and Juvenile Law Advisory Committee; the Center for Families, Children & the Courts; and the Center for Judiciary Education and Research. *Resources:* Family and Juvenile Law Advisory Committee; Center for Families, Children & the Courts; and Center for Judiciary Education and Research *Key Objectives Supported:* 1, 2, 6		probate guardianship proceedings.
10.	Consider recommendations within committee's purview for promoting access to the courts and protecting the legal interests of persons suffering from mental disorders or intellectual disabilities, including recommendations 24–27 of the Mental Health Issues Implementation Task Force as referred by the Judicial Council to PMHAC.	2	*Judicial Council Direction:* As referred by the Judicial Council and Strategic Plan, Goal III, Policy 6; Goal IV, Policies 3, 4, 5, 8; Operational Plan, Goal III, Objective B5a *Origin of Project:* The Judicial Council's Task Forces for Criminal Justice Collaboration on Mental Health Issues and Mental Health Issues Implementation. *Resources:* Center for Families, Children & the Courts (CFCC), Criminal Justice Services	Ongoing. On hold pending Supreme Court review of *Jackson v. Superior Court* (S235549) (if IST defendant not restored to competence at end of 3-year commitment period, may prosecution initiate new competency proceeding by dismissing charges and file new charging document?).	Informal protocol to coordinate to coordinate proceedings to appoint a mental health conservator under the Lanterman-Petris-Short Act with civil commitment, probate conservatorship, or criminal proceedings regarding the same person.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Key Objectives Supported: 1, 3, 6		
11.	Modernization Project—Phase 2 (with Information Technology Advisory Committee): Collaborate with ITAC to identify and develop any rule amendments or form revisions needed to implement Assembly Bill 976 (Stats. 2017, ch. 319), Judicial Council-sponsored legislation authorizing consensual electronic service of notice.	1(b), 2(b)	*Judicial Council Direction:* Goal III, Policy B1 Operational Plan, Goal III, Objective 5a *Origin of Project:* Information Technology Advisory Committee *Resources:* Information Technology Advisory Committee, Information Technology Advisory Committee *Key Objective Supported:* 1, 6	July 1, 2019.	Rule and form changes, if needed.
12.	Proposal to review the Judicial Council forms for proceedings to approve a minor's compromise and, if needed, recommend revisions to resolve inconsistencies with statute or other forms.	1(e)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B2; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Judge, Superior Court of Orange County *Resources:* *Key Objective Supported:* 1, 6	January 1, 2019	Possible revisions to forms MC-350, MC-350EX, MC-315, MC-355, and MC-356

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
13.	Consider proposal for rules of court and forms for simplified guardianship accountings in which all funds are held in blocked account.	2(b)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B2; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Judge, Superior Court, County of San Bernardino *Resources:* Probate court attorneys and examiners *Key Objective Supported:* 1, 2, 6	September 1, 2019	Streamlined and simplified procedure and forms for use in appropriate guardianship accountings.
14.	Proposal for legislation to amend Probate Code to permit funeral expenses of a decedent to be treated as administration expenses and thus payable without creditors' claims on his or her estate.	2	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B2; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Managing Probate Attorney, Superior Court of Riverside County *Resources:* JCC Governmental Affairs *Key Objective Supported:* 1, 6	Effective date of legislation, January 1, 2020.	Smoother estate administration that would permit estates to reimburse funeral expenses paid at or before commencement of administration by the decedent's family members.
15.	Review and analyze pending legislation affecting practice and procedure in proceedings under the Probate Code and in mental health law to assist the Judicial	1	*Judicial Council Direction:* CRC, rule 10.44(a) *Origin of Project:*	Ongoing	Recommendations to the Judicial Council's Policy Coordination and Liaison Committee for council positions on legislation affecting

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Council in developing positions concerning the legislation.		This project has been a core committee function since creation of the permanent committee in 2000. *Resources:* JCC Governmental Affairs *Key Objective Supported:* 1, 6		probate and civil mental health proceedings.
16.	Review and analyze reported appellate court decisions in proceedings under the Probate Code and in civil mental health matters during the current year and make recommendations for legislative changes and changes in practice and procedure made necessary or advisable by these decisions.	1	*Judicial Council Direction:* CRC, rule 10.44(a) *Origin of Project:* This project has been a core committee function since the committee was made a permanent advisory committee in 2000. *Resources:* *Key Objective Supported:* 1, 6	Ongoing	Recommendations for legislation or changes in court rules and forms in response to appellate court decisions.
17.	Collaborate with members of the Information Technology Advisory Committee and other advisory bodies and staff to develop rules for remote access to court records by parties, their attorneys, and justice partners; and (2) participate in the joint ad hoc subcommittee authorized by the council oversight committees to develop the rules.	1(c)	*Judicial Council Direction:* Committee charge in CRC 10.44 *Origin of Project:* Judicial Council and ITAC *Resources:* Legal Services and IT staff; staff to other advisory committees *Key Objective Supported:* 4, 6	January 1, 2019	Adoption of new and amended rules of court, effective January 1, 2019.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
18.	Proposal to amend rule 10.44(c) to dedicate one committee position to a lawyer employed by a nonprofit organization or court self-help center whose primary practice involves guardianships and conservatorships.	1(e)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy 6; Goal IV, Policies 3, 4, 5, 8; Operational Plan, Goal III, Objective B5a *Origin of Project:* Committee chair and lead staff *Resources:* Center for Families, Children & the Courts (CFCC) *Key Objectives Supported:* 1, 2, 3, 5, 6	??	New membership category in rule 10.44(c); improved access to courts
19.	Consult with Court Executives Advisory Committee on proposal to address possible conflict in court records retention statutes affecting retention of original wills and codicils. This proposal carries over from 2016, when CEAC withdrew this element from its records retention legislation. (AB 1443; Stats. 2017, ch. 172.)	2	*Judicial Council Direction:* Strategic Plan, Goal III, Policy A2; Operational Plan, Goal III, Objective 2b. *Origin of Project:* Court Executives Advisory Committee *Resources:* Court Executives Advisory Committee JCC Governmental Affairs JCC Legal Services, Legal Opinions Unit *Key Objective Supported:* 1, 6	January 1, 2020	Clarification of the law to specify how long court must retain original wills and codicils that have not been probated and when those wills and codicils may instead be stored in electronic form.

III. STATUS OF 2017 PROJECTS:

#	Project	Completion Date/Status
1	Proposal for general review and possible revision of the forms used for guardianship proceedings to simplify them and make them more accessible to self-represented litigants.	Ongoing
2	Collaborate with Family and Juvenile Law Advisory Committee to identify, consider, and propose resolution of issues crossing over among probate guardianship, family law custody, and juvenile dependency proceedings. Issues already identified include disparate investigatory resources, the availability of remedial services and judicial authority to order them, and procedures for referrals from family or probate court to child welfare if the court has reason to believe that a child may be abused or neglected.	Incorporated into item 1 at request of Family and Juvenile Law Advisory Committee.
3	Monitor the implementation, in probate guardianship proceedings, of the directives in section 155 of the Code of Civil Procedure (added by Stats. 2014, ch. 685, § 1) and section 1510.1 of the Probate Code (added by Stats. 2015, ch. 694) concerning judicial findings to support (proposed) wards' petitions for Special Immigrant Juvenile (SIJ) status in federal immigration proceedings.	Ongoing
4	Consider recommendations within committee's purview for promoting access to the courts and protecting the legal interests of persons suffering from mental disorders or intellectual disabilities, including recommendations 24–27 of the Mental Health Issues Implementation Task Force as referred by the Judicial Council to PMHAC.	Ongoing
5	Develop model protocol to coordinate civil commitment proceedings, conservatorship proceedings under the Probate Code and the Lanterman-Petris-Short Act, and criminal proceedings when directed at the same person.	Deferred pending Supreme Court review in *Jackson v. Superior Court* (S235549; argued Oct. 2, 2017).
6	Proposal for revision of the *Capacity Declaration—Conservatorship* (form GC-335) to facilitate completion of the form by clinical psychologists and psychiatrists consistent with law without diminishing its usefulness to the courts. Provide	Ongoing

	expressly for placement of a submitted form in the confidential portion of the case file.	
7	Review and consider recommendations for changes in law, practice, and procedure in limited conservatorships for the developmentally disabled, including rules of court concerning qualifications and continuing education requirements for counsel appointed by the court for (proposed) limited conservatees.	Ongoing
8	Proposal for new Judicial Council forms to implement transfer of conservatorships under the California Conservatorship Jurisdiction Act (Chapter 8 of Part 3 of Division 4 of the Probate Code, commencing with section 1980), added by SB 940 (Stats. 2014, ch. 553), and revised forms to clarify necessary jurisdictional facts under the Act.	Ongoing
9	Modernization Project—Phase 2 (with ITAC): Monitor legislative progress of Judicial Council-sponsored amendments of Probate Code provisions governing service of notice to permit consensual e-service of notice. Revise existing Judicial Council forms to provide for consent to e-service of notice and proof of service by electronic means.	Ongoing
10	Consult with CEAC on proposal to address possible conflict in court records retention statutes affecting retention of original wills and codicils. This proposal carries over from 2016, as CEAC withdrew that element of its legislative proposal addressing records retention (AB 1443; Stats. 2017, ch. 172).	The committee did not work on this project this year and has included it on this year's agenda at CEAC's request.
11	Develop legislative proposal to apply section 2361's requirement that a conservator give notice of the conservatee's death to conservators of the estate and to require notice to all persons entitled under section 2581 of the code.	The committee did not work on this project this year.
12	Consider proposal for rules of court and forms for simplified guardianship accountings in which all funds are held in blocked account.	The committee did not work on this project this year and included it on this year's annual agenda.
13	Consider proposed legislation to dispense with filing fees for petitions to establish a guardianship of the person only, and for petitions filed by appointed guardians in these cases.	Recast as proposal to revoke or revise fee waiver forms.

14	Proposal for legislation to amend Probate Code to permit funeral expenses of a decedent to be treated as administration expenses and thus payable without creditors' claims in his or her estate.	The committee did not work on this project this year and included it on this year's annual agenda.
15	Consider options to assist courts to implement Assembly Bill 2380 (Stats. 2016, ch. 882), which requires a criminal court, at arraignment, to provide specific information about options to arrange child care to a felony defendant who is the sole custodial parent of a minor child.	Disseminated information to courts on Judicial Resource Network regarding options available to defendants who are sole custodial parents. Incorporated elements of this project into ongoing proposal to revise guardianship pamphlets for both probate court proceedings and juvenile court proceedings.
16	Review the Judicial Council forms for proceedings to approve a minor's compromise and, if needed, recommend revisions to resolve inconsistencies with statute or other forms.	Ongoing
17	Review and analyze pending legislation affecting practice and procedure in proceedings under the Probate Code and in mental health law to assist the Judicial Council in developing positions concerning the legislation.	Ongoing
18	Review and analyze reported appellate court decisions in proceedings under the Probate Code and in civil mental health matters during the current year and make recommendations for legislative changes and changes in practice and procedure made necessary or advisable by these decisions.	Ongoing
19	Collaborate with members of the Information Technology Advisory Committee and other advisory bodies to develop rules for remote access to court records by parties, their attorneys, and justice partners; and (2) participate in the joint ad hoc subcommittee authorized by the council oversight committees to develop the rules.	Ongoing

IV. Subgroups/Working Groups—Detail

Subgroups/Working Groups:

Subgroup or working group name: Legislation Subcommittee

Purpose of subgroup or working group: Review current legislation affecting the judicial branch and make recommendations to Judicial Council's Policy Coordination and Liaison Committee for development of the Judicial Council positions on the legislation; provide technical assistance to make improvements in probate-related legislative proposals.

Number of advisory body members on the subgroup or working group: **6**

Number and description of additional members (not on this advisory body): **0**

Date formed: July 1, 2000.

Number of meetings or how often the subgroup or working group meets: Monthly (by teleconference) when the California Legislature is in session.

Ongoing or date work is expected to be completed: Ongoing

Subgroup or working group name: Civil Mental Health Issues Subcommittee

Purpose of subgroup or working group: Review mental health issues that arise in proceedings under the Probate Code and in civil mental health proceedings—including recommendations the Mental Health Issues Implementation Task Force as referred by the Judicial Council—identify issues within committee purview, and recommend appropriate Judicial Council action. Provide technical assistance to other advisory committees considering proposals related to mental health issues as they arise in criminal, family, and juvenile law.

Number of advisory body members on the subgroup or working group: **4**

Number and description of additional members (not on this advisory body): **0**

Date formed: February 26, 2016

Number of meetings or how often the subgroup or working group meets: By teleconference as needed.

Ongoing or date work is expected to be completed: As needed.

Subgroup or working group name: New Legal Mental Capacity Subcommittee

Purpose of subgroup or working group: Examine proposals to update and refine procedures for determining legal mental capacity in various contexts, including proposal to revise the *Capacity Declaration—Conservatorship* (form GC-335) and the *Dementia Attachment to Capacity Declaration—Conservatorship* (form GC-335A).

Number of advisory body members on the subgroup or working group: **4**

Number and description of additional members (not on this advisory body): **3** (1 judicial officer, 2 clinical experts)

Date formed: November 1, 2017

Number of meetings or how often the subgroup or working group meets: Monthly by teleconference

Ongoing or date work is expected to be completed: January 1, 2019

Subgroup or working group name: New Guardianship Process Subcommittee

Purpose of subgroup or working group: Develop ways of simplifying the process for filing and adjudicating guardianship petitions and for making the process more accessible to self-represented litigants, including petitioners, parents, and children.

Number of advisory body members on the subgroup or working group: **5**

Number and description of additional members (not on this advisory body): **2** court attorneys

Date formed: November 1, 2017

Number of meetings or how often the subgroup or working group meets: Monthly by teleconference

Ongoing or date work is expected to be completed: January 1, 2020

Traffic Advisory Committee
Annual Agenda—2018
Approved by RUPRO: TBD,

I. ADVISORY BODY INFORMATION

Chair:	Hon. Gail Dekreon
Staff:	Ms. Jamie Schechter and Ms. Kimberly DaSilva, Criminal Justice Services

Advisory Body's Charge: Under rule 10.54 of the California Rules of Court, the committee makes recommendations to the council for improving the administration of justice in the area of traffic procedure, practice, and case management and in other areas as set forth in the fish and game, boating, forestry, public utilities, parks and recreation, and business licensing bail schedules. Over the course of the past few years, a significant amount of changes has occurred in traffic procedure. We anticipate that trend will continue and that this committee will respond to those changes as it has done so in the past.

Advisory Body's Membership: Thirteen members; 6 trial court judicial officers, 1 juvenile traffic hearing officer, 2 judicial administrators, 1 criminal defense lawyer, 1 representative from the California Highway Patrol, 1 representative from the Department of Motor Vehicles, and 1 representative from the California Office of Traffic Safety.

Subgroups/Working Groups: None

Advisory Body's Key Objectives for 2018:

Provide recommendations to the Judicial Council that:

1. Support rule, form, and bail schedule proposals to promote timely, effective, technologically current, fair, and accessible processing of traffic proceedings;
2. Support proposals on traffic fines, fees, assessments, and forfeitures to promote improved and fair imposition and collection, while also improving access;
3. Assist Governmental Affairs in developing Judicial Council-sponsored legislation involving proceedings in traffic court, and responding to proposed legislative developments;
4. Investigate the development of a statewide form repository for traffic court forms;
5. Create tools to assist bench officers, court staff, justice partners, and the public in traffic proceedings;
6. Educate bench officers, court staff, justice partners, and the public on procedures in traffic court; and
7. Investigate methods to notify criminal justice partners, including law enforcement, of changes to relevant forms.

II. ADVISORY BODY PROJECTS

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1	**2018 Bail Schedules Revision.** Revise the annual Uniform Bail and Penalty Schedules.	1 – Must be done	Judicial Council Direction: Strategic Plan Goal III. Modernization of Management and Administration; Operational Plan Objective: III.4. Uphold the integrity of court orders, protect court user safety, and improve public understanding of compliance requirements; improve the collection of fines, fees, and forfeitures statewide. Origin of Project: Vehicle Code section 40310 requires the Judicial Council to adopt an annual schedule for nonparking traffic infractions. California Rule of Court 4.103 requires the Judicial Council to adopt annual schedules of the following other schedules: traffic misdemeanors, boating, forestry, fish and game, public utilities, parks and recreation, and business licensing. Resources: Governmental Affairs (GA) staff assists committee and Criminal Justice Services staff with tracking legislation affecting the bail schedules.	December, 2018. The committee will circulate an invitation to comment in October and will report to the council for adoption prior to the January 1, 2019 effective date.	Adoption of revised statewide Uniform Bail and Penalty Schedules to conform to changes in the law and for use updating courts' county bail schedules as required by Penal Code section 1269b and California Rule of Court 4.102.

[1] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.
[2] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Key Objectives Supported: 1, 4.		
2	**Rules Modernization Project** a. In collaboration with ITAC, identify and develop priorities for potential rule and statutory modifications so that the rules and statutes will be consistent with modern business practices. (For example, consider electronic notification to replace mail, paying fines online, etc.). b. Review rules and statutes in a systematic manner and develop recommendations for comprehensive changes. c. Assist in developing rules for remote access to court records by parties, their attorneys, and justice partners, and participate in the joint ad hoc subcommittee authorized by RUPRO that will be developing these rules.	1(d)-(f) or 2(b) depending on rule or statute	Judicial Council Direction: Strategic Plan Goal: Goal VI – Branchwide Infrastructure for Service Excellence. Operational Plan Objective: VI, Objective 4, Implement new tools to facilitate the electronic exchange of court information while balancing privacy and security. Origin of Project: The Judicial Council mandate based on recommendations from Information Technology Advisory Committee and other advisory committees. Resource: ITAC. Key Objectives Supported: 1.	January 2019.	Amendment and/or adoption of rules or statutes.
3	**Rules and Forms for Access to Justice in Infraction Cases.** Consider development of rules and forms to promote improved access to justice in all infraction cases, including amending rules 4.105 and its progeny.	1(e) – should be done	Judicial Council Direction: Strategic Plan Goal: III. Modernization of Management and Administration. Operational Plan Objective: III.5. Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the	January 2019.	Adoption of revised or new rules and forms.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			fair, timely, consistent, and efficient processing of all types of cases. Origin of Project: This item is added in response to a specific directive by the Judicial Council to consider rule, form or any other recommendations necessary to promote access to justice in all infraction cases. Resources: Criminal Law Advisory Committee, Advisory Committee on Providing Access and Fairness, Court Executives Advisory Committee and Information Technology Advisory Committee to provide recommendations on court practices and procedures. Key Objectives Supported: 1, 2.		
4	**Legislation for Access to Justice in Infraction Cases.** Recommend development of legislation to promote access to justice in all infraction cases.[MS1]	2 – Should be done	Judicial Council Direction: Strategic Plan Goal: III. Modernization of Management and Administration. Operational Plan Objective: III.5. Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases.	Ongoing.	Enactment of or amendment to legislation.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Origin of Project: This item is added in response to a specific directive by the Judicial Council to consider rule, form or any other recommendations necessary to promote access to justice in all infraction cases. Resources: Criminal Law Advisory Committee, Advisory Committee on Providing Access and Fairness, Court Executives Advisory Committee and Information Technology Advisory Committee to provide recommendations on court practices and procedures. Key Objectives Supported: 1, 2, and 3.		
5	**Develop Rules and Forms for Trials Under Vehicle Code Sections 40902 and 40903.** Develop revised rules and forms to clarify, standardize and improve processing of trials by written declaration and trials in absentia for traffic infractions under Vehicle Code sections 40902 and 40903**.**	2(a)	Judicial Council Direction: Strategic Plan Goal: III. Modernization of Management and Administration; VI. Branchwide Infrastructure for Service Excellence. Operational Plan Objective: III.5. Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases; Objective IV.1. Foster excellence in public service to ensure that all court users receive satisfactory services and outcomes. Origin of Project: Proposed in response to requests from courts to reduce expense and	January 1, 2019.	Amend rules; adopt new ~~forms,~~ and revised forms.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			clarify rules and procedures for trial by written declaration. As required by Vehicle Code section 40902, the council has adopted rules and forms for trials by written declaration requested by a defendant. Vehicle Code section 40903 provides that a defendant who fails to appear may be deemed to have elected to have a trial by written declaration. Resources: Court Executives Advisory Committee and Trial Court Presiding Judges Advisory Committee to provide recommendations on best practices and development of forms and procedures. Key Objectives Supported: 1.		
6	**Statewide Repository of Forms.** Investigate the development of a statewide form repository for traffic court forms. Many courts utilize different local forms. A repository could provide courts with a reference point for developing their own forms. A member of the Traffic Advisory Committee identified the utility of having a repository of forms, to provide information sharing between different jurisdictions.	2 – Should be done	Judicial Council Direction: Strategic Plan Goal: III.A.6. Modernization of management and administration-Manage and coordinate cases effectively by sharing appropriate information between and within the courts and other justice system partners; Strategic Plan Goal: IV.5. Provide necessary resources to all courts—particularly high-volume courts such as traffic, small claims, juvenile dependency, and family courts—and support the branchwide implementation of effective practices to enhance procedural fairness and reduce the time and expense of court proceedings.	Fall 2018.	Statewide Repository of Forms.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Operational Plan Objective: Goal IV. Objective 1a. Foster excellence in public service to ensure that all court users receive satisfactory services and outcomes by providing necessary resources to all courts to ensure and support quality services. Origin of Project: A member of the Traffic Advisory Committee identified the utility of having a statewide repository of forms. Resources: Legal Services Office to provide recommendations for best practices of developing a repository of forms. Key Objectives Supported: 4		
7	**Notifying Criminal Justice Partners of Changes to Relevant Forms.** Investigate methods to notify criminal justice partners, including law enforcement, of changes to relevant forms. Pursuant to Vehicle Code section 40500, law enforcement must issue a notice to appear (commonly known as a citation), and the Judicial Council must prescribe the notice to appear. Currently, there is no procedure[MS2] for notifying justice partners of changes to relevant Judicial Council forms.	2 – Should be done	Judicial Council Direction: Strategic Plan Goal: IV.1. Quality of Justice and Service to the Public. Maintain a branchwide culture that fosters excellence in public service by building strong working relationships with communities, law and justice system partners, and other state and local leaders. Operational Plan Objective: Goal IV. Objective 3a. Develop and support collaboration to improve court practices, to leverage and share resources, and to create tools to educate court stakeholders and the public by providing methods and mechanisms that help justice system partners	Fall 2018.	Develop notification method or policy.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			identify, assess, and share practices and processes for improving court services. Origin of Project: A law enforcement agency requested information on existing Judicial Council procedures, if any, to notify them when relevant forms, including law enforcement citations were changed. Resources: Legal Services Office to provide recommendations for best practices for notifying justice partners of changes to relevant Judicial Council forms. Key Objectives Supported: 7		
8	**Community Outreach.** Provide advice to Judicial Council staff [MS3]for implementation and maintenance of community outreach materials developed for use by bench officers.	2 – Should be done	Judicial Council Direction: Strategic Plan Goal: I. Access, Fairness, and Diversity; IV. Quality of Justice and Service to the Public. Operational Plan Objective: I.2. Identify and eliminate barriers to all levels of service; ensure that interactions with the court are understandable, convenient, and perceived as fair; Objective IV.1. Foster excellence in public service to ensure that all court users receive satisfactory services and outcomes. Origin of Project: Outreach materials were developed by the committee in 2001 in response to a directive by the Judicial Council and regularly updated to enhance community outreach and improve public trust and confidence in the courts.	Ongoing.	Revision of traffic outreach materials, including the Self-Help Traffic material, on the California Courts Website, and posting on the Judicial Resources Network.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Resource: CJER to provide consultation regarding improvement of outreach educational materials. Key Objectives Supported: 2 and 5.		
9	**Traffic Bench Officer and Temporary Judge Training.** Provide advice as requested by the Center for Judicial Education and Research with development of traffic training programs and materials for bench officers and temporary judges assigned to traffic proceedings.	2 – Should be done	Judicial Council Direction: Strategic Plan Goal: V. Education for Branchwide Professional Excellence. Operational Plan Objective: V.1. Provide relevant and accessible education and professional development opportunities for all judicial officers (including court-appointed temporary judges) and court staff. Origin of Project: Recommended by committee to support the Center for Judicial Education and Research (CJER) and research in preparation and presentation of statewide training programs for traffic bench officers. Resource: CJER Governing Committee to provide advice and recommendations to CJER as requested for traffic training programs and materials. Key Objectives Supported: 4 and 5.	Ongoing.	Provide assistance for CJER training programs for traffic bench officers.

III. STATUS OF 2017 PROJECTS:

#	Project	Completion Date/Status
1	Jointly proposed, with the Criminal Law Advisory Committee and in consultation with the Advisory Committee on Providing Access and Fairness, rules and rule amendments to improve communication to infraction defendants about fines, failures to appear or pay, and ability-to-pay determinations.	Implementation deadline, May 1, 2017.
2	Jointly proposed, with the Criminal Law Advisory Committee and the Advisory Committee on Providing Access and Fairness, forms and a rule on ability to pay in traffic and other infraction cases.	Anticipated completion November 2017 or Spring 2018.
3	Submitted proposed legislation to revise Penal Code section 1209.5 related to community service in lieu of infractions.	Anticipated completion November 2017.
4	Assisted in developing rules for remote access to court records by parties, their attorneys, and justice partners, and participate in the joint ad hoc subcommittee authorized by RUPRO that will be developing these rules	Anticipated completion January 2019.
5	Bail Schedule Revision.	Ongoing/ revised Uniform Bail and Penalty Schedules will be recommended to the Judicial Council in November for adoption effective January 1, 2018, in accordance with Vehicle Code section 40310.
6.	Remote Video Proceedings.	In conjunction with the Information and Technology Advisory Committee, recommended a revised set of guidelines which were approved by the Judicial Council's Technology Committee in January 2017.
7.	Community Outreach, including revision of California Courts website Self-Help Traffic page.	Revised the California Courts website Self-Help Traffic page / Ongoing. See Item 5 on agenda.
8.	Traffic Bench Officer and Temporary Judge Training.	Ongoing. See Item 6 on agenda.

VI. Subgroups/Working Groups - Detail

Subgroups/Working Groups: *[For each group listed in Section I, including any proposed "new" subgroups/working groups, provide the below information. For working groups that include members who are not on this advisory body, provide information about the additional members (e.g., from which other advisory bodies), and include the number of representatives from this advisory body as well as additional members on the working group.]*

Subgroup or working group name: None

Purpose of subgroup or working group: N/A

Number of advisory body members on the subgroup or working group: N/A

Number and description of additional members (not on this advisory body): N/A

Date formed: N/A.

Number of meetings or how often the subgroup or working group meets: N/A

Ongoing or date work is expected to be completed: N/A

Criminal Law Advisory Committee
Annual Agenda—2018
Approved by RUPRO:

I. ADVISORY BODY INFORMATION

Chairs:	Hon. Tricia A. Bigelow, Chair; Hon. Richard Couzens (Ret.), Vice Chair
Staff:	Sarah Fleischer-Ihn, Attorney, Criminal Justice Services Office

Advisory Body's Charge: The Criminal Law Advisory Committee makes recommendations to the Judicial Council for improving the administration of justice in criminal proceedings. (Cal. Rules of Court, rule 10.42(a).)

Advisory Body's Membership: The committee has 20 members: 2 appellate court justices, 7 judges, 3 court administrators, 3 prosecutors, 3 defense attorneys, and 2 probation officers.

Subgroups/Working Groups:

Subcommittees:

- Limited Duration/Ad Hoc Subcommittee on Use of Risk Needs Assessment Information at Sentencing (see Section IV – disbanding)
- Joint Ad-Hoc Subcommittee on Remote Access

Advisory Body's Key Objectives for 2018:

1. Provide recommendations to the Judicial Council to improve the administration of the criminal justice system.

2. Provide recommendations to the Judicial Council for approval of various rule and form proposals to promote timely, consistent, and effective criminal case processing.

3. Assist Governmental Affairs staff in developing Judicial Council-sponsored legislation involving criminal court administration, and responding to proposed legislative developments.

II. ADVISORY BODY PROJECTS

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1.	**Recently enacted legislation:** Review enacted legislation 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. Specific proposals to consider developing include: AB 1115 (Jones-Sawyer): Convictions: expungement Would allow a defendant sentenced to state prison for a felony that, if committed after the 2011 Realignment Legislation, would have been eligible for sentencing to a county jail to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty, after the lapse of one or 2 years following the defendant's completion of the sentence, as specified, provided that the defendant is not under supervision as specified, and is not serving a sentence for, on probation for, or charged with the commission of any offense.	2(a), 2(b)	Judicial Council Direction: Strategic Plan Goal 3: Modernization of Management and Administration. Operational Plan Objective 5: Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases.[3] Origin of Project: Governmental Affairs Key Objectives Supported: 1, 2.	Ongoing	Recommendations for rules, forms, and/or legislation.

[1] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

[2] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

[3] Much of the work by the Criminal Law Advisory Committee falls within this pair of Strategic/Operational Plan Goals. This pair of goals is referred to through the rest of this agenda as "Strategic Plan Goal 3, Operational Plan Objective 5."

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	SB 239 (Wiener): Infectious and communicable diseases: HIV and AIDS: criminal penalties. Would repeal felony and misdemeanor laws related to HIV. Would make the intentional transmission of an infectious or communicable disease, as defined, a misdemeanor. Would impose various requirements upon the court in order to prevent the public disclosure of the identifying characteristics, as defined, of the complainant and the defendant. Would repeal Penal Code section 647f, felony prostitution, and vacate any conviction, dismiss any charge, and legally deem that an arrest under the provision never occurred. Would authorize a person serving a sentence as a result of a violation of the provision to petition for a recall or dismissal of sentence before the trial court that entered the judgment of conviction in his or her case. Would require a court to vacate the conviction and resentence the person to any remaining counts while giving credit for any time already served.	1(a), 1(b)			
2.	**Criminal Law Legislation:** Review and recommend Judicial Council positions on pending criminal law legislation and assist Governmental Affairs staff in pursuing Judicial Council-sponsored legislation developed by the committee in 2017.	1	Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5. Origin of Project: Governmental Affairs; legislative proposals were originally developed at the request of judges and/or court administrators.	Ongoing	Recommendations for rules, forms, and/or legislation.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Resources: Governmental Affairs. Key Objectives Supported: 3.		
3.	**Mental Health Issues:** Consider and implement recommendations originally developed by the Mental Health Implementation Task Force to improve the resolution of mental health issues during criminal proceedings, and consider other mental health-related proposals. Specific proposals to consider developing include: • Potential amendments to Penal Code section 1369 et seq. to address the confidentiality of court records of competency proceedings. • Development of optional forms to administer psychotropic medications to minors tried as adults.	2 2(a), 2(b)	Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5. Origin of Project: Mental Health Implementations Task Force; judges. Resources: Collaborative Justice Courts Advisory Committee. Key Objective Supported: 1, 2.	Ongoing	Recommendations for rules, forms, and/or legislation.
4.	**Continued Implementation of Propositions 47, 57, 63, 64:** Monitor implementation of four recently enacted propositions and assist courts with any required implementation: a) Proposition 47, enacted November 5, 2014, which reduced the classification of many nonserious and nonviolent property and drug crimes from a felony to a misdemeanor, as well as its extension to November 4, 2022 under Assembly Bill 2765 (Weber, Stats. 2016, ch. 767);	2(a), 2(b)	Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5. Origin of Project: Initiative measures. Resources: Family and Juvenile Law Advisory Committee	January 1, 2019	Recommendations for adoption of rules and forms; incorporating information in education and training programs.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	b) Proposition 57, enacted November 8, 2016, which changed rules governing parole and the granting of custody credits to state prison inmates and restructured the process for transfer of jurisdiction from juvenile to criminal court; c) Proposition 63, enacted November 8, 2016, which includes a firearms relinquishment procedure for defendants convicted of specified offenses; and d) Proposition 64, enacted November 8, 2016, which decriminalized or reduced the penalty for most marijuana offenses and allows for prior offenses to be reclassified accordingly.	2(a), 2(b) 2(a), 2(b) 2(a), 2(b)	Key Objectives Supported: 1.		
5.	**MC-275, Petition for Writ of Habeas Corpus, and Rule 4.551, Habeas Corpus Proceedings:** Amendments to rule 4.551, form MC-275, and/or other rules and forms regarding standard of review for writs of habeas corpus and post-conviction relief (see S.B. 1134, Habeas corpus: new evidence: motion to vacate judgment: indemnity; A.B. 813, Criminal procedure: post-conviction relief).	1(b)	Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5. Origin of Project: Legal and legislative changes. Resources: Not applicable. Key Objectives Supported: 2.	January 1, 2019	Recommendations to amend rules and forms.
6.	**Modernize Trial Court Rules to Support E-Business:** In conjunction with the Court Technology Advisory Committee, develop rule, form, and legislative proposals to promote e-business in criminal court proceedings.	1(d)	Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5.	Ongoing	Recommendations for rules, forms, and/or legislation.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Origin of Project: Court Technology Advisory Committee; judges, advisory committee members. Resources: Information Technology Advisory Committee. Key Objective Supported: 2.		
7.	**Update Criminal Rules of Court**: Develop amendments to rules of court to reflect best practices and promote fairness and efficiency. Specific proposals to consider developing include: • Potential amendment to rule 4.111 to allow a court to consider the failure to serve and file an opposition pleading within the time permitted or the failure to file an opposition pleading at all as an admission that a moving party's pretrial motion is meritorious. • Potential amendment to rule 4.113 to apply to noticed pretrial motions.	1(b)	Judicial Council Direction: Strategic Plan Goal 3, Operational Plan Objective 5. Origin of Project: Advisory committee member. Resources: Not applicable. Key Objectives Supported: 2(b).	January 1, 2019	Recommendations for rules.
8.	**Commission on the Future of California's Court System:** In 2017, the Futures Commission made recommendations for criminal law reform. If those recommendations are referred to the committee, it would review them and determine the next steps needed for implementation. Criminal law recommendations:	1	Judicial Council Direction: Letter from Chief Justice to Judicial Council internal committee chairs, May 17, 2017 Origin of Project:	Ongoing	Recommendations for rules, forms, and/or legislation.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	a) Reduction of continuances in criminal cases b) Reduction of certain misdemeanors to infractions c) Refining the adjudication and settlement of fines, fees, and assessments		Commission on the Future of California's Court System Resources: Not applicable Key Objectives Supported: 1, 2.		
9.	**Pretrial Detention Reform Workgroup:** The Pretrial Detention Reform Workgroup is scheduled to make recommendations to the Chief Justice by December 2017. If those recommendations are referred to the committee, it would review them and determine the next steps needed for implementation.	1	Judicial Council Direction: Anticipated referral from Chief Justice; Strategic Plan Goal 3, Operational Plan Objective 5. Origin of Project: Pretrial Detention Reform Workgroup, Governmental Affairs Resources: Not applicable Key Objectives Supported: 1, 2.	Ongoing	Recommendations for rule, form, and/or legislative proposals; incorporating information in education and training programs.

III. STATUS OF 2017 PROJECTS:

Item[4]	Project	Completion Date/Status
1	**Implementation of Proposition 64**	Effective July 1, 2017, the Judicial Council approved forms CR-400, 401, 402, and 403.
2	**Implementation of Proposition 57**	Proposition 57 memo updated May 2017. The committee declined to develop a proposal for amendments to rules of court including rule 4.480 regarding sentencing judge's statement under Penal Code section 1203.01.
3	**Continued Implementation of Proposition 47**	Proposition 47 memo updated May 2017. The committee did not develop a proposal for potential amendments to Gov. Code section 68152(c).
4	**Omnibus Rules Proposal**	At its September 2017 meeting, the Judicial Council approved amendments to the felony sentencing rules in Cal. Rules of Court, rules 4.403, 4.405, 4.406, 4.408, 4.409, 4.410, 4.411, 4.411.5, 4.412, 4.413, 4.415, 4.420, 4.421, 4.423, 4.425, 4.428, 4.433, 4.435, 4.437, 4.447, 4.451, and 4.452. The committee did not develop a proposal for amendments to rule 4.551, form MC-275, and/or other rules and forms regarding standard of review for writs of habeas corpus and post-conviction relief (see S.B. 1134, Habeas corpus: new evidence: motion to vacate judgment: indemnity; A.B. 813, Criminal procedure: post-conviction relief.)
5	**Evidence-Based Practices**	At its September 2017 meeting, the Judicial Council approved Cal. Standards of Judicial Administration, standard 4.35, use of risk/needs assessments at sentencing; and amendments to the felony sentencing rules to provide guidance to courts on the use of risk/needs assessments.
6	**Mental Health Issues**	At its September 2017 meeting, the Judicial Council approved amendments to Cal. Rule of Court 4.130, Court-Appointed Expert's Report in Mental Competency Proceedings.

[4] Number corresponds with item number of 2017 Annual Agenda.

		The committee reviewed proposed DSH and DDS regulations regarding competency related issues. It submitted public comments in response to the proposed DDS regulations. The committee put on hold potential amendments to Penal Code section 1370(c)(2) to authorize courts to order a conservatorship investigation for Lanterman-Petris-Short conservatorships other than Murphy conservatorships.
7	**Revise Plea Form, With Explanations and Waiver of Rights – Felony (Criminal), CR-101**	At its September 2017 meeting, the Judicial Council approved amendments to CR-101.
8	**Criminal Law Legislation – pending legislation**	The committee provided subject matter expertise on numerous pending criminal law bills in 2017. It is anticipated that at its November 2017 meeting, the Judicial Council will approve proposed Judicial Council sponsored legislation to amend Penal Code sections 817 and 1526 to address telephonic confirmation requirement for law enforcement affidavits.
9	**Criminal Law Legislation – enacted legislation**	At its September 2017 meeting, the Judicial Council approved CR-210, to implement provisions of Proposition 63, and MC-245 and MC-246, to implement Penal Code section 1473.7.
10	**Modernize Trial Court Rules to Support E-Business**	Staff and advisory committee members participated in the Remote Access to Court Records Ad-Hoc Subcommittee. The committee did not develop potential amendments to rules 2.250 - 2.261 relating to electronic filing. (See A.B. 1867, Evidence: judicial notice: official records of conviction.) It is anticipated that at its November 2017 meeting, the Judicial Council will approve proposed Judicial Council sponsored legislation to amend Penal Code sections 817 and 1526 to address telephonic confirmation requirement for law enforcement affidavits.
11	**Bail and Fines/Fees in Non-Traffic Infraction and other Criminal Cases**	Collaborated with other advisory committees to develop an ability to pay form for traffic and non-traffic infractions.

		The committee did not develop potential amendments to Penal Code section 1237.2 or rules of court to expand appellate court remand of issues concerning imposition of fine or fees.
12	**Victim Restitution Rights Form**	The committee did not develop a proposal.
13	**DNA Expungement Instruction Form**	The committee did not develop a proposal.
14	**Criminal and Dismissal Procedures and for Veteran Defendants**	The committee did not develop a proposal.

IV. Subgroups/Working Groups – Detail

Subgroups/Working Groups:

Ad Hoc/Limited Duration Subcommittee: Use of Risk/Needs Assessments at Sentencing

Purpose of subgroup or working group: The Criminal Law Advisory Committee is working to develop a proposed Standard of Judicial Administration to provide California courts guidance on using risk/needs assessments in criminal proceedings, including sentencing.

Number of advisory body members on the subgroup or working group: Seven members of CLAC work on this subcommittee. The subcommittee has consulted with subject matter experts.

Ongoing or date work is expected to be completed: The Ad Hoc/Limited Duration Subcommittee on the Use of Risk/Needs Assessments at Sentencing developed a standard for judicial administration on the use of risk/needs assessments at sentencing that was approved by the Judicial Council at the Council's September 15, 2017 meeting. The Subcommittee has met its purpose and will no longer be needed.

Joint Ad Hoc Subcommittee on Remote Access

Purpose of subcommittee or working group: The purpose of this subcommittee is to develop rules, standards, and guidelines for online access to court records for parties, their attorneys, local justice partners, and other governmental agencies. (This is part of the Tactical Plan for Technology, 2017-2018, adopted by the Judicial Council.)

Date formed: April 19, 2017 (approved by RUPRO)

Number of meetings or how often group meets: As needed by teleconference only (1 meeting has been held; approximately 4 more are anticipated to complete the project)

Ongoing or date work is expected to be completed: January 1, 2019

Family and Juvenile Law Advisory Committee
Annual Agenda—2018
Approved by RUPRO:

I. ADVISORY BODY INFORMATION

Chair:	Hon. Jerilyn Borack and Hon. Mark A. Juhas, Co-chairs
Staff:	Ms. Audrey Fancy and Ms. Tracy Kenny, Co-lead Staff; Ms. Carolynn Bernabe, Administrative Coordinator, Center for Families, Children & the Courts

Advisory Body's Charge: Makes recommendations to the Judicial Council for improving the administration of justice in all cases involving marriage, family, or children. [Rule 10.43]

Advisory Body's Membership: 34 members with 1 appellate court justice; 18 trial court judicial officers; 1 judicial administrator; 1 child custody mediator; 3 lawyers whose primary area of practice is family law; 1 lawyer specializing in governmental child support; 1 domestic violence prevention advocate; 1 chief probation officer; 1 child welfare director; 1 court appointed special advocate director; 1 county counsel assigned to juvenile dependency; 1 district attorney assigned to juvenile delinquency; 1 public-interest children's rights lawyer; 2 lawyer from public or private defender's office whose primary area is juvenile law.

Subgroups/Working Groups[1]:

The following have been established with approval from, or direction by, the Judicial Council or its internal advisory bodies (Rules and Project Committee or Executive and Planning):

- Protective Order Forms Working Group (POWG)
- Violence Against Women Education Program/Victims of Crime Act (VAWEP/VOCA)[2]
- Joint Juvenile Competency Issues Working Group
- AB 1058 Funding Allocation Joint Subcommittee
- Juvenile Dependency: Court-Appointed-Counsel Workload Working Group
- Joint Ad-Hoc Subcommittee on Remote Access

[1] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

[2] On August 22, 2014, the Judicial Council approved a recommendation from the Family and Juvenile Law Advisory Committee that VAWEP become a standing subcommittee of the Family and Juvenile Law Advisory Committee. The composition of VAWEP has been guided by grant requirements and advisory committee chair review. A copy of the council report is available here: http://www.courts.ca.gov/documents/jc-20140822-itemE.pdf

Advisory Body's Key Objectives for 2018:

1. Provide recommendations to the Judicial Council on funding and allocation methods for specified legislatively mandated court-related programs.
2. Provide recommendations to the Judicial Council for changes to or new statewide rules and forms to enable the council to fulfill legislative mandates.
3. Coordinate with related advisory groups to fulfill council directives in the area of domestic violence, family law, and juvenile law.

II. ADVISORY BODY PROJECTS

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1.	**Implementation of Legislative Changes from the 2015-2016 Legislative Session** 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 review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration. a) **AB 1299 (Ridley-Thomas) Medi-Cal: specialty mental health services: foster children** *Ch.603, Statutes of 2016* Requires that the responsibility under Medi-Cal for providing specialty mental health services must be transferred within forty-eight hours of the child being moved	1(a), (b), or (c)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Legislative mandate. Resources: Legal Services Key Objective Supported: 2, 3	September 1, 2018 or January 1, 2019	Rules and forms, incorporating information in education and training programs, or information and analysis for council on why action on the council's part may or may not be necessary.

[3] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

[4] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	to a new county. In certain situations, this presumptive transfer can be waived. b) **AB 1688 (Rodriguez) Dependent children: out-of-county placement: notice** *Ch. 608, Statutes of 2016* Requires the county to provide notice to the child's attorney and to the child if 10 years of age or older prior to moving the child to a placement outside the county and allows for the child to object to the move.				
2.	**Implementation of Legislative Changes from the 2017-2018 Legislative Session** 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 review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration. Family: a) **AB 264 (Low): Protective orders** *Ch. 270, Statutes of 2017* Would require the court to consider issuing a protective order restraining the defendant from any contact with a percipient witness to a crime involving domestic violence, a violation of specified sex offenses, or a violation of laws	1(a), (b), or (c)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Legislative mandate. Resources: Legal Services Key Objective Supported: 2, 3	September 1, 2018 or January 1, 2019	Rules and forms, incorporating information in education and training programs, or information and analysis for council on why action on the council's part may or may not be necessary.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	relating to criminal gangs, if it is shown by clear and convincing evidence that the witness has been harassed. b) **AB 413 (Eggman) Confidential communications: domestic violence** *Ch. 191, Statutes of 2017* Authorizes individuals seeking domestic violence restraining orders to record confidential communications if they contain evidence germane to the restraining order request for the sole purpose of providing that evidence in support of the request. c) **AB 712 (Bloom): Civil Actions: change of venue** *Ch. 316, Statutes of 2017* Requires a court to retain jurisdiction over emergency orders regarding child custody after a transfer of jurisdiction has been initiated but not assumed by the receiving court. Requires the council, by 1/1/19, to establish timeframes for a court to transfer and to assume jurisdiction. d) **AB 953 (Baker): Protective orders: personal information of minors** *Ch. 384, Statutes of 2017* Authorizes a minor or a minor's guardian to petition the court to keep all information regarding the minor obtained when issuing a protective order under either of the above provisions, including, but not limited to, the minor's name, address, and the circumstances surrounding the protective order with respect to that minor, in a confidential case file. e) **AB 1396 (Burke): Surrogacy** *Ch. 326, Statutes of 2017*				

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Clarifies that the parent and child relationship cannot be established between a child and a surrogate, as defined, by proof of having given birth. Requires the court to issue the judgment or order regarding parentage forthwith, unless specified conditions are met. f) **SB 179 (Atkins): Gender identity: female, male, or nonbinary** *Ch. 853, Statutes of 2017* Changes the requirements for getting a new birth certificate issued to reflect a change in gender designation. g) **SB 204 (Dodd): Domestic violence: protective orders** *Ch. 98, Statutes of 2017* Enacts the Uniform Recognition and Enforcement of Canadian Domestic Violence Protection Orders Act, which would authorize the enforcement of a valid Canadian domestic violence protection order in a tribunal of this state under certain conditions. h) **SB 469 (Skinner D): Child support guidelines: low-income adjustments** *Ch. 730, Statutes of 2017* Extends existing low-income adjustment on the net disposable income threshold for child support obligors from 1/1/2018 to 1/1/2021. Juvenile Dependency: i) **AB 404 (Stone): Foster care** *Ch. 732, Statutes of 2017*				

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Makes changes to procedures relating to the placement of dependent children, including, among other things, by revising the preference to make a placement with specified relatives and, instead, to grant a preference for placement with any relative. j) **AB 604 (Gipson): Nonminor dependents: extended foster care benefits** *Ch. 707, Statutes of 2017* Expands the definition of nonminor dependent to include a nonminor subject to an order vesting temporary placement and care with a county child welfare department. k) **AB 1332 (Bloom): Juveniles: dependents: removal** *Ch. 665, Statutes of 2017* Would prohibit the removal of a child from the physical custody of his or her parent with whom the child did not reside at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence that there would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child for the parent to live with the child or otherwise exercise the parent's right to physical custody, and there are no reasonable means available by which the child's physical and emotional health can be protected without removing the child from the child's parent's physical custody. l) **AB 1371 (Stone): Juveniles: ward, dependent, and nonminor dependent parents** *Ch. 666, Statutes of 2018*				

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Extends prohibition for program of supervision from being undertaken until the parent has consulted with his or her counsel to a parent who is a nonminor dependent or ward of the juvenile court. m) **AB 1401 (Maeinschein): Juveniles: protective custody warrant** *Ch. 262, Statutes of 2017* Would authorize the court to issue a protective custody warrant, without filing a petition in the juvenile court alleging that the minor comes within the jurisdiction of the juvenile court as a dependent, if there is probable cause to believe the minor comes within the jurisdiction of the juvenile court as a dependent, there is a substantial danger to the safety or physical health of the child, and there are no reasonable means to protect the child's safety or physical health without removal. n) **SB 213 (Mitchell): Placement of children: criminal records check** *Ch. 733, Statutes of 2017* Prohibits final approval for adoption, placement, and licensure (for foster care providers and resource families) if a person in the house has been convicted of certain crimes. Juvenile Delinquency Law Legislation o) **AB 90 (Weber): Criminal gangs** *Ch. 695, Statutes of 2017* Clarifies requirements to petition the court to be removed from state managed gang database.				

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	p) **AB 529 (Stone): Juveniles: sealing of records** *Ch. 685, Statutes of 2017* Would require, if a person who has been alleged to be a ward of the juvenile court and has his or her petition dismissed or if the petition is not sustained by the court after an adjudication hearing, the court to seal all records pertaining to that dismissed petition that are in the custody of the juvenile court, and in the custody of law enforcement agencies, the probation department, or the Department of Justice. q) **SB 312 (Skinner): Juveniles: sealing of records** *Ch. 679, Statutes of 2017* Expands the exception to sealing of juvenile court records to include those cases where a finding on a serious or violent offense is reduced to a misdemeanor. r) **SB 439 (Mitchell): Jurisdiction of the juvenile court** *Ch. 679, Statutes of 2017* Limits the ages under which a person may be adjudged a ward of the juvenile court or, for the purposes of WIC §§601 and 602, fall under the jurisdiction of the juvenile court to between 12 and 18 years old, inclusive. s) **SB 462 (Atkins): Juveniles: case files: access** *Ch. 462, Statutes of 2017* Expands the list of who can be allowed to access an otherwise sealed juvenile case file to include law enforcement agencies, probation departments, or other specified agencies for the purposes of data collection and				

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	research, provided the court is satisfied that identifying information is protected.				
3.	**FL-800 Joint Petition for Summary Dissolution** Update to reflect change in cost of living per Family Code section 2400(b) as a technical change.	1(a)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Legislative mandate. Resources: Legal Services Key Objective Supported: 2, 3	Ongoing requirement to adjust every other year, next adjustment to be effective January 1, 2018 (approved by the Judicial Council 3/24/17 in a technical report)	Revised form.
4.	**Family Code section 3027** Proposed form addressing family law cases involving allegations of child abuse to ensure that court ordered evaluations and investigations comply with the statute and the specific directives of the court to obtain information.	1(e)	Judicial Council Direction: Origin of Project: Referral from JC as part of the Elkins work Resources: Probate and Mental Health	January 1, 2019	New form.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Advisory Committee Key Objective Supported:		
5.	**Court coordination and allegations of child abuse and neglect** A proposal to work collaboratively with Probate and Mental Health as well as the Committee on Providing Access and Fairness on issues related to court coordination and allegations of child abuse and neglect in guardianship cases. Initial joint work will include updating an existing pamphlet (JV-350) concerning guardianships established in juvenile court as well as the probate guardianship pamphlet (GC-205), both of which need significant revision.	1	Judicial Council Direction: Origin of Project: Resources: Probate and Mental Health Advisory Committee Key Objective Supported:	Ongoing	Revised guardianship pamphlets for juvenile and probate guardianships
6.	**Proposition 47 & AB 2765, Proposition 57, and Proposition 64** Monitor implementation of three recently enacted proposition and assist juvenile courts with any required implementation:	1	Judicial Council Direction: Statutory mandate and council delegation to the committee.	Ongoing	Rules, forms, or information and analysis for council on why action on the council's part may or may not be necessary.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	a) Proposition 47 enacted November 5, 2014, which reduced the classification of many nonserious and nonviolent property and drug crimes from a felony to a misdemeanor, as well as its extension to November 4, 2022 under Assembly Bill 2765 (Weber, Stats. 2016, ch. 767); b) Proposition 57 enacted November 8, 2016 which restructured the process for transfer of jurisdiction from juvenile to criminal court and eliminated the ability of prosecutors to directly file cases in criminal court; and c) Proposition 64 enacted November 8, 2016 which reduced most marijuana offenses for minors to misdemeanors and allows for prior offenses to be reclassified accordingly.		Origin of Project: Statutory mandate Resources: Criminal Justice Services Key Objective Supported: 2		
7.	**Assembly Bill 1058 Child Support Program Funding** Provide recommendations to the council for allocation of funding pursuant to Family Code sections 4252(b) and 17712.	1	Judicial Council Direction: Legislative mandate and council delegation to the committee. Origin of Project: Legislative mandate Resources: Finance office	Ongoing	Council report with recommendations

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Key Objective Supported: Provide recommendations to the Judicial Council on funding and allocation methods for specified legislatively mandated court-related programs.		
8.	**Access to Visitation Funding and Legislative Report** Provide recommendations to the council for allocation of funding pursuant to Family Code section 3204. Additionally, the committee will provide the council with the statutorily mandated legislative report on the program due every other year.	1	Judicial Council Direction: Legislative mandate and council delegation to the committee. Resources: Judicial Council Finance office Origin of Project: Legislative mandate and Judicial Council direction Key Objective Supported: 1	Ongoing	Council report with recommendations and report to the legislature

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
9.	**Serve as statutorily mandated Advisory Committee to the Judicial Council for the Court Appointed Special Advocates (CASA) grants program (Welf. & Inst. Code, § 100 et seq.)** Recommend annual funding to local programs pursuant to the methodology approved by the Judicial Council in August 2013. Conduct 5-year review of 2013 methodology and recommend changes if necessary.	1	Judicial Council Direction: Committee charge under CRC 10.43; Legislative mandate Origin of Project: Welf. & Inst. Code, § 100 et seq. and Judicial Council direction Resources: Judicial Council Finance office Key Objective Supported: 1	Ongoing	Council report with recommendations
10.	**Blue Ribbon Commission on Children in Foster Care (BRC) recommendations** Review and consider for action, when resources become available, the BRC recommendations related to court reform that have been ongoing, but have not yet been fully implemented because of significant budget challenges. Those recommendations broadly include: 1. Reducing caseloads for judicial officers, attorneys, and social workers; 2. Ensuring a voice in court and meaningful hearings for participants;	1	Judicial Council Direction: Refer by the Judicial Council Origin of Project: Judicial Council Resources: Key Objective Supported: 1	Ongoing	Unknown

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	3. Ensuring adequately trained and resourced attorneys, social workers, and Court Appointed Special Advocates (CASA); and 4. Establish and monitor data exchange standards and information between the courts and child welfare agencies and those to be monitored by the Judicial Council Technology Committee, in consultation with the Family and Juvenile Advisory Committee, develop technical and operational administration standards for interfacing court case management systems and state justice partner information systems.				
11.	**Family Law: Elkins Family Law Task Force recommendations** Continue to provide Judicial Council members input on council accepted recommendations for family law issues addressed by the Elkins Family Law Task Force	1	Judicial Council Direction: Refer by the Judicial Council Origin of Project: Judicial Council Resources: Key Objective Supported: 1	Ongoing	Contribution to education and training content; review of relevant legislation with input for the council's consideration; recommendations, as needed, for rules and forms
12.	**Consider referrals from the Commission on the Future of California's Court System** The Futures Commission made recommendations for significant reform in family and juvenile law. If those recommendations are referred to the committee it would	1	Judicial Council Direction: Letter from Chief Justice to Judicial Council internal committee chairs, May 17, 2017		Request for proposals for pilot mediation projects and legislation to authorize consolidate court pilot project

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	review them and determine the next steps needed for implementation. Family Recommendations: a) Provide mediation without recommendations as the first step in resolving all child custody disputes. b) Explore through pilot projects or otherwise whether additional services, including tiered mediation, would be effective in complex or contentious cases. Juvenile Recommendations: c) Establish a single juvenile court with consolidated jurisdiction over all juvenile court matters. d) Provide courts with jurisdiction over children and parents in all juvenile cases and provide children and parents counsel when appropriate. e) Test these proposals via pilot programs in a diverse set of courts.		Origin of Project: Commission on the Future of California's Court System Resources: Legal Services, Governmental Affairs Office		
13.	**Domestic Violence** Provide recommendations to the council on statewide judicial branch domestic violence issues in the area of family and juvenile law, including projects referred from the work of the Domestic Violence Practice and Procedure Task Force and the Violence Against Women Education Program (VAWEP). Serve as lead committee for Protective Orders Working Group (POWG). Examine the need for statewide guidance on access to the California Courts Protective Order	1	Judicial Council Direction: Referral of projects from the Domestic Violence Practice and Procedure Task Force Origin of Project: Judicial Council	Ongoing	Coordination of activities in subject matter area to avoid duplication of resources and potential conflict in rules, forms, and other areas. Possible rule of

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Registry (CCPOR). Examine need for clarification of restraining order forms regarding different formats of ammunition.		Resources: Criminal Justice Services Key Objective Supported: 3		court to govern access to CCPOR.
14.	**Legislation** As requested by the Judicial Council Policy Coordination and Liaison Committee review and recommend positions on legislation related to family and juvenile law matters.	1	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: PCLC Resources: Governmental Affairs Office Key Objective Supported: 2	Ongoing	Subject matter expertise provided to PCLC so that council may take appropriate action
15.	**Education** Contribute to planning efforts in support of family and juvenile law judicial branch education.	1	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project CJER Governing Committee	Ongoing	Subject matter expertise provided to CFCC, Education Division, and CJER Governing Committee so that content of

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Resources: CJER Key Objective Supported: 2		programs can be coordinated across the branch
16.	**Review approval of training providers under 5.210, 5.225, 5.230, and 5.518.** Training providers/courses are reviewed for compliance with these rules by Judicial Council staff, in consultation with the Family and Juvenile Law Advisory Committee.	1	Judicial Council Direction: Judicial Council Origin of Project: Judicial Council, result of name change (from AOC to JC) and review of delegations Resources: Judicial council Support Services, Legal Services, Key Objective Supported: 2	Ongoing	Approve providers
17.	**Serve as lead/subject matter resource for other advisory groups to avoid duplication of efforts and contribute to development of recommendations for council action.** Such efforts may include providing family and juvenile law expertise and review to working groups, advisory committees, and subcommittees as needed.	2	Judicial Council Direction: Pursuant to the committee's charge under California Rules of Court, rule 10.43 "Makes recommendations	Ongoing	Coordinated rules, forms, and legislative proposals

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			to the Judicial Council for improving the administration of justice in all cases involving marriage, family, or children." Origin of Project: Respective advisory bodies Resources: Key Objective Supported: 2		
18.	**Appellate Rule and Forms** Work with the Appellate Advisory Committee on the development of rules and forms regarding appellate procedures related to juvenile and family law proceedings. For 2018 this may include a family law specific form for preparing a Proposed Statement on Appeal.	2	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: AAC, courts, and members of the bar Resources: Legal Services Key Objective Supported: 2, 3	January 1, 2018	Rules and forms, incorporating information in education and training programs, or information and analysis for council on why action on the council's part may or may not be necessary.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
19.	**Rules Modernization Project and Implementation of AB 976** Each advisory committee was asked to include in their annual agendas for 2015 and 2016 an item providing for the drafting of proposed amendments to modernize the California Rules of Court related to their subject matter areas. This effort was undertaken in coordination with ITAC, which is responsible for developing and completing the overall rules modernization project. Implementation of council sponsored legislation (AB 976 (Berman) Electronic filing and service) that emerged from this project will require rule and form changes.	2(b)	Judicial Council Direction: Pursuant to the committee's charge under California Rules of Court, rule 10.43 "Makes recommendations to the Judicial Council for improving the administration of justice in all cases involving marriage, family, or children." Origin of Project: ITAC Resources: Key Objective Supported: 2	January 1, 2018	Implementation of eight technical changes effective January 1, 2016. Identification of further rule or form changes or necessary legislation.
20.	**Juvenile Dependency: Court-Appointed-Counsel Workload** Begin fulfilling the Judicial Council's charge to "Consider a comprehensive update of the attorney workload data and time standards in the current workload model" by monitoring and assessing the impact of the new funding provided for	2	Judicial Council Direction: As referred by the council Origin of Project: Judicial Council	Ongoing	Judicial Council report

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	court-appointed dependency counsel in the 2017-18 Budget Act. Form subcommittee of Committee members joined by legal services managers, juvenile court judges, court executives, researchers and other stakeholders to guide data collection and analysis, assess impact of the new funding and expanded attorney services, and define outcomes and measures to be used in the update of the current workload model. Report to Committee in September 2018.		Judicial Council Resources: Finance Key Objective Supported: 1		
21.	**Juvenile Law: Intercounty Transfers** Review requests under rule 5.610(g) to approve local collaborative agreements for alternative juvenile court transfer forms in lieu of JV-550.	2(b)	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: Judicial Council. Judicial Branch Administration: Judicial Council Delegations to the Administrative Director of the Courts (October 25, 2013) Resources: Key Objective Supported: 2, 3	Ongoing	Judicial Council report
22.	**Court Coordination and Efficiencies**	2	Judicial Council Direction:	Ongoing	Recommendations to groups and expertise

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	Review promising practices that enhance coordination and increase efficient use of resources across case types involving families and children including review of unified court implementation possibilities, court coordination protocols, and methods for addressing legal mandates for domestic violence coordination so as to provide recommendations for education content and related policy efforts.		Committee charge under CRC 10.43 Origin of Project: Committee charge Resources: Key Objective Supported: 3		will be offered to those that request it
23.	**Indian Child Welfare Act Rules and Forms** In conjunction with the Tribal Court-State Court Forum and Probate and Mental Health Advisory Committee review for possible rules or forms new federal regulations governing court proceedings covered by the Indian Child Welfare Act (ICWA) (25 U.S.C. 1901 et seq.) which became effective December 12, 2016.	2	Judicial Council Direction: Committee charge Origin of Project: Federal regulations Resources: Legal Services Key Objective Supported: 2	Ongoing	Rules and forms, incorporating information in education and training programs, or information and analysis for council on why action on the council's part may or may not be necessary.
24.	**California ICWA Compliance Task Force Report** Review the recommendations in the California ICWA Compliance Task Force Report to the California Attorney General's Bureau of Children's Justice 2017 and make recommendations for legislative and rules and forms revisions and other implementation steps as appropriate	2	Judicial Council Direction: Strategic Plan Goal II Origin of Project:	TBD	Identification of potential projects within the purview of the committee.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			California ICWA Compliance Task Force Report Resources: Tribal Court-State Court Forum and California Supreme Court's Advisory Committee on the Code of Judicial Ethics Key Objective Supported: 2 & 3		
25.	**Consider Mental Health Issues Implementation Task Force Referrals** Review and consider recommendations referred by the Judicial Council following the task force's final report to the council. Recommend appropriate action within the committee's purview.	2	Judicial Council Direction: As referred by the council Origin of Project: Judicial Council Resources: Legal Services, Criminal Justice Services office Key Objective Supported: 2, 3	Ongoing	Unknown

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
26.	**Juvenile Law: Competency issues** To enrich recommendations to the council and avoid duplication of effort, members of the committee will collaborate with members of the Collaborative Justice Courts Advisory Committee, and former members of the Mental Health Issues Implementation Task Force serving on other advisory bodies, to consider developing recommendations to the Judicial Council to: (1) revise rule 5.645 to define appropriate evaluation tools for use with juveniles, (2) amend legislative language to clarify the presumption of competency, (3) suggest other legislative changes necessary to improve the handling of cases where competency issues are raised, and (4) identify effective practices developed by local courts to address juvenile cases in which competency is a factor. Continued work to secure legislative change consistent with the Governor's veto message on AB 935.	2	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: Committee members and numerous suggestions from trial court judges in recent years. Resources: Collaborative Justice Courts Advisory Committee Key Objective Supported: 2, 3	January 1, 2018	Sponsored legislation.
27.	**AB 1058 Funding Allocation Joint Subcommittee:** To enrich recommendations to the council and avoid duplication of effort, members of the committee will continue to collaborate with members of the Trial Court Budget Advisory Committee, the Workload Assessment Advisory Committee, and representatives from the California Department of Child Support Services to reconsider the allocation methodology developed in 1997 and make recommendations to the council for fiscal year 2019-20 allocations. In addition to approving the finalized	Ongoing	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: Legislative mandate Resources:	Ongoing	Judicial Council resolution.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	recommendations on a funding methodology to allocate AB 1058 grant funds, the committee will examine strategies for courts to employ to manage their existing workloads within their future funding allocations to ensure that access to justice in child support matters is not compromised by the reallocation of funds.		Key Objective Supported: 2		
28.	**Dual-Status Youth** Pursuant to Assembly Bill 1911 ([Eggman]; Stats. 2016, ch 637) convene a group of stakeholders to define data elements and outcome tracking for youth involved in the dependency and delinquency system and report to the legislature by January 1, 2018.	1	Judicial Council Direction: Refer by the Judicial Council Origin of Project: Legislature Resources: Key Objective Supported: 2	January 1, 2018	Legislative report.
29.	**Justice Partner Remote Access to Court Records Joint Ad Hoc Subcommittee** To develop an effective set of rules for the council in a timely manner and to avoid duplication of effort, members of the committee will (1) collaborate with members of the Information Technology Advisory Committee and other advisory bodies to develop rules for remote access to court records by parties, their attorneys, and justice partners, and (2) participate in the joint ad hoc subcommittee authorized by the council oversight committees to develop the rules.	1(c)	Judicial Council Direction: Committee charge under CRC 10.43 Origin of Project: Judicial Council and ITAC	January 1, 2019	Adoption of rules effective January 1, 2019.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Resources: Legal Services and IT staff; staff to other advisory committees Key Objective Supported: 2		
30.	**AB 1058 Program Rule Changes** Consider implementation of rule changes to improve the efficient and effective operation of the AB 1058 child support program in the courts to include: a) a new rule setting forth the minimum qualifications for an AB 1058 child support commissioner. b) Amend rule 5.330 to increase compliance with submission of federally required child support registry form. c) Amend rule 5.305(b) to clarify the requirements and timeframe for Title IV-D cases heard by a judge to be directed to the calendar of a child support commissioner. d) Amend rule 5.275 to require that child support calculators include the low income adjustment range on the first page and to conform fee requirements for child support calculator submission to the Judicial Council with current practice of the council not to accept payment of these fees.	1(d)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Program funder and staff. Resources: Legal Services Key Objective Supported: 2, 3	January 1, 2019	New and amended rules to implement needed changes in the program.

#	Project[3]	Priority[4]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
31.	**Minors and nonminor dependents** Continue monitoring implementation, and recommend rule and form changes as necessary, to improve the handling of proceedings involving nonminor dependents. The Judicial Council was a cosponsor of Assembly Bill 12, the original legislation that authorized extended foster care for young adults ages 18 to 21, which was enacted in 2010, with most of its provisions effective January 1, 2012. The council has supported each of the subsequent cleanup bills to make changes to ensure smooth and effective implementation of Assembly Bill 12: Assembly Bill 212 in 2011, Assembly Bill 1712 in 2012, and Assembly Bill 787 (Stone; Stats. 2013, ch. 487) in 2013.	2(a)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Legislative mandate. Resources: Legal Services Key Objective Supported: 2, 3	Ongoing	Revised rules and forms.
32.	**Technical Changes to Rules and Forms** Develop rule and form changes as necessary to correct technical errors meeting the criteria of rule 10.22(d)(2); "a nonsubstantive technical change or correction or a minor substantive change that is unlikely to create controversy…."	2(a)	Judicial Council Direction: Committee charge under rule 10.43 Origin of Project: Judicial Council. Resources: Legal Services Key Objective Supported: 2	Ongoing	Revised rules and forms.

III. STATUS OF 2017 PROJECTS:

[List each of the projects that were included in the 2016 Annual Agenda and provide the status for the project.]

#	Project	Completion Date/Status
1.	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 review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.	
	a.) **AB 424 (Gaines) Court appointed child advocates: wards** *Chapter 71, Statutes of 2015* Summary: Expands the Court Appointed Special Advocate program to allow appointment of CASAs for any minor dependent, nonminor dependent, or ward who is subject to the jurisdiction of the juvenile court.	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Juvenile Law: Court Appointed Special Advocates
	b.) **SB 794 (Comm. on Human Services) Child Welfare Services** Chapter 425, Statues of 2015 Summary: Implements federal legislation that modified title IVE findings that must be made at status review hearings for children in out of home placement.	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Juvenile Law: Title IV-E Findings and Orders
	c.) **AB 1945 (Stone D) Juveniles: sealing of records** *Chapter 858, Statutes of 2016* *Passed by the Assembly and Senate and enrolled to the Governor* Summary: 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.	Completed effective September 1, 2017 Juvenile Law: Sealing of Records
	f.) **AB 2872 (Patterson) Children** *Chapter 702, Statutes of 2016*	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018.

	Summary: Allows an otherwise sealed juvenile case file to be inspected by a court-appointed investigator, acting within the scope of investigative duties of an active case, for the purpose of conducting a stepparent adoption, access to juvenile case files. g.) **SB 1060 (Leno D) Postadoption contact: siblings of dependent children or wards** *Chapter 719, Statutes of 2016* Summary: Requires a county placement agency to convene a meeting with a dependent, the dependent's sibling or siblings. The prospective adoptive parent or parents, and a facilitator, for the purpose of deciding whether to voluntarily execute a postadoption sibling contact agreement. Further requires the court to inquire about the status and results of this meeting at the first six-month review hearing.	Family and Juvenile Law: Stepparent Adoption and Postadoption Contact by Siblings Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Family and Juvenile Law: Stepparent Adoption and Postadoption Contact by Siblings
2.	**Commercially Sexually Exploited Children** Review legislation passed, signed, and chaptered in 2016 related to Commercially Sexually Exploited Children (CSEC) to determine which, if any, of the bills require Rules or Forms. Review to include: AB 1322 (Mitchell), AB 1276 (Santiago), AB 1678 (Santiago), AB 1682 (Stone), AB 1684 (Stone), AB 1702 (Stone), AB 1761 (Weber), AB 2498 (Bonta), SB 823 (Block), SB 1064 (Hancock), SB 1129 (Monning), and AB 2027 (Quirk).	Committee reviewed legislation and determined that no rule or form changes were required to implement the statutory changes.
3.	**Proposition 57** 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.	Completed effective May 22, 2017. Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016
4.	**Proposition 64** Develop rule and form proposal to implement Proposition 64, the "Control, Regulate and Tax Adult Use of Marijuana Act," commonly	Completed effective July 1, 2017 Criminal Procedure and Juvenile Law: Judicial Council Forms Under Proposition 64

	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.	
5.	**FL-800 Joint Petition for Summary Dissolution** Update to reflect change in cost of living per Family Code section 2400(b) as a technical change.	To the Judicial Council proposed to be effective January 1, 2018. Rules and Forms: Technical Amendments
6.	**Family Law: Changes to Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Orders** In continuation of 2015 annual agenda item 1 regarding implementation of AB 1081 (Quirk) effective July 1, 2017, amend rule 5.94 of the California Rules of Court, adopt *Order on Request to Continue Hearing* (form FL-307), and revising two forms, *Declaration Regarding Notice and Service of Request for Temporary Emergency (Ex Parte) Orders* and *Request and Order to Continue Hearing and Extend Temporary Emergency (Ex Parte) Orders*. The proposed changes would respond to specific suggestions from court professionals by increasing efficiencies in processing requests to continue hearings and requests for temporary emergency orders.	Completed effective September 1, 2017. Family Law: Request to Continue Hearing and Declaration Regarding Notice of Request for Temporary Emergency Orders
7.	**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.	Completed effective September 1, 2017. Family Law: Simplifying Limited Scope Representation Forms and Procedures
8.	**Revise CRC 5.380** First adopted by the Judicial Council effective January 1, 2014 to implement in California the requirements of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 authorizing federally recognized tribes to develop their own tribal	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Family Law: Transfers of Title IV-D Child Support Cases Between State and Tribal Court

	title IV-D child support programs when the Yurok Tribe became the first California tribe to begin accepting child support cases. Since initial implementation, the need for revisions to streamline and improve the process have been identified and should be undertaken in light of additional tribal title IV-D programs commencing operations in California.	
9.	**Revise CRC 5.552** To conform to the requirements of subparagraph (f) of section 827 of the Welfare and Institutions Code which was added effective January 1, 2015 to clarify the right of an Indian child's tribe to have access to the juvenile court file of a case involving that child. At that time, no changes were made to California Rules of Court rule 5.552 which implements section 827 of the Welfare and Institutions Code. Contrary to section 827 as amended, rule 5.552 continues to require that representatives of an Indian child's tribe petition the juvenile court if the tribe wants access to the juvenile court file. This inconsistency has created confusion	Approved by RUPRO on July 26, 2017 to be submitted to the Judicial Council and proposed to be effective January 1, 2018. Indian Child Welfare Act: Tribal Access to Court Records
10.	**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 minor ward 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.	Completed effective September 1, 2017. Juvenile Law: Commitment to Department of Corrections and Rehabilitation
11.	**Juvenile Dependency: Court-Appointed-Counsel Workload** Consider a comprehensive update of the attorney workload data and time standards in the current workload model. Because any updates to the workload data and time standards will uniformly affect all trial courts, this pending work should not slow or delay the remaining three-year phase-in period previously approved by the Judicial Council for implementing the new dependency counsel funding methodology. Rather this recommendation recognizes that a	Completed work on small court dependency workload effective July 1, 2017. Juvenile Dependency: Small Court Dependency Workload Working Group Final Recommendations

	comprehensive update could not be completed within the time frame set by the Judicial Council for final report from the joint committees.	

IV. Subgroups/Working Groups - Detail

Subgroups/Working Groups:

Subcommittee or working group name: **Protective Orders Forms Working Group** (includes representatives from the Civil and Small Claims Advisory Committee and Criminal Law Advisory Committee)

Purpose of subcommittee or working group: This working group was established at the direction of RUPRO to coordinate advisory committees' activities concerning protective orders that prevent domestic violence, civil harassment, elder and dependent abuse, and school place violence. The group assists in ensuring that there is consistency and uniformity, to the extent appropriate, in the different protective orders used in family, juvenile, civil, probate and criminal proceedings. The working group helps advisory committees and the Judicial Council by developing and updating Judicial Council protective order forms. It also reviews pending legislation and suggests new legislation to improve protective orders. It prepares proposals changes to the rules of court on protective orders, as necessary or appropriate. The Council has indicated that this advisory committee is to serve as lead for the Protective Orders Forms Working Group.

Number of advisory group members: 8

The Family and Juvenile Law Advisory Committee has 8 members who participate in the Protective Orders Working Group.

Number and description of additional members (not on this advisory group):

In addition to the 8 members from Family and Juvenile Law Advisory Committee, there are 6 members from other advisory groups on the Protective Orders Working Group: Civil and Small Claims (5), Criminal (1), and Domestic Violence Practice and Procedure Task Force (1). There is one former member of the Civil and Small Claims Advisory Committee (a retired commissioner) who is still participating in the group. There is a vacant position for a member of the Probate and Mental Health Advisory Committee.

Date formed: In 2007, at the direction of RUPRO. The formation of an interdisciplinary group to address protective order issues was originally suggested by the Chair of RUPRO in August 2006.

Number of meetings or how often the group meets:

Approximately 6-8 telephone meetings annually, depending on extent of business. (All meetings are by telephone.)

Ongoing or date work is expected to be completed:

Some core working group activities are ongoing—such as updating Judicial Council forms and reviewing legislation. Other activities—such as developing proposed Judicial Council-sponsored legislation—are projects of a specific duration.

Subcommittee or working group name: **Violence Against Women Education Program and Victims of Crime Act Committee**

Purpose of subcommittee or working group: Per Judicial Council referral, VAWEP/VOCA will continue to provide guidance and evaluation of the VAWEP grant-funded projects and make recommendations to improve court practice and procedure in domestic violence cases as directed by the Family and Juvenile Law Advisory Committee and as approved in the advisory committee's annual agenda.

As indicated by the Judicial Council, VAWEP will request that the chair of the Criminal Law Advisory Committee select one or more members of that advisory committee to serve on VAWEP to help address questions relating to court practice and procedure in criminal domestic violence matters.

In addition, the VAWEP/VOCA Committee will serve as the advisory body for use of an 18 month grant pursuant to the federal Victims of Crime Act that will fund education and assistance for courts in increasing compliance with court orders and implementing Marsy's law.

Date formed: 2003 as a committee; designated as a subcommittee by Judicial Council action, August 22, 2014.

Number of meetings or how often the group meets: 1 in person meeting and 1 teleconference anticipated

Ongoing or date work is expected to be completed: Ongoing.

Subcommittee or working group name: **Joint Juvenile Competency Issues Working Group**

Purpose of subcommittee or working group: To enrich recommendations to the council and avoid duplication of effort, members of the committee will collaborate with members of the Collaborative Justice Courts Advisory Committee, and former members of the Mental Health Issues Implementation Task Force serving on other advisory bodies, to consider developing recommendations to the Judicial Council to: (1) revise rule 5.645 to define appropriate evaluation tools for use with juveniles, (2) amend legislative language to clarify the presumption of competency, (3) suggest other legislative changes necessary to improve the handling of cases where competency issues are raised, and (4) identify effective practices developed by local courts to address juvenile cases in which competency is a factor. If AB 935 (Stone) Juvenile proceedings: competency is enacted, work will be commenced on implementing the changes in that legislation. Otherwise legislative changes will be pursued.

Date formed: designated as a subcommittee by RUPRO in December 2014.

Number of meetings or how often the group meets: Teleconferences as needed

Ongoing or date work is expected to be completed: January 1, 2019 if AB 935 is signed and rules and forms are enacted to implement its provisions.

Subcommittee or working group name: **AB 1058 Funding Allocation Joint Subcommittee**

Purpose of subcommittee or working group: To enrich recommendations to the council and avoid duplication of effort, members of the committee will collaborate with members of the Trial Court Budget Advisory Committee, the Workload Assessment Advisory

Committee, and representatives from the California Department of Child Support Services to reconsider the allocation methodology developed in 1997 and report back at the February 2016 Judicial Council meeting.

Date formed: designated as a subcommittee by RUPRO and E&P June 1, 2015.

Number of meetings or how often the group meets: 1 in person meeting anticipated
Ongoing or date work is expected to be completed: Ongoing

Subcommittee or working group name: **Juvenile Dependency: Court-Appointed-Counsel Workload Working Group**
Purpose of subcommittee or working group: Begin fulfilling the Judicial Council's charge to "Consider a comprehensive update of the attorney workload data and time standards in the current workload model" by monitoring and assessing the impact of the new funding provided for court-appointed dependency counsel in the 2017-18 Budget Act. Form subcommittee of Committee members joined by legal services managers, juvenile court judges, court executives, researchers and other stakeholders to guide data collection and analysis, assess impact of the new funding and expanded attorney services, and define outcomes and measures to be used in the update of the current workload model.

Date formed: N/A request designation as a subcommittee by RUPRO on October 23, 2017

Number of meetings or how often the group meets: 4 teleconferences anticipated
Ongoing or date work is expected to be completed: Preliminary report to committee in October 2018

Subcommittee or working group name: **Joint Ad Hoc Subcommittee on Remote Access**
Purpose of subcommittee or working group: The purpose of this subcommittee is to develop rules, standards, and guidelines for online access to court records for parties, their attorneys, local justice partners, and other governmental agencies. (This is part of the Tactical Plan for Technology, 2017-2018, adopted by the Judicial Council.)
Date formed: April 19, 2017 (approved by RUPRO)
Number of meetings or how often group meets: as needed by teleconference only (1 meeting has been held; approximately 4 more are anticipated to complete the project)
Ongoing or date work is expected to be completed: January 1, 2019

Item number:10

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: 10/24/17

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Child Support: Revise Income Withholding for Support and Related Instructions

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

Staff contact (name, phone and e-mail): Gary Slossberg, 916-263-0660, gary.slossberg@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: Item 10: Assembly Bill 1058 Child Support Program Funding
Provide recommendations to the council for allocation of funding pursuant to Family Code sections 4252(b) and 17712. [To remain eligible for federal IV-D funding from the federal government California must be in compliance with federal regulations which require the use of the proposed form.]

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: November 16–17, 2017

Title
Child Support: Revise Income Withholding for Support and Related Instructions

Rules, Forms, Standards, or Statutes Affected
Revise forms FL-195 and FL-196

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
January 1, 2018

Date of Report
October 12, 2017

Contact
Gary Slossberg, 916-263-0660
gary.slossberg@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council approve revisions to *Income Withholding for Support* (form FL-195/OMB 0970-0154) and *Income Withholding for Support—Instructions* (form FL-196/OMB 0970-0154) to comply with Family Code section 5208 and federal law.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective January 1, 2018, approve revisions to *Income Withholding for Support* (form FL-195/OMB 0970-0154) and *Income Withholding for Support—Instructions* (form FL-196/OMB 0970-0154) to comply with Family Code section 5208 and federal law.

The proposed forms are attached at pages 6–16.

Previous Council Action

Income Withholding for Support (form FL-195/OMB 0970-0154) and *Income Withholding for Support—Instructions* (form FL-196/OMB 0970-154) were developed by the federal Office of Child Support Enforcement and were adopted by the Judicial Council on December 2, 1999. The *Income Withholding for Support* form was renumbered, effective January 1, 2003, as FL-195, and the instructions for the FL-195 were renumbered as FL-196. The federal Office of Management and Budget (OMB) revised the form and instructions in 2007, and the Judicial Council revised FL-195 and FL-196 to incorporate the changes made to the federal form, effective July 1, 2008.

The federal OMB revised the form and instructions on May 16, 2011, and the Judicial Council revised FL-195 and FL-196, without circulating the forms for public comment, to incorporate the changes made to the federal forms, effective January 1, 2012. Most recently, the federal OMB revised the form and instructions on July 15, 2014, and the Judicial Council revised FL-195 and FL-196 consistent with the changes made by the OMB, without circulating the forms for public comment, effective January 1, 2015.

Rationale for Recommendation

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) (Pub.L. No. 104-193) instituted welfare reform, which included a requirement that the Office of Child Support Enforcement (OCSE) develop a standardized form to collect child support payments in all title IV-D cases and in nontitle IV-D cases with orders initially issued in the state on or after January 1, 1994. Local child support agencies and the courts that are authorized under state law to issue Income Withholding Orders (IWOs) must use the federal Office of Management and Budget–approved IWO for all child support income withheld by employers.

Family Code section 5208 was amended in 1999 to comply with this federal mandate and required that the federal form *Order/Notice to Withhold Income for Child Support*[1] be used as the earnings assignment order in any action in which child or family support is ordered.[2] Under Family Code section 5208, the Judicial Council must adopt a new version of the federal form without any modifications. California courts are provided an opportunity to comment when federal OCSE solicits comments for revisions to the form via the *Federal Register*.

Significant amounts of federal funding for both welfare and child support programs are contingent on compliance with federal child support program regulations. Thus, it is important that state forms and procedures comply with these regulations. The federal government requires

[1] In 2007, the federal form was renamed *Income Withholding for Support*.
[2] PRWORA requires that states transmit orders and notices for income withholding to employers using uniform formats prescribed by the Secretary of Health and Human Services. (42 U.S.C. § 666(b)(6)(A)(ii).) A copy of 42 U.S.C. § 666(b) can be found at *https://www.law.cornell.edu/uscode/text/42/666*. Family Code section 5208 is available at *https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=FAM&sectionNum=5208*.

that the form be adopted without any local changes to either content or format although—because these are Judicial Council forms—the Judicial Council form numbers would continue to appear on the forms. Adopting these federal forms as Judicial Council forms FL-195 and FL-196 ensures that they are published and made easily available for California users.

In governmental child support cases, after a judgment for child support is issued or child support is modified, the *Income Withholding for Support* (form FL-195) is prepared by the local child support agency and sent to the obligor's employer. The employer then withholds child support from the obligor's earnings consistent with the instruction on the form and sends the child support to the State Distribution Unit. In family law cases where the local child support agency is not involved in enforcing the support order, the wage assignment is usually prepared by the obligee and then filed with the court. The court must issue the order and the order becomes part of the court's record. The obligee then sends the order to the employer for withholding. The Judicial Council adopted the federal form as a Judicial Council form to make this commonly used form readily accessible to family law litigants who are often self-represented, and because this form becomes part of the court's record when the court issues the order.

The *Income Withholding for Support* form previously approved by the Office of Management and Budget was modified to address items identified by states and employers/income withholders. The federal Office of Child Support Enforcement solicited comments for revisions to the *Income Withholding for Support* form via the *Federal Register* on October 4, 2016.[3] The comments were reviewed and many of the recommended changes were incorporated into the revised form. The revised form was issued on August 31, 2017, and became effective immediately, but states are allowed until August 31, 2018, to implement the changes to the form.

Consistent with the changes to the federal form, *Income Withholding for Support* (form FL-195) and *Income Withholding for Support—Instructions* (form FL-196) have been revised. These key changes include:

- Adding an optional field for the employee/obligor's date of birth;
- Clarifying that an entity, including a child support agency, should send a One-Time Order/Notice for Lump Sum Payment after receiving notification of an upcoming lump sum payment by an employer or other source;
- Removing the words "up to" in front of the withholding limit percentage and clarifying that the IWO sender must enter a specific withholding percentage, up to the Consumer Credit Protection Act (CCPA) limits, in the correct data field to avoid overwithholding from a noncustodial parent;
- Clarifying tribal withholding limits and adding links to addresses and contacts for tribes;
- Changing references to FIPS Code to Locator Code;

[3] The request for comment on the *Federal Register* is available at https://www.gpo.gov/fdsys/pkg/FR-2016-10-04/pdf/2016-23865.pdf.

- Adding a link to the OCSE Child Support Portal for employers to report lump sum payments and terminations, and to update information about their company;
- Adding emphasis to fields that are optional and not required; and
- Adding a statement on encryption requirements.

In addition to the changes made by the federal Office of Child Support Enforcement, the Family and Juvenile Law Advisory Committee recommends that the remittance section on page 2 of form FL-195 continue to be prepopulated with the address of the California State Disbursement Unit. This change was part of the form revisions made effective on January 1, 2015, to ensure compliance with federal and state law requiring employers to send all earnings withheld pursuant to the terms of an earnings assignment order to the State Disbursement Unit for disbursement to the obligee—and not directly to the obligee—whether the local child support agency is providing services or not. The addition of the State Disbursement Unit address did not modify the language of the form, but instead prepopulated the form to add information required to be completed by the litigant.

In some rare circumstances, an attorney or litigant may need to access an income withholding order in which the child support payments should not be sent to the California State Disbursement Unit. These circumstances include an attorney who is assisting someone who resides in another state or members of a tribe who have a title IV-D program. In both these circumstances, the payments are still required to be sent to a state disbursement unit, but not California's. In these uncommon situations, a wage withholding order without the California State Disbursement Unit's prepopulated address can be obtained on the federal Office of Child Support Enforcement's website. Since these instances are rare, the Family and Juvenile Law Advisory Committee recommends continuing to prepopulate form FL-195 with the address of the California State Disbursement Unit.

Income Withholding for Support (form FL-195) continues to require that the employee's social security number be included on the form. The intention of this requirement is so that employers can do their due diligence in making sure that the wage assignment received is for the correct employee or where the employer may employ several people with the same name. There may be some concerns regarding potential identity theft and confidentiality. Because this is a mandatory federal form, it cannot be revised to remove this item or provide further instruction to the person completing the form. However, rule 1.201(a)(1) of the California Rules of Court provides, "If an individual's social security number is required in a pleading or other paper filed in the public file, only the last four digits of that number may be used." Compliance with this rule by the person filling out the form will protect the obligor's confidential information while still providing sufficient information for the employer and substantially adhering to the federal form.

Comments, Alternatives Considered, and Policy Implications

The Family and Juvenile Law Advisory Committee did not circulate forms FL-195/OMB 0970-0154 or FL-196/0970-0154 for comment because these forms must be implemented exactly as approved by the OMB without any local changes. The federal forms approval process included a

public comment period and stakeholder input through a federal Office of Child Support Enforcement workgroup, review of the forms and recommendations for changes by the U.S. Government Accountability Office, and approval by OMB.

Because the recommended revisions of *Income Withholding for Support* (FL-195/OMB 0970-0154) and *Income Withholding for Support—Instructions* (FL-196/OMB 0970-0154) are necessary to comply with federal requirements, no alternative actions were considered.

Implementation Requirements, Costs, and Operational Impacts

The committee is not aware of any implementation requirements, costs, or operational impacts affecting the local courts that will result from approval of the proposed forms other than standard reproduction costs. The forms will be posted on the California Courts website. Courts will not incur costs beyond those that they may incur if they provide the forms to the public.

Attachments

1. Forms FL-195/OMB 0970-0154 and FL-196/OMB 0970-0154, at pages 6–16.

INCOME WITHHOLDING FOR SUPPORT

☐ **INCOME WITHHOLDING ORDER/NOTICE FOR SUPPORT (IWO)**
☐ **AMENDED IWO**
☐ **ONE-TIME ORDER/NOTICE FOR LUMP SUM PAYMENT**
☐ **TERMINATION OF IWO**

Date: _____

☐ Child Support Enforcement (CSE) Agency ☐ Court ☐ Attorney ☐ Private Individual/Entity (Check One)

NOTE: This IWO must be regular on its face. Under certain circumstances you must reject this IWO and return it to the sender (see IWO instructions www.acf.hhs.gov/css/resource/income-withholding-for-support-instructions). If you receive this document from someone other than a state or tribal CSE agency or a court, a copy of the underlying support order must be attached.

State/Tribe/Territory _____ Remittance ID (include w/payment) _____
City/County/Dist./Tribe _____ Order ID _____
Private Individual/Entity _____ Case ID _____

_____
Employer/Income Withholder's Name

_____
Employer/Income Withholder's Address

_____

_____

Employer/Income Withholder's FEIN _____

RE: _____
Employee/Obligor's Name (Last, First, Middle)

_____
Employee/Obligor's Social Security Number

_____
Employee/Obligor's Date of Birth

_____
Custodial Party/Obligee's Name (Last, First, Middle)

Child(ren)'s Name(s) (Last, First, Middle)	Child(ren)'s Birth Date(s)

ORDER INFORMATION: This document is based on the support order from _____ (State/Tribe).
You are required by law to deduct these amounts from the employee/obligor's income until further notice.

$ _____ Per _____ current child support
$ _____ Per _____ past-due child support - **Arrears greater than 12 weeks?** ☐ Yes ☐ No
$ _____ Per _____ current cash medical support
$ _____ Per _____ past-due cash medical support
$ _____ Per _____ current spousal support
$ _____ Per _____ past-due spousal support
$ _____ Per _____ other (must specify) _____ .
for a **Total Amount to Withhold** of **$** _____ per _____ .

AMOUNTS TO WITHHOLD: You do not have to vary your pay cycle to be in compliance with the *Order Information*. If your pay cycle does not match the ordered payment cycle, withhold one of the following amounts:

$ _____ per weekly pay period
$ _____ per semimonthly pay period (twice a month)
$ _____ per biweekly pay period (every two weeks)
$ _____ per monthly pay period
$ _____ **Lump Sum Payment:** Do not stop any existing IWO unless you receive a termination order.

Document Tracking ID _____

Employer's Name: _____ Employer FEIN: _____

Employee/Obligor's Name: _____ SSN: _____

Case Identifier: _____ Order Identifier: _____

***REMITTANCE INFORMATION**:* If the employee/obligor's principal place of employment is _____ (State/Tribe), you must begin withholding no later than the first pay period that occurs ____ days after the date of _____. Send payment within ____ business days of the pay date. If you cannot withhold the full amount of support for any or all orders for this employee/obligor, withhold ____% of disposable income for all orders. If the obligor is a non-employee, obtain withholding limits from Supplemental Information. If the employee/obligor's principal place of employment is not _____ (State/Tribe), obtain withholding limitations, time requirements, and any allowable employer fees from the jurisdiction of the employee/obligor's principal place of employment. State-specfic withholding limit information is available at www.acf.hhs.gov/css/resource/state-income-withholding-contacts-and-program-requirements. For tribe-specific contacts, payment addresses, and withholding limitations, please contact the tribe at www.acf.hhs.gov/sites/default/files/programs/css/tribal_agency_contacts_printable_pdf.pdf or https://www.bia.gov/tribalmap/DataDotGovSamples/tld_map.html.

For electronic payment requirements and centralized payment collection and disbursement facility information [State Disbursement Unit (SDU)], see www.acf.hhs.gov/css/employers/employer-responsibilities/payments.

Include the Remittance ID with the payment and if necessary this locator code: _____.

Remit payment to California State Disbursement Unit (SDU/Tribal Order Payee)
at P.O. Box 989067, West Sacramento, CA 95798-9067 (SDU/Tribal Payee Address)

☐ **Return to Sender (Completed by Employer/Income Withholder).** Payment must be directed to an SDU in accordance with sections 466(b)(5) and (6) of the Social Security Act or Tribal Payee (see Payments to SDU below). If payment is not directed to an SDU/Tribal Payee or this IWO is not regular on its face, you *must* check this box and return the IWO to the sender.

If Required by State or Tribal Law:
Signature of Judge/Issuing Official: _____
Print Name of Judge/Issuing Official: _____
Title of Judge/Issuing Official: _____
Date of Signature: _____

If the employee/obligor works in a state or for a tribe that is different from the state or tribe that issued this order, a copy of this IWO must be provided to the employee/obligor.

☐ If checked, the employer/income withholder must provide a copy of this form to the employee/obligor.

ADDITIONAL INFORMATION FOR EMPLOYERS/INCOME WITHHOLDERS

State-specific contact and withholding information can be found on the Federal Employer Services website located at www.acf.hhs.gov/css/resource/state-income-withholding-contacts-and-program-requirements.

Employers/income withholders may use OCSE's Child Support Portal (https://ocsp.acf.hhs.gov/csp/) to provide information about employees who are eligible to receive a lump sum payment, have terminated employment, and to provide contacts, addresses, and other information about their company.

Priority: Withholding for support has priority over any other legal process under State law against the same income (section 466(b)(7) of the Social Security Act). If a federal tax levy is in effect, please notify the sender.

Combining Payments: When remitting payments to an SDU or tribal CSE agency, you may combine withheld amounts from more than one employee/obligor's income in a single payment. You must, however, separately identify each employee/obligor's portion of the payment.

Payments To SDU: You must send child support payments payable by income withholding to the appropriate SDU or to a tribal CSE agency. If this IWO instructs you to send a payment to an entity other than an SDU (e.g., payable to the custodial party, court, or attorney), you must check the box above and return this notice to the sender. Exception: If this IWO was sent by a court, attorney, or private individual/entity and the initial order was entered before January 1, 1994 or the order was issued by a tribal CSE agency, you must follow the “Remit payment to” instructions on this form.

Employer's Name: _____ Employer FEIN: _____

Employee/Obligor's Name: _____ SSN: _____

Case Identifier: _____ Order Identifier: _____

Reporting the Pay Date: You must report the pay date when sending the payment. The pay date is the date on which the amount was withheld from the employee/obligor's wages. You must comply with the law of the state (or tribal law if applicable) of the employee/obligor's principal place of employment regarding time periods within which you must implement the withholding and forward the support payments.

Multiple IWOs: If there is more than one IWO against this employee/obligor and you are unable to fully honor all IWOs due to federal, state, or tribal withholding limits, you must honor all IWOs to the greatest extent possible, giving priority to current support before payment of any past-due support. Follow the state or tribal law/procedure of the employee/obligor's principal place of employment to determine the appropriate allocation method.

Lump Sum Payments: You may be required to notify a state or tribal CSE agency of upcoming lump sum payments to this employee/obligor such as bonuses, commissions, or severance pay. Contact the sender to determine if you are required to report and/or withhold lump sum payments.

Liability: If you have any doubts about the validity of this IWO, contact the sender. If you fail to withhold income from the employee/obligor's income as the IWO directs, you are liable for both the accumulated amount you should have withheld and any penalties set by state or tribal law/procedure.

Anti-discrimination: You are subject to a fine determined under state or tribal law for discharging an employee/obligor from employment, refusing to employ, or taking disciplinary action against an employee/obligor because of this IWO.

Withholding Limits: You may not withhold more than the lesser of: 1) the amounts allowed by the Federal Consumer Credit Protection Act (CCPA) [15 USC §1673 (b)]; or 2) the amounts allowed by the law of the state of the employee/obligor's principal place of employment, if the place of employment is in a state; or the tribal law of the employee/obligor's principal place of employment if the place of employment is under tribal jurisdiction. Disposable income is the net income after mandatory deductions such as: state, federal, local taxes; Social Security taxes; statutory pension contributions; and Medicare taxes. The federal limit is 50% of the disposable income if the obligor is supporting another family and 60% of the disposable income if the obligor is not supporting another family. However, those limits increase 5% --to 55% and 65% --if the arrears are greater than 12 weeks. If permitted by the state or tribe, you may deduct a fee for administrative costs. The combined support amount and fee may not exceed the limit indicated in this section.

Depending upon applicable state or tribal law, you may need to consider amounts paid for health care premiums in determining disposable income and applying appropriate withholding limits.

Arrears Greater Than 12 Weeks? If the ***Order Information*** section does not indicate that the arrears are greater than 12 weeks, then the employer should calculate the CCPA limit using the lower percentage.

Supplemental Information:

Employer's Name: _____ Employer FEIN: _____

Employee/Obligor's Name: _____ SSN: _____

Case Identifier: _____ Order Identifier: _____

NOTIFICATION OF EMPLOYMENT TERMINATION OR INCOME STATUS: If this employee/obligor never worked for you or you are no longer withholding income for this employee/obligor, you must promptly notify the CSE agency and/or the sender by returning this form to the address listed in the contact information below:

☐ This person has never worked for this employer nor received periodic income.

☐ This person no longer works for this employer nor receives periodic income.

Please provide the following information for the employee/obligor:

Termination date: _____ Last known telephone number: _____

Last known address: _____

_____

Final payment date to SDU/Tribal Payee: _____ Final payment amount: _____

New employer's name: _____

New employer's address: _____

_____

CONTACT INFORMATION:

To Employer/Income Withholder: If you have questions, contact _____ (issuer name)

by telephone: _____, by fax: _____, by email or website: _____ .

Send termination/income status notice and other correspondence to:
_____ (issuer address).

To Employee/Obligor: If the employee/obligor has questions, contact _____ (issuer name)

by telephone: _____, by fax: _____, by email or website: _____ .

IMPORTANT: The person completing this form is advised that the information may be shared with the employee/obligor.

Encryption Requirements:
When communicating this form through electronic transmission, precautions must be taken to ensure the security of the data. Child support agencies are encouraged to use the electronic applications provided by the federal Office of Child Support Enforcement. Other electronic means, such as encrypted attachments to emails, may be used if the encryption method is compliant with Federal Information Processing Standard (FIPS) Publication 140-2 (FIPS PUB 140-2).

The Paperwork Reduction Act of 1995
This information collection and associated responses are conducted in accordance with 45 CFR 303.100 of the Child Support Enforcement Program. This form is designed to provide uniformity and standardization. Public reporting for this collection of information is estimated to average two to five minutes per response. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

INCOME WITHHOLDING FOR SUPPORT - Instructions

The Income Withholding for Support (IWO) is the OMB-approved form used for income withholding in:

- tribal, intrastate, and interstate cases enforced under Title IV-D of the Social Security Act
- all child support orders initially issued in the state on or after January 1, 1994, and
- all child support orders initially issued (or modified) in the state before January 1, 1994 if arrearages occur.

This form is the standard format prescribed by the Secretary in accordance with section 466(b)(6)(a)(ii) of the Social Security Act. **Except as noted, the following information is required and must be included.**

Please note:

- For the purpose of this IWO form and these instructions, "state" is defined as a state or territory.
- Dos and don'ts on using this form are found at www.acf.hhs.gov/css/resource/using-the-income-withholding-for-support-form-dos-and-donts.

COMPLETED BY SENDER:

1a. **Income Withholding Order/Notice for Support (IWO).** Check the box if this is an initial IWO.

1b. **Amended IWO.** Check the box to indicate that this form amends a previous IWO. Any changes to an IWO must be done through an amended IWO.

1c. **One-Time Order/Notice For Lump Sum Payment.** Check the box when this IWO is to attach a one-time collection of a lump sum payment after receiving notification from an employer/income withholder or other source. When this box is checked, enter the amount in field 14, Lump Sum Payment, in the *Amounts to Withhold* section. Additional IWOs must be issued to collect subsequent lump sum payments.

1d. **Termination of IWO.** Check the box to stop income withholding on a child support order. Complete all applicable identifying information to aid the employer/income withholder in terminating the correct IWO.

1e. **Date.** Date this form is completed and/or signed.

1f. **Child Support Enforcement (CSE) Agency, Court, Attorney, Private Individual/Entity (Check One).** Check the appropriate box to indicate which entity is sending the IWO. If this IWO is **not** completed by a state or tribal CSE agency, the sender should contact the CSE agency (see www.acf.hhs.gov/programs/css/resource/state-income-withholding-contacts-and-program-requirements) to determine if the CSE agency needs a copy of this form to facilitate payment processing.

NOTE TO EMPLOYER/INCOME WITHHOLDER:

This IWO must be regular on its face. The IWO must be rejected and returned to sender under the following circumstances:

- IWO instructs the employer/income withholder to send a payment to an entity other than a state disbursement unit (for example, payable to the custodial party, court, or attorney). Each state is required to operate a state disbursement unit (SDU), which is a centralized facility for collection and disbursement of child support payments. Exception: If this IWO is issued by a court, attorney, or private individual/entity and the initial child support order was entered before January 1, 1994 or the order was issued by a tribal CSE agency, the employer/income withholder must follow the payment instructions on the form.
- Form does not contain all information necessary for the employer to comply with the withholding.
- Form is altered or contains invalid information.

- Amount to withhold is not a dollar amount.
- Sender has not used the OMB-approved form for the IWO.
- A copy of the underlying order is required and not included.

If you receive this document from an attorney or private individual/entity, a copy of the underlying support order containing a provision authorizing income withholding must be attached.

COMPLETED BY SENDER:

1g. **State/Tribe/Territory.** Name of state or tribe sending this form. This must be a governmental entity of the state or a tribal organization authorized by a tribal government to operate a CSE program. If you are a tribe submitting this form on behalf of another tribe, complete field 1i.

1h. **Remittance ID (include w/payment).** Identifier that employers/income withholders must include when sending payments for this IWO. The Remittance ID is entered as the case identifier on the electronic funds transfer/electronic data interchange (EFT/EDI) record.

NOTE TO EMPLOYER/INCOME WITHHOLDER:

The employer/income withholder must use the Remittance ID when remitting payments so the SDU or tribe can identify and apply the payment correctly. The Remittance ID is entered as the case identifier on the EFT/EDI record.

COMPLETED BY SENDER:

1i. **City/County/Dist./Tribe. Optional** field for the name of the city, county, or district sending this form. If entered, this must be a government entity of the state or the name of the tribe authorized by a tribal government to operate a CSE program for which this form is being sent. If a tribe is submitting this form on behalf of another tribe, enter the name of that tribe.

1j. **Order ID.** Unique identifier associated with a specific child support obligation. It could be a court case number, docket number, or other identifier designated by the sender.

1k. **Private Individual/Entity.** Name of the private individual/entity or non-IV-D tribal CSE organization sending this form.

1l. **Case ID.** Unique identifier assigned to a state or tribal CSE case. In a state IV-D case as defined at 45 Code of Federal Regulations (CFR) 305.1, this is the identifier reported to the Federal Case Registry (FCR). One IWO must be issued for each IV-D case and must use the unique CSE Agency Case ID. For tribes, this would be either the FCR identifier or other applicable identifier.

Fields 2 and 3 refer to the employee/obligor's employer/income withholder and specific case information.

2a. **Employer/Income Withholder's Name.** Name of employer or income withholder.

2b. **Employer/Income Withholder's Address.** Employer/income withholder's mailing address including street/PO box, city, state, and zip code. (This may differ from the employee/obligor's work site.) If the employer/income withholder is a federal government agency, the IWO should be sent to the address listed under Federal Agency Income Withholding Contacts and Program Information at www.acf.hhs.gov/css/resource/federal-agency-iwo-and-medical-contact-information.

2c. **Employer/Income Withholder's FEIN.** Employer/income withholder's nine-digit Federal Employer Identification Number (if available).

3a. **Employee/Obligor's Name.** Employee/obligor's last name and first name. A middle name is **optional**.

3b. **Employee/Obligor's Social Security Number.** Employee/obligor's Social Security number or other taxpayer identification number.

3c. **Employee/Obligor's Date of Birth.** Employee/obligor's date of birth is **optional**.

3d. **Custodial Party/Obligee's Name.** Custodial party/obligee's last name and first name. A middle name is **optional**. Enter one custodial party/obligee's name on each IWO form. Multiple custodial parties/obligees are not to be entered on a single IWO. Issue one IWO per state IV-D case as defined at 45 CFR 305.1.

3e. **Child(ren)'s Name(s).** Child(ren)'s last name(s) and first name(s). A middle name(s) is **optional**. (Note: If there are more than six children for this IWO, list additional children's names and birth dates in the **Supplemental Information** section). Enter the child(ren) associated with the custodial party/obligee and employee/obligor only. Child(ren) of multiple custodial parties/obligees is not to be entered on an IWO.

3f. **Child(ren)'s Birth Date(s).** Date of birth for each child named.

3g. **Blank box.** Space for court stamps, bar codes, or other information.

ORDER INFORMATION – Field 4 identifies which state or tribe issued the order. Fields 5 through 12 identify the dollar amounts for specific kinds of support (taken directly from the support order) and the total amount to withhold for specific time periods.

4. **State/Tribe.** Name of the state or tribe that issued the support order.

5a-b. **Current Child Support.** Dollar amount to be withheld **per** the time period (for example, week, month) specified in the underlying support order.

6a-b. **Past-due Child Support.** Dollar amount to be withheld **per** the time period (for example, week, month) specified in the underlying support order.

6c. **Arrears Greater Than 12 Weeks?** The appropriate box (Yes/No) must be checked indicating whether arrears are greater than 12 weeks.

7a-b. **Current Cash Medical Support.** Dollar amount to be withheld **per** the time period (for example, week, month) specified in the underlying support order.

8a-b. **Past-due Cash Medical Support.** Dollar amount to be withheld **per** the time period (for example, week, month) specified in the underlying support order.

9a-b. **Current Spousal Support.** (Alimony) Dollar amount to be withheld **per** the time period (for example, week, month) specified in the underlying support order.

10a-b. **Past-due Spousal Support.** (Alimony) Dollar amount to be withheld **per** the time period (for example, week, month) specified in the underlying order.

11a-c. **Other.** Miscellaneous obligations dollar amount to be withheld **per** the time period (for example, week, month) specified in the underlying order. **Must specify** a description of the obligation (for example, court fees).

12a-b. **Total Amount to Withhold.** The total amount of the deductions **per** the corresponding time period. Fields 5a, 6a, 7a, 8a, 9a, 10a, and 11a should total the amount in 12a.

NOTE TO EMPLOYER/INCOME WITHHOLDER:

An acceptable method of determining the amount to be paid on a weekly or biweekly basis is to multiply the monthly amount due by 12 and divide that result by the number of pay periods in a year. Additional information about this topic is available in Action Transmittal 16-04, Correctly Withholding Child Support from Weekly and Biweekly Pay Cycles (https://www.acf.hhs.gov/css/resource/correctly-withholding-child-support-from-weekly-and-biweekly-pay-cycles).

COMPLETED BY SENDER:

AMOUNTS TO WITHHOLD - Fields 13a through 13d specify the dollar amount to be withheld for this IWO if the employer/income withholder's pay cycle does not correspond with field 12b.

13a. **Per Weekly Pay Period.** Total amount an employer/income withholder should withhold if the employee/obligor is paid weekly.

13b. **Per Semimonthly Pay Period.** Total amount an employer/income withholder should withhold if the employee/obligor is paid twice a month.

13c. **Per Biweekly Pay Period.** Total amount an employer/income withholder should withhold if the employee/obligor is paid every two weeks.

13d. **Per Monthly Pay Period.** Total amount an employer/income withholder should withhold if the employee/obligor is paid once a month.

14. **Lump Sum Payment.** Dollar amount withheld when the IWO is used to attach a lump sum payment. This field should be used when field 1c is checked.

15. **Document Tracking ID**. **Optional** unique identifier for this form assigned by the sender.

Please Note: Employer's Name, FEIN, Employee/Obligor's Name and SSN, Case ID, and Order ID must appear in the header on page two and subsequent pages.

REMITTANCE INFORMATION - Payments are forwarded to the SDU in each state, unless the initial child support order was entered by a state before January 1, 1994 and never modified, accrued arrears, or was enforced by a child support agency or by a tribal CSE agency. If the order was issued by a tribal CSE agency, the employer/income withholder must follow the remittance instructions on the form.

16. **State/Tribe.** Name of the state or tribe sending this document.

17. **Days**. Number of days after the effective date noted in field 18 in which withholding must begin according to the state or tribal laws/procedures for the employee/obligor's principal place of employment.

18. **Date.** Effective date of this IWO.

19. **Business Days.** Number of business days within which an employer/income withholder must remit amounts withheld pursuant to the state or tribal laws/procedures of the principal place of employment.

20. **Percentage of Disposable Income.** The percentage of disposable income that may be withheld from the employee/obligor's paycheck. It is the sender's responsibility to determine the percentage an employer/income withholder is required to withhold.

NOTE TO EMPLOYER/INCOME WITHHOLDER:

The employer/income withholder may not withhold more than the lesser of: 1) the amounts allowed by the Federal Consumer Credit Protection Act [15 USC §1673(b)]; or 2) the amounts allowed by the jurisdiction of the employee/obligor's principal place of employment (i.e., the amounts allowed by state law if the employee/obligor's principal place of employment is in a state; or the amounts allowed by tribal law if the employee/obligor's principal place of employment is under tribal jurisdiction). State-specific withholding limitations, time requirements, and any allowable employer fees are available at www.acf.hhs.gov/css/resource/state-income-withholding-contacts-and-program-requirements. For tribe-specific contacts, payment addresses, and withholding limitations, please contact the tribe at www.acf.hhs.gov/sites/default/files/programs/css/tribal_agency_contacts_printable_pdf.pdf or https://www.bia.gov/tribalmap/DataDotGovSamples/tld_map.html.

A federal government agency may withhold from a variety of incomes and forms of payment, including voluntary separation incentive payments (buy-out payments), incentive pay, and cash awards. For a more complete list, see 5 CFR 581.103.

COMPLETED BY SENDER:

21. **State/Tribe.** Name of the state or tribe sending this document.

22. **Locator Code.** Geographic Locator Codes are standard codes for states, counties, and cities issued by the National Institute of Standards and Technology. These were formerly known as Federal Information Processing Standards (FIPS) codes.

23. **SDU/Tribal Order Payee.** Name of SDU (or payee specified in the underlying tribal support order) to which payments must be sent.

24. **SDU/Tribal Payee Address.** Address of the SDU (or payee specified in the underlying tribal support order) to which payments must be sent.

COMPLETED BY EMPLOYER/INCOME WITHHOLDER:

25. **Return to Sender Checkbox.** The employer/income withholder should check this box and return the IWO to the sender if this IWO is not payable to an SDU or Tribal Payee or this IWO is not regular on its face as indicated on page 1 of these instructions.

COMPLETED BY SENDER IF REQUIRED BY STATE OR TRIBAL LAW:

26. **Signature of Judge/Issuing Official.** Signature of the official authorizing this IWO.

27. **Print Name of Judge/Issuing Official.** Name of the official authorizing this IWO.

28. **Title of Judge/Issuing Official.** Title of the official authorizing this IWO.

29. **Date of Signature.** Date the judge/issuing official signs this IWO.

30. **Copy of IWO checkbox.** Check this box for all intergovernmental IWOs. If checked, the employer/income withholder is required to provide a copy of the IWO to the employee/obligor.

ADDITIONAL INFORMATION FOR EMPLOYERS/INCOME WITHHOLDERS

The following fields refer to federal, state, or tribal laws that apply to issuing an IWO to an employer/income withholder. State- or tribal-specific information may be included only in the fields below.

COMPLETED BY SENDER:

31. **Liability.** Additional information on the penalty and/or citation of the penalty for an employer/income withholder who fails to comply with the IWO. The state or tribal law/procedures of the employee/obligor's principal place of employment govern the penalty.

32. **Anti-discrimination**. Additional information on the penalty and/or citation of the penalty for an employer/income withholder who discharges, refuses to employ, or disciplines an employee/obligor as a result of the IWO. The state or tribal law/procedures of the employee/obligor's principal place of employment govern the penalty.

33. **Supplemental Information**. Any state-specific information needed, such as maximum withholding percentage for nonemployees/independent contractors, fees the employer/income withholder may charge the obligor for income withholding, or children's names and DOBs if there are more than six children on this IWO. Additional information must be consistent with the requirements of the form and the instructions.

COMPLETED BY EMPLOYER/INCOME WITHHOLDER:

NOTIFICATION OF EMPLOYMENT TERMINATION OR INCOME STATUS

The employer must complete this section when the employee/obligor's employment is terminated, income withholding ceases, or if the employee/obligor has never worked for the employer.

34a-b. **Employment/Income Status Checkbox.** Check the employment/income status of the employee/obligor.

35. **Termination Date.** If applicable, date employee/obligor was terminated.

36. **Last Known Telephone Number.** Last known (home/cell/other) telephone number of the employee/obligor.

37. **Last Known Address.** Last known home/mailing address of the employee/obligor.

38. **Final Payment Date.** Date employer sent final payment to SDU/Tribal Payee.

39. **Final Payment Amount.** Amount of final payment sent to SDU/Tribal Payee.

40. **New Employer's Name.** Name of employee's/obligor's new employer (if known).

41. **New Employer's Address.** Address of employee's/obligor's new employer (if known).

COMPLETED BY SENDER:

CONTACT INFORMATION

42. **Issuer Name (Employer/Income Withholder Contact).** Name of the contact person that the employer/income withholder can call for information regarding this IWO.

43. **Issuer Telephone Number.** Telephone number of the contact person.

44. **Issuer Fax Number. Optional** fax number of the contact person.

45. **Issuer Email/Website. Optional** email or website of the contact person.

46. **Issuer Address (Termination/Income Status and Correspondence Address).** Address to

which the employer should return the Employment Termination or Income Status notice. It is also the address that the employer should use to correspond with the issuing entity.

47. **Issuer Name (Employee/Obligor Contact).** Name of the contact person that the employee/obligor can call for information.

48. **Issuer Telephone Number.** Telephone number of the contact person.

49. **Issuer Fax Number. Optional** fax number of the contact person.

50. **Issuer Email/Website. Optional** email or website of the contact person.

Encryption Requirements:
When communicating the Income Withholding for Support (IWO) through electronic transmission, precautions must be taken to ensure the security of the data. Child support agencies are encouraged to use the electronic applications provided by the federal Office of Child Support Enforcement. Other electronic means, such as encrypted attachments to emails, may be used if the encryption method is compliant with Federal Information Processing Standard (FIPS) Publication 140-2 (FIPS PUB 140-2).

The Paperwork Reduction Act of 1995
This information collection and associated responses are conducted in accordance with 45 CFR 303.100 of the Child Support Enforcement Program. This form is designed to provide uniformity and standardization. Public reporting burden for this collection of information is estimated to average 5 minutes per response for Non-IV-D CPs; 2 minutes per response for employers; 3 seconds for e-IWO employers, including the time for reviewing instructions, gathering and maintaining the data needed, and reviewing the collection of information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Item number:11

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: October 24, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Family Law: Technical Changes to Bifurcation Forms

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: Objectives for 2017

Project description from annual agenda: Advisory Body's Key Objectives for 2017 #2. Provide recommendations to the Judicial Council for changes to or new statewide rules and forms to enable the council to fulfill legislative mandates.

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: November 17, 2017

Title
Family Law: Technical Changes to Bifurcation Forms

Rules, Forms, Standards, or Statutes Affected
Revise forms FL-315 and FL-347

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
January 1, 2018

Date of Report
October 13, 2017

Contact
Gabrielle D. Selden, 415-865-8085
gabrielle.selden@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends technical revisions to two forms—an application and an order for the early termination of marital or partnership status. Specifically, the list of the conditions of granting the bifurcation of the case and ending status early upon a separate trial will be changed to track the language used in Family Code section 2337. This change will ensure that the conditions of granting the bifurcation last until the judgment has been entered on all remaining issues and has become final.

Recommendation

The Family and Juvenile Law Advisory Committee, recommends that the Judicial Council, effective July 1, 2018, revise

1. *Application or Response to Application for Separate Trial* (form FL-315) to clarify that the conditions enumerated in item 4b (2)-(5)) last "until judgment has been entered on all remaining issues and has become final."

2. *Bifurcation of Status of Marriage or Domestic Partnership—Attachment* (form FL-347) to clarify that the conditions enumerated item 5b-e of form FL-347 last "until judgment has been entered on all remaining issues and has become final."

The revised forms are attached at pages 4–9.

Previous Council Action

The Judicial Council adopted form FL-347 and revised form FL-315, effective January 1, 2009.[1] to comply with Assembly Bill 861 (Stats 2006, ch. 141), which amended Family Code section 2337 to require all pension plans be joined before the termination of marital status and the court make orders regarding the distribution of those pension funds. The bill also added optional conditions to Section 2337 to protect the nonmoving party as a result of the termination of marriage or domestic partnership.

Rationale for Recommendation

Committee staff was alerted that there is confusion related to the difference between the language in Family Code section 2337 and the language of the implementing forms, FL-315 and FL-347.

The various sections of the bifurcation statute FC 2337(c)(2)-(5)[2] all begin by stating "Until judgment has been entered on all remaining issues and has become final, the party shall maintain all …existing health and med coverage, indemnify/hold the party harmless from adverse consequences if the bifurcation results in the loss of rights, etc." Forms FL-315 and FL-347 state "Until a judgment has been entered and ***filed*** on all remaining issues…" While this is the most common way for a judgment to become final, it is not accurate in all cases.

Thus, language used in the forms may have the effect of shortening the duration of the protections and responsibilities of the parties under Family Code section 2337 in some cases. For example, a judgment on all remaining issues may *become final* upon filing with the family court soon after a separate trial on the matter. [3] However, some judgments may not become final until an order is made on appeal or following a new trial.[4]

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[1] The full report is available at http://www.courts.ca.gov/documents/102408itema34.pdf

[2] https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=FAM&sectionNum=2337.

[3] Family Code section 2340: A judgment of dissolution of marriage shall specify the date on which the judgment becomes finally effective for the purpose of terminating the marriage relationship of the parties.

[4] Family Code section 2341: (a) Notwithstanding Section 2340, if an appeal is taken from the judgment or a motion for a new trial is made, the dissolution of marriage does not become final until the motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed. (b) Notwithstanding any other provision of law, the filing of an appeal or of a motion for a new trial does not stay the effect of a judgment insofar as it relates to the dissolution of the marriage status and restoring the parties to the status of unmarried persons, unless the appealing or moving party specifies in the notice of appeal or

To remedy a situation in which a party could be denied the complete protections afforded by Family Code section 2337 after the court terminates the marriage or domestic partnership, the committee recommends changing the forms so that they are legally accurate.

Application or Response to Application for Separate Trial (form FL-315)
This form will be revised to clarify that the conditions enumerated in item 4b (2)-(5)) last "until judgment has been entered on all remaining issues and has become final."

Bifurcation of Status of Marriage or Domestic Partnership—Attachment (form FL-347)
This form will be revised to clarify that the conditions enumerated item 5b-e last "until judgment has been entered on all remaining issues and has become final."

Comments, Alternatives Considered, and Policy Implications

Forms FL-315 and FL-347 did not circulate for comment. Under rule 10.22(d)(2) of the California Rules of Court, the recommended revisions to the forms are unlikely to create controversy as described below.

The committee is aware that there are two appeals pending on this issue. The Judicial Council does not have a policy about making a change to a rule or form while an appeal related to that rule or form is pending. The committee recognizes that its recommendations could affect the outcome of those cases. For this reason, the committee considered waiting for the Court of Appeal to make its determination. However, the committee was concerned that waiting to change the form to reflect the statutory language might cause harm to other persons seeking to protect their rights upon bifurcation of the marital status.

Although implementation of the revisions will require courts to incur standard reproduction costs for the forms, the changes will provide clarity about the rights and responsibilities of parties whose marriage or partnership is terminated early in family court.

Attachments and Links

Form FL-315, at pages 4-6
Form FL-347, at pages 7-9

motion for new trial an objection to the termination of the marriage status. No party may make such an objection to the termination of the marriage status unless such an objection was also made at the time of trial.

PETITIONER: RESPONDENT:	CASE NUMBER:

☐ **REQUEST FOR SEPARATE TRIAL** **OR** ☐ **RESPONSE TO REQUEST FOR SEPARATE TRIAL**

Attachment to ☐ ***Request for Order*** **(form FL-300)** ☐ ***Responsive Declaration to Request for Order*** **(form FL-320)**

1. I am the ☐ petitioner ☐ respondent and ☐ request ☐ oppose the request that the court sever (bifurcate) and grant an early and separate trial on the following issue or issues:
   a. ☐ Permanent custody and visitation of the children of the marriage of domestic partnership
   b. ☐ Date of separation of the parties
   c. ☐ Alternate valuation date for property
   d. ☐ Validity of agreement entered into before or during the marriage or domestic partnership
   e. ☐ Dissolution of the status of the marriage or domestic partnership
      (1) I will serve with this application or response my preliminary *Declaration of Disclosure* (form FL-140) and completed *Schedule of Assets* and *Debts* (form FL-142) *and Income and Expense Declaration* (FL-150) unless they have been previously served or the parties have stipulated in writing to defer service.
      (2) All pension or retirement plans in which the community has an interest are listed below or on attachment 1e(2):
      (3) All pension or retirement plans listed in 1e(2) have been joined as a party to this proceeding, unless joinder is precluded or made unnecessary as a matter of law. *(See* Retirement Plan Joinder—Information Sheet (form FL-318-INFO) *to determine if a joinder is required.)*
      (4) I understand that the court may make the orders specified or requested on pages 2 and 3 if the request is granted to bifurcate the status of the marriage or domestic partnership and the marriage or partnership is ended.
      (5) ☐ I request that the court make the orders indicated on pages 2 and 3 and any attachments.

   NOTE: A request for an early termination of your marital or partnership status may have a significant impact on your rights or responsibilities in your case. If you do not understand this form, you should speak with an attorney.

   f. ☐ Other *(specify):*

2. a. ☐ I request that the court conduct this separate trial on the hearing date.
   b. ☐ I will, at the hearing, ask the court to set a date for this separate trial.
3. The reasons in support of this request are *(specify):*

   ☐ Memorandum attached. ☐ Supporting declarations attached.

PETITIONER: RESPONDENT:	CASE NUMBER:

4. Conditions relating to bifurcation of the status of the marriage or partnership:

   a. I understand that the court must enter an order to preserve the claims of each spouse or domestic partner in all retirement plan benefits upon entry of judgment granting a dissolution of the status of the marriage or domestic partnership.

   b. I request that the court order the following as a condition of granting the bifurcation and ending the marriage or partnership upon an early and separate trial:

   (1) ☐ **Division of property**

   The ☐ petitioner ☐ respondent and his or her estate must indemnify and hold me harmless from any taxes, reassessments, interest, and penalties that I have to pay in connection with the division of the community estate that I would not have had to pay if we were still married or in a domestic partnership at the time the division was made.

   (2) ☐ **Health insurance**

   Until judgment has been entered on all remaining issues and has become final ☐ petitioner ☐ respondent must maintain all existing health and medical insurance coverage for me and any minor children as named dependents as long as he or she is eligible to do so. If at any time during this period, he or she is not eligible to maintain that coverage, he or she must, at his or her sole expense, provide and maintain health and medical insurance coverage that is comparable to the existing health and medical insurance coverage to the extent it is available.

   To the extent that coverage is not available, the ☐ petitioner ☐ respondent must be responsible for paying, and demonstrate to the court's satisfaction the ability to pay, for health and medical care for me and the minor children to the extent that care would have been covered by the existing insurance coverage but for the dissolution of marital status or domestic partnership, and must otherwise indemnify and hold me harmless from any adverse consequences resulting from the loss or reduction of the existing coverage.

   (3) ☐ **Probate homestead**

   Until judgment has been entered on all remaining issues and has become final, the ☐ petitioner ☐ respondent must indemnify and hold me harmless from any adverse consequences if the bifurcation results in a termination of my right to a probate homestead in the residence in which I am residing at the time the severance is granted.

   (4) ☐ **Probate family allowance**

   Until judgment has been entered on all remaining issues and has become final, the ☐ petitioner ☐ respondent must indemnify and hold me harmless from any adverse consequences if the bifurcation results in the loss of my right to a probate family allowance as the surviving spouse or surviving domestic partner.

   (5) ☐ **Retirement benefits**

   Until judgment has been entered on all remaining issues and has become final, the ☐ petitioner ☐ respondent must indemnify and hold me harmless from any adverse consequences if the bifurcation results in the loss of my rights with respect to any retirement, survivor, or deferred compensation benefits under any plan, fund, or arrangement, or to any elections or options associated those benefits, to the extent that I would have been entitled to those benefits or elections as the spouse or surviving spouse or the domestic partner or surviving domestic partner.

   (6) ☐ **Social security benefits**

   The ☐ petitioner ☐ respondent must indemnify and hold me harmless from any adverse consequences if the bifurcation results in the loss of rights to social security benefits or elections to the extent that I would have been entitled to those benefits or elections as the surviving spouse or surviving domestic partner.

   (7) ☐ **Beneficiary designation—nonprobate transfer**

   The ☐ petitioner ☐ respondent must maintain the beneficiary designation specified for each Nonprobate Transfer Asset (Probate Code section 5000) identified on the attached list in the percentage indicated. *(See Attachment 7 (not a form), which lists each asset and proposed percentage.)* This designation must stay in effect until judgment has been entered with respect to the community ownership of that asset and until my interest in it has been distributed to me.

PETITIONER: RESPONDENT:	CASE NUMBER:

(8) ☐ **Individual Retirement Accounts**

To preserve the ability of the nonowner to defer the distribution of an Individual Retirement Account (IRA) or annuity upon the death of the owner, the court should make the attached orders assigning and transferring the community interest of ☐ petitioner ☐ respondent in each listed IRA to that party. *(See Attachment 8 (not a form), which lists names of IRAs, account numbers, and amount to be awarded.)*

(9) ☐ **Enforcement of community property rights**

Because it will be difficult to enforce either of our community property rights if one of us dies before the division and distribution or compliance with any court-ordered payment of any community property interest, the court should make the attached order to provide enforcement security for ☐ petitioner ☐ respondent. *(See attachment 9 (not a form), which specifies the security interest to be ordered as provided by Family Code section 2337(c)(9).)*

(10) ☐ **Other conditions that are just and equitable**

I request that the court make the following additional orders:

5. Number of pages attached after this page:

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)

PETITIONER: RESPONDENT:	CASE NUMBER:

BIFURCATION OF STATUS OF MARRIAGE OR DOMESTIC PARTNERSHIP

ATTACHMENT TO ☐ **JUDGMENT (FL-180)** ☐ **FINDINGS AND ORDER AFTER HEARING (FL-340)**

The court grants the request of ☐ petitioner ☐ respondent to bifurcate and grant a separate trial on the issue of the dissolution of the status of the marriage or domestic partnership apart from other issues.

Date marital or domestic partnership status ends (specify):

THE COURT FINDS

1. A preliminary declaration of disclosure with a completed schedule of assets and debts and income and expense declaration has been served on the nonmoving party, or the parties have stipulated in writing to defer service of the preliminary declaration of disclosure until a later time.
2. Each retirement or pension plan of the parties has been joined as a party to the proceeding for dissolution unless joinder is precluded or made unnecessary by applicable law.

THE COURT ORDERS

3. a. To preserve the claims of each party in all retirement plan benefits on entry of judgment granting a dissolution of the status of the marriage or domestic partnership, the court makes one of the following orders for each retirement plan in which either party is a participant:

   (1) A final domestic relations order or qualified domestic relations order under Family Code section 2610 disposing of each party's interest in retirement plan benefits, including survivor and death benefits.

   (2) An interim order preserving the nonemployee party's right to retirement plan benefits, including survivor and death benefits, pending entry of judgment on all remaining issues.

   (3) A provisional order on *Pension Benefits—Attachment to Judgment* (form FL-348) incorporated as an attachment to the judgment of dissolution of the status of marriage or domestic partnership (*Judgment (Family Law)* (form FL-180)). This order provisionally awards to each party a one-half interest in all retirement benefits attributable to employment during the marriage or domestic partnership.

   b. Name of plan:

	Type of order attached 3a(1)	3a(2)	3a(3)
	☐	☐	☐
	☐	☐	☐
	☐	☐	☐

   ☐ See attachment 3b for additional plans.

   c. The moving party must promptly serve on the retirement or pension plan administrator a copy of any order entered under items a and b above and a copy of the judgment granting dissolution of the status of the marriage or domestic partnership (form FL-180).

4. Jurisdiction is reserved for later determination of all other pending issues in this case.

5. The court makes the following additional orders as conditions for granting the severance on the issue of dissolution of the status of marriage or domestic partnership. In the case of the moving party's death, the order continues to be binding on that moving party's estate and will be enforceable against any asset, including the proceeds thereof, to the same extent that these obligations would have been enforceable before the person's death.

   a. ☐ **Division of property**

   The ☐ petitioner ☐ respondent must indemnity and hold the other party harmless from any ☐ taxes, ☐ reassessments, ☐ interest, and ☐ penalties payable by the other party in connection with the division of the community estate that would not have been payable if the parties were still married or domestic partners at the time the division was made.

PETITIONER: RESPONDENT:	CASE NUMBER:

5. b. ☐ **Health insurance**

Until judgment has been entered on all remaining issues and has become final, the ☐ petitioner ☐ respondent must maintain all existing health and medical insurance coverage for the other party, and that party must also maintain any minor children as named dependents, as long as that party is eligible to do so. If at any time during this period the ☐ petitioner ☐ respondent is not eligible to maintain that coverage, that party must, at his or her sole expense, provide and maintain health and medical insurance coverage that is comparable to the existing health and medical insurance coverage to the extent it is available.

If that coverage is not available, the ☐ petitioner ☐ respondent is responsible for paying the health and medical care for the other party and the minor children to the extent that care would have been covered by the existing insurance coverage but for the dissolution of marital status or domestic partnership, and will otherwise indemnify and hold the other party harmless from any adverse consequences resulting from the loss or reduction of the existing coverage. "Health and medical insurance coverage" includes any coverage under any group or individual health or other medical plan, fund, policy, or program.

c. ☐ **Probate homestead**

Until judgment has been entered on all remaining issues and has become final, the ☐ petitioner ☐ respondent must indemnify and hold the other party harmless from any adverse consequences to the other party if the bifurcation results in a termination of the other party's right to a probate homestead in the residence in which the other party resides at the time the severance is granted.

d. ☐ **Probate family allowance**

Until judgment has been entered on all remaining issues and has become final, the ☐ petitioner ☐ respondent must indemnify and hold the other party harmless from any adverse consequences to the other party if the bifurcation results in the loss of the rights of the other party to a probate family allowance as the surviving spouse or surviving domestic partner.

e. ☐ **Retirement benefits**

Except for any retirement plan, fund, or arrangement identified in any order issued and attached as set out in paragraph 3, until judgment has been entered on all remaining issues and has become final, the ☐ petitioner ☐ respondent must indemnify and hold the other party harmless from any adverse consequences to the other party if the bifurcation results in the loss of the other party's rights with respect to any retirement, survivor, or deferred compensation benefits under any plan, fund, or arrangement, or to any elections or options associated with them, to the extent that the other party would have been entitled to those benefits or elections as the spouse or surviving spouse or the domestic partner or surviving domestic partner of the moving party.

f. ☐ **Social security benefits**

The moving party must indemnify and hold the other party harmless from any adverse consequences if the bifurcation results in the loss of rights to social security benefits or elections to the extent the other party would have been entitled to those benefits or elections as the surviving spouse or surviving domestic partner of the moving party.

g. ☐ **Beneficiary designation—nonprobate transfer**

Attachment 5(g), Order Re: Beneficiary Designation for Nonprobate Transfer Assets, will remain in effect for each covered asset until the division of any community interest therein has been completed.

h. ☐ **Individual Retirement Accounts**

Attachment 5(h), Order Re: Division of IRA Under Internal Revenue Code Section 408(d)(6), has been issued to preserve the ability of ☐ petitioner ☐ respondent to defer distribution of his or her community interest on the death of the IRA owner.

PETITIONER: RESPONDENT:	CASE NUMBER:

5. i. ☐ **Enforcement of community property rights**
Good cause exists to make additional orders as set out in Family Code section 2337(c)(9). See Attachment 5(i).

j. ☐ **Other conditions that are just and equitable**
Other:

6. Number of pages attachments:

WARNING: *Judgment (Family Law)* (form FL-180) (status only) must be completed in addition to this form for the status of the marriage or domestic partnership to be ended.

Item number:12

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: October 24, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Family Law: Technical Changes to Limited Scope Representation Rule and Form

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: November 17, 2017

Title
Family Law: Technical Changes to Limited Scope Representation Rule and Form

Rules, Forms, Standards, or Statutes Affected
Amend rule 5.425; revise form 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
January 1, 2018

Date of Report
October 11, 2017

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Executive Summary

The Family and Juvenile Law Advisory Committee recommends technical revisions to one rule of court and one order form used in limited scope representation cases. The technical changes will respond to the concerns recently raised by court clerks about the change in procedure needed because the order form, amended effective September 1, 2017, includes a proof of service on page two. Changing one subdivision of the rule and deleting the proof of service on the order form will allow court clerks to process the order only one time, instead of having to file it two times to comply with the requirements of the rule—once when the judicial officer has signed it, and then when the proof of service on page two is filed with the court.

Recommendation

The Family and Juvenile Law Advisory Committee, recommends that the Judicial Council, effective January 1, 2018:

1. Amend rule 5.425 (e)((3)(G) to specify that, if the court finds that the attorney has completed the agreed-upon work, his or her representation is concluded on the date determined by the court upon service of the signed in the *Order on Completion of Limited Scope Representation* (form FL-958); and

2. Revise *Order on Completion of Limited Scope Representation* (form FL-958) by:
   (a) deleting the proof of service on page 2: and
   (b) revising item 3e. to reflect that the attorney must serve the parties in the case and file the proof of service, unless otherwise directed by the court.

The amended rule and revised form follow on pages 5–6.

Previous Council Action

Effective September 1, 2017, the Judicial Council amended rule 5.425, approved two new forms, and revise 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 simplified withdrawal process was intended 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.

Rationale for Recommendation

After reviewing the Report to the Judicial Council[1] relating to the simplified limited scope representation rule and forms adopted by the council, effective September 1, 2017, a court clerk contacted staff of the Family and Juvenile Law Advisory Committee in mid-August. She stated that the clerks in her court did not understand how to implement rule 5.425 (e)(3)(G)[2] and mandatory *Order on Completion of Limited Scope Representation* (form FL-958)[3] because form FL-958 includes a proof of service on page two. This change to the form seemed to require the order to be filed two times before it is fully processed and the limited scope attorney is relieved as counsel.

The general procedure for processing court orders is the following:

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[1] The Judicial Council report can be found at:
https://jcc.legistar.com/View.ashx?M=F&ID=5107922&GUID=D470C9CC-1B64-4149-993E-D3BE2A2F5F20

[2] Rule 5.425(e)(3)(G) provides: 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).

[3] Item 3e. on form FL-958 provides " The attorney must serve copies of this order on the parties and their attorneys and file the proof of service with the court.

(1) the judicial officer signs the order after hearing;
(2) courtroom staff stamps the original order to be placed in the court file;
(3) copies of the file-stamped orders are served on the parties in the case;
(4) A separate proof of service form is completed; and
(5) The separate, completed proof of service is filed with the court to reflect that the filed order was served.

Effective September 1, 2017, rule 5.425 and form FL-958 require the court clerk to process the order after hearing two times before the attorney can be relieved as the limited scope attorney of record, as follows:

(1) the judicial officer signs the order after hearing;
(2) courtroom staff stamps the original order to be placed in the court file (page 2 is blank);
(3) The attorney serves copies of the file-stamped orders on the parties in the case;
(4) The proof of service on page 2 of the already-filed order is completed; and
(5) The order (with page two completed) is refiled with the court. It receives a second file-stamp date on page one.

The revisions to rule 5.425 and form FL-958 were intended to simplify the procedure for serving the order, make it more convenient for the attorney to comply with the rule, and assure the timely service of the order on all parties. Instead, the procedures specifically relating to cases requiring court intervention to resolve the conflict between the attorney and his or her client have confused court clerks trying to reconcile the requirements of the rule with existing procedures for the efficient processing court orders. This was an unintended consequence of adding a proof of service to the order after hearing.

Change to rule 5.425
In light of the above, the committee recommends amending rule 5.425 (e)(3)(G) as follows:

> If the court finds that the attorney has completed the agreed-upon work, the representation is concluded <u>on the date determined by the court</u> ~~upon service of the signed~~ <u>in the</u> *Order on Completion of Limited Scope Representation* (form FL-958).

This change will also make the rule consistent with the language of the form in item 3b(1)-(3), which allows the judicial officer the discretion to terminate the limited scope attorney's representation effective (1) immediately, (2) upon the filing of the proof of service of the signed order on the client, or (3) as specified in item 3b(3).

Changes to form FL-958
The committee also recommends that *Order on Completion of Limited Scope Representation* (form FL-958) be made a one page form by deleting the proof of service. The committee also

recommends revising item 3.e. on the form to be consistent with rule 5.425(e)(3)(F).[4] To this end, item 3 will be revised to state: "Unless otherwise directed by the court, 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."

Comments, Alternatives Considered, and Policy Implications

This proposal was not circulated for comment. Under rule 10.22(d)(2) of the California Rules of Court, the recommended adjustments to rule 5.425 and form FL-958 are unlikely to create controversy. No other alternatives were considered due to the need implement the changes as soon as possible for the efficient processing of the order after hearing in limited scope representation cases.

Although implementation of the revisions will require courts to incur standard reproduction costs for the forms, the changes will reduce the impact on case management systems in family courts by having an order can be processed following standard court procedures.

Attachments and Links

1. Rule 5.425, at page 5
2. Form FL-958, at page 6

[4] Rule 5.425 (e)(3)(F) provides: The attorney is responsible for filing and serving the *Order* on the client and other parties after the hearing, unless the court directs otherwise.

Rule 5.425 of the California Rules of Court is amended, effective January 1, 2018, to read:

Rule 5.425. Limited scope representation; application of rules

(a)–(d) * * *

(e) Procedures to be relieved as counsel on completion of limited scope representation if client has not signed a substitution of attorney

(1)–(2) * * *

(3) *Objection*

(A)–(D)

(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 <u>on the date determined by the court</u> ~~upon service of the signed~~ <u>in the</u> *Order on Completion of Limited Scope Representation* (form FL-958).

(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:	
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 request of the attorney to be relieved of limited scope representation is denied.
   b. ☐ The attorney is relieved as the limited scope attorney of record for the party/client.
      (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. Unless otherwise directed by the court, the attorney must serve copies of this order on the parties and their attorneys of record and 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. January 1, 2018]

Cal. Rules of Court, rule 5.425
www.courts.ca.gov

PROBATE AND MENTAL HEALTH ADVISORY COMMITTEE
Annual Agenda—2017–2018
Approved by RUPRO: October 23, 2017

I. ADVISORY BODY INFORMATION

Chair:	Hon. John H. Sugiyama, Judge, Superior Court of California, County of Contra Costa
Staff:	Corby Sturges, Attorney, Judicial Council Center for Families, Children & the Courts (CFCC)

Advisory Body's Charge:

California Rules of Court, Rule 10.44:

Probate and Mental Health Advisory Committee

(a) Area of focus

The committee makes recommendations to the council for improving the administration of justice in proceedings involving:

(1) Decedents' estates, trusts, conservatorships, guardianships, and other probate matters; and

(2) Mental health and developmental disabilities issues.

(b) Additional duty

The committee must coordinate activities and work with the Family and Juvenile Law Advisory Committee in areas of common concern and interest.

Advisory Body's Membership: There are currently 17 members of the committee, distributed among the following categories:

(1) Judicial officer with experience in probate: **4 members**

(2) Lawyer or examiner who works for the court on probate or mental health matters: **4 members**

(3) Lawyer whose primary practice involves decedents' estates, trusts, guardianships, conservatorships, or elder abuse law: **3 members; 1 advisory member**

(4) Investigator who works for the court to investigate probate guardianships or conservatorships: **1 member**

(5) Person knowledgeable in mental health or developmental disability law: **2 members**

(6) Person knowledgeable in private management of probate matters in a fiduciary capacity: **1 member**

(7) County counsel, public guardian, or other similar public officer familiar with guardianship and conservatorship issues: **1 member**

Subgroups/Working Groups:

Subgroup or working group name:

- Legislation Subcommittee
- Civil Mental Health Issues Subcommittee
- New Legal Mental Capacity Working Group
- New Guardianship Process Working Group
- Joint Ad Hoc Subcommittee on Remote Access

Advisory Body's Key Objectives for 2018:

- Make recommendations for improving practice and procedure, access to the courts, court supervision of fiduciaries, and protection of vulnerable persons in court proceedings under the Probate Code and the Lanterman-Petris-Short Act.
- Recommend comprehensive revisions to Judicial Council forms for use in probate guardianship proceedings to simplify judicial practice and procedure and promote meaningful access to the courts for petitioners, children, and parents.
- Recommend revisions to Judicial Council forms used to provide evidence of legal mental capacity in conservatorship proceedings.
- Collaborate with the Information Technology Advisory Committee and the Civil and Small Claims Advisory Committee to develop or amend rules of court to facilitate delivery of notice and other documents by electronic means and to develop rules for remote electronic access to probate court records.
- Continue implementation of the California Conservatorship Jurisdiction Act to facilitate transfers of conservatorships between California and other states.
- Develop recommendations to promote greater efficiency and cost savings in court management and disposition of probate proceedings.

II. ADVISORY BODY PROJECTS

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1.	Proposal for global review and revision of the Judicial Council guardianship forms to simplify them, make them more accessible to self-represented litigants, and allow more effective communication of information to the court. Coordinate with Family and Juvenile Law Advisory Committee, Tribal Court-State Court Forum, and Advisory Committee on Providing Access and Fairness to promote access to, coordination of, and consistency among all proceedings affecting custody of children at risk of abuse, neglect, or abandonment.	1(e)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B1; Goal IV, Policies 3, 4, 5, 8; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Probate Attorneys, Superior Courts of Los Angeles, Orange, Riverside, Sacramento, San Diego, San Joaquin, and Santa Clara Counties *Resources:* Family and Juvenile Law Advisory Committee; Tribal Court-State Court Forum; Advisory Committee on Providing Access and Fairness *Key Objectives Supported:* 1, 2, 6	This is a multiyear project. Review was begun in 2017; proposals for new or revised forms will go forward in stages, and the first set of forms is anticipated to take effect January 1, 2019.	New and revised Judicial Council forms for use in guardianship proceedings. Possible new or amended rules of court. Potential revisions include increased notice to parents of their continuing liability for support and potential adverse consequences of for their parental rights, as well as clarification of jurisdictional requirements for guardianships of the estate.
2.	Proposal to update form GC-205, the probate court *Guardianship Pamphlet*, to reflect current law and increase	1(a), 1(e)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B1; Operational Plan, Goal III, Objective 5a.	September 1, 2018	New and revised forms to provide accurate information to prospective guardians

[1] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.
[2] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
	accessibility for self-represented petitioners; to develop an analogous informational pamphlet for parents of children who are subject to guardianship petitions to ensure the provision of due process in these proceedings; to coordinate with Family and Juvenile Law Advisory Committee's proposed update of form JV-350, the juvenile court *Guardianship Pamphlet.* Potential related revisions to other guardianship forms.		*Origin of Project:* Assembly Bill 2380 (Stats. 2016, ch. 882); Probate Attorneys, Superior Courts of Los Angeles, Orange, Riverside, and San Joaquin Counties *Resources:* Family and Juvenile Law Advisory Committee; Center for Families, Children & the Courts *Key Objectives Supported:* 1, 2, 6		and parents in guardianship proceedings in both probate court and juvenile court.
3.	Proposal to examine the federal Indian Child Welfare Act (ICWA) regulations (25 CFR § 23 et seq.) that took effect December 12, 2016, and the ICWA Compliance Task Force Report presented to the California Attorney General on March 24, 2017, to identify and implement changes to rules and forms needed to comply with ICWA in probate guardianship proceedings.	1(a), 1(e)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B1; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Federal Bureau of Indian Affairs; Tribal Court/State Court Forum *Resources:* Tribal Court-State Court Forum; Family and Juvenile Law Advisory Committee; Advisory Committee on Providing Access and Fairness; Center for Families, Children & the Courts *Key Objectives Supported:* 1, 2, 6	January 1, 2019	New or revised forms; amended rules

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
4.	Review report of the ICWA Compliance Task Force presented to the Attorney General on March 24, 2017, to determine whether action on any of the report's recommendations is within the committee's purview. Coordinate review with the Family and Juvenile Law Advisory Committee and the Tribal Court-State Court Forum.	2(b)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B1; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Federal Bureau of Indian Affairs; Tribal Court/State Court Forum *Resources:* Tribal Court-State Court Forum; Family and Juvenile Law Advisory Committee; Center for Families, Children & the Courts *Key Objectives Supported:* 1, 2, 6	January 1, 2019	Recommendations for action within the committee's purview to promote better compliance with ICWA's requirements in probate guardianship proceedings.
5.	Proposal to develop new Judicial Council forms to facilitate transfer of conservatorships to and from California under the California Conservatorship Jurisdiction Act (Prob. Code §§ 1980–2033; added by Stats. 2014, ch. 553), to revise and simplify registration forms, and to clarify necessary jurisdictional facts.	1(b)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B2 Operational Plan, Goal III, Objective 5. *Origin of Project:* California Conservatorship Jurisdiction Act, SB 940 (Stats. 2014, ch. 553), probate court attorneys *Resources:* *Key Objective Supported:* 1, 5, 6	New and revised forms anticipated to take effect September 1, 2018.	New forms for transferring conservatorship proceedings to or from California, revised forms for registering out-of-state conservatorships in California.
6.	Proposal to revise *Capacity Declaration—Conservatorship* (form GC-335) and *Dementia Attachment to Capacity Declaration—Conservatorship*	1(a), 1(e)	*Judicial Council Direction:* Strategic Plan, Goal IV, Policy 3; Operational Plan, Goal IV, Objective 1f.	This would be a multi-year project, with consultation of medical experts and legislative analysis continuing	Possible amendment of Probate Code section 811; substantially revised capacity declaration and

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	(form GC-335A) to facilitate completion of the form by clinical psychologists and psychiatrists consistent with law without diminishing its usefulness to the courts. Provide expressly for placement of a submitted form in the confidential portion of the case file. Replace "dementia" with "major neurocognitive disorder" or "MNCD" to conform to SB 413 (Stats. 2017, ch. 122).		*Origin of Project:* Committee Chair, probate judges and court attorneys; psychiatrists and clinical psychologists *Resources:* experts in psychiatry and clinical psychology *Key Objective Supported:* 1, 3, 6	from 2017 and revised forms to take effect no sooner than January 1, 2019.	dementia attachment for use in conservatorships and, possibly, other proceedings.
7.	Proposal to revoke the special fee waiver forms for use in guardianship and conservatorship proceedings and, if necessary, to revise the civil fee waiver forms to accommodate the distinction between the petitioner and the applicant in guardianship and conservatorship proceedings.	1(e)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B1; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Superior Courts of Contra Costa, Orange, Riverside, San Joaquin, Stanislaus Counties *Resources:* JCC Governmental Affairs; Civil and Small Claims Advisory Committee *Key Objective Supported:* 1, 2, 6	January 1, 2019	Revoked fee waiver forms. Possible minor revisions to the civil fee waiver forms to conform to statute.
8.	Review and consider recommendations for changes in law, practice, and procedure in limited conservatorships for the	1(e)	*Judicial Council Direction:* CRC, rule 10.44(a)(1) Strategic Plan, Goal I, Policy 10; Goal IV, Policy 3;	January 1, 2019	Amended rules of court, new or revised Judicial Council forms, including provisions

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	developmentally disabled, including rules of court concerning qualifications and continuing education requirements for counsel appointed by the court in conservatorship proceedings, including counsel for (proposed) limited conservatees.		Operational Plan, Goal I, Objective 3; Goal IV, Objective 1f. *Origin of Project:* This project arose out of a 2014 request from the Disability & Abuse Project of the Spectrum Institute for creation of a limited conservatorship task force modeled after the 2006 Chief Justice's Probate Conservatorship Task Force. The committee considered the request at a public portion of its November 2014 meeting, but did not recommend creating a task force. *Resources:* Governmental Affairs, Advisory Committee on Providing Access and Fairness; Center for Families, Children & the Courts; Center for Judiciary Education and Research *Key Objective Supported:* 1, 3, 6		for training of judicial officers, court staff, and court-appointed counsel in limited conservatorship cases.
9.	Monitor the implementation, in probate guardianship proceedings, of the directives in section 155 of the Code of Civil Procedure (added by Stats. 2014, ch. 685, § 1) and section 1510.1 of the Probate Code (added by Stats. 2015, ch. 694) concerning	1(b)	*Judicial Council Direction:* Strategic Plan, Goal IV, Policy 3; Operational Plan, Goal IV, Objectives 1d and 1f. *Origin of Project:* Legislation enacted in response to wave of unaccompanied immigrant	Ongoing. Monitoring Supreme Court review of *Bianka M. v. Superior Court* (S233757) to identify any necessary rule amendments or form revisions.	Possible amended rules of court and revised Judicial Council forms to the extent needed to conform to changes to the law and to help courts process petitions for SIJ findings in

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	judicial findings to support (proposed) wards' petitions for Special Immigrant Juvenile (SIJ) status in federal immigration proceedings.		children entering California. When appropriate, implementation will be in collaboration with the Family and Juvenile Law Advisory Committee; the Center for Families, Children & the Courts; and the Center for Judiciary Education and Research. *Resources:* Family and Juvenile Law Advisory Committee; Center for Families, Children & the Courts; and Center for Judiciary Education and Research *Key Objectives Supported:* 1, 2, 6		probate guardianship proceedings.
10.	Consider recommendations within committee's purview for promoting access to the courts and protecting the legal interests of persons suffering from mental disorders or intellectual disabilities, including recommendations 24–27 of the Mental Health Issues Implementation Task Force as referred by the Judicial Council to PMHAC.	2	*Judicial Council Direction:* As referred by the Judicial Council and Strategic Plan, Goal III, Policy 6; Goal IV, Policies 3, 4, 5, 8; Operational Plan, Goal III, Objective B5a *Origin of Project:* The Judicial Council's Task Forces for Criminal Justice Collaboration on Mental Health Issues and Mental Health Issues Implementation. *Resources:* Center for Families, Children & the Courts (CFCC), Criminal Justice Services	Ongoing. On hold pending Supreme Court review of *Jackson v. Superior Court* (S235549) (if IST defendant not restored to competence at end of 3-year commitment period, may prosecution initiate new competency proceeding by dismissing charges and file new charging document?).	Informal protocol to coordinate to coordinate proceedings to appoint a mental health conservator under the Lanterman-Petris-Short Act with civil commitment, probate conservatorship, or criminal proceedings regarding the same person.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Key Objectives Supported: 1, 3, 6		
11.	Modernization Project—Phase 2 (with Information Technology Advisory Committee): Collaborate with ITAC to identify and develop any rule amendments or form revisions needed to implement Assembly Bill 976 (Stats. 2017, ch. 319), Judicial Council-sponsored legislation authorizing consensual electronic service of notice.	1(b), 2(b)	*Judicial Council Direction:* Goal III, Policy B1 Operational Plan, Goal III, Objective 5a *Origin of Project:* Information Technology Advisory Committee *Resources:* Information Technology Advisory Committee, Information Technology Advisory Committee *Key Objective Supported:* 1, 6	July 1, 2019.	Rule and form changes, if needed.
12.	Proposal to review the Judicial Council forms for proceedings to approve a minor's compromise and, if needed, recommend revisions to resolve inconsistencies with statute or other forms.	1(e)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B2; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Judge, Superior Court of Orange County *Resources:* *Key Objective Supported:* 1, 6	January 1, 2019	Possible revisions to forms MC-350, MC-350EX, MC-315, MC-355, and MC-356

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
13.	Consider proposal for rules of court and forms for simplified guardianship accountings in which all funds are held in blocked account.	2(b)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B2; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Judge, Superior Court, County of San Bernardino *Resources:* Probate court attorneys and examiners *Key Objective Supported:* 1, 2, 6	September 1, 2019	Streamlined and simplified procedure and forms for use in appropriate guardianship accountings.
14.	Proposal for legislation to amend Probate Code to permit funeral expenses of a decedent to be treated as administration expenses and thus payable without creditors' claims on his or her estate.	2	*Judicial Council Direction:* Strategic Plan, Goal III, Policy B2; Operational Plan, Goal III, Objective 5a. *Origin of Project:* Managing Probate Attorney, Superior Court of Riverside County *Resources:* JCC Governmental Affairs *Key Objective Supported:* 1, 6	Effective date of legislation, January 1, 2020.	Smoother estate administration that would permit estates to reimburse funeral expenses paid at or before commencement of administration by the decedent's family members.
15.	Review and analyze pending legislation affecting practice and procedure in proceedings under the Probate Code and in mental health law to assist the Judicial	1	*Judicial Council Direction:* CRC, rule 10.44(a) *Origin of Project:*	Ongoing	Recommendations to the Judicial Council's Policy Coordination and Liaison Committee for council positions on legislation affecting

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	Council in developing positions concerning the legislation.		This project has been a core committee function since creation of the permanent committee in 2000. *Resources:* JCC Governmental Affairs *Key Objective Supported:* 1, 6		probate and civil mental health proceedings.
16.	Review and analyze reported appellate court decisions in proceedings under the Probate Code and in civil mental health matters during the current year and make recommendations for legislative changes and changes in practice and procedure made necessary or advisable by these decisions.	1	*Judicial Council Direction:* CRC, rule 10.44(a) *Origin of Project:* This project has been a core committee function since the committee was made a permanent advisory committee in 2000. *Resources:* *Key Objective Supported:* 1, 6	Ongoing	Recommendations for legislation or changes in court rules and forms in response to appellate court decisions.
17.	Collaborate with members of the Information Technology Advisory Committee and other advisory bodies and staff to develop rules for remote access to court records by parties, their attorneys, and justice partners; and (2) participate in the joint ad hoc subcommittee authorized by the council oversight committees to develop the rules.	1(c)	*Judicial Council Direction:* Committee charge in CRC 10.44 *Origin of Project:* Judicial Council and ITAC *Resources:* joint Ad Hoc Subcommittee on Remote Access; Legal Services and IT staff; staff to other advisory committees *Key Objective Supported:* 4, 6	January 1, 2019	Adoption of new and amended rules of court, effective January 1, 2019.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
18.	Proposal to amend rule 10.44(c) to dedicate one committee position to a lawyer employed by a nonprofit organization or court self-help center whose primary practice involves guardianships and conservatorships.	1(e)	*Judicial Council Direction:* Strategic Plan, Goal III, Policy 6; Goal IV, Policies 3, 4, 5, 8; Operational Plan, Goal III, Objective B5a *Origin of Project:* Committee chair and lead staff *Resources:* Center for Families, Children & the Courts (CFCC) *Key Objectives Supported:* 1, 2, 3, 5, 6	March 2018	New membership category in rule 10.44(c); improved access to courts
19.	Consult with Court Executives Advisory Committee on proposal to address possible conflict in court records retention statutes affecting retention of original wills and codicils. This proposal carries over from 2016, when CEAC withdrew this element from its records retention legislation. (AB 1443; Stats. 2017, ch. 172.)	2	*Judicial Council Direction:* Strategic Plan, Goal III, Policy A2; Operational Plan, Goal III, Objective 2b. *Origin of Project:* Court Executives Advisory Committee *Resources:* Court Executives Advisory Committee JCC Governmental Affairs JCC Legal Services, Legal Opinions Unit *Key Objective Supported:* 1, 6	January 1, 2020	Clarification of the law to specify how long court must retain original wills and codicils that have not been probated and when those wills and codicils may instead be stored in electronic form.

III. STATUS OF 2017 PROJECTS:

#	Project	Completion Date/Status
1	Proposal for general review and possible revision of the forms used for guardianship proceedings to simplify them and make them more accessible to self-represented litigants.	Ongoing
2	Collaborate with Family and Juvenile Law Advisory Committee to identify, consider, and propose resolution of issues crossing over among probate guardianship, family law custody, and juvenile dependency proceedings. Issues already identified include disparate investigatory resources, the availability of remedial services and judicial authority to order them, and procedures for referrals from family or probate court to child welfare if the court has reason to believe that a child may be abused or neglected.	Incorporated into item 1 at request of Family and Juvenile Law Advisory Committee.
3	Monitor the implementation, in probate guardianship proceedings, of the directives in section 155 of the Code of Civil Procedure (added by Stats. 2014, ch. 685, § 1) and section 1510.1 of the Probate Code (added by Stats. 2015, ch. 694) concerning judicial findings to support (proposed) wards' petitions for Special Immigrant Juvenile (SIJ) status in federal immigration proceedings.	Ongoing
4	Consider recommendations within committee's purview for promoting access to the courts and protecting the legal interests of persons suffering from mental disorders or intellectual disabilities, including recommendations 24–27 of the Mental Health Issues Implementation Task Force as referred by the Judicial Council to PMHAC.	Ongoing
5	Develop model protocol to coordinate civil commitment proceedings, conservatorship proceedings under the Probate Code and the Lanterman-Petris-Short Act, and criminal proceedings when directed at the same person.	Deferred pending Supreme Court review in *Jackson v. Superior Court* (S235549; argued Oct. 2, 2017).
6	Proposal for revision of the *Capacity Declaration—Conservatorship* (form GC-335) to facilitate completion of the form by clinical psychologists and psychiatrists consistent with law without diminishing its usefulness to the courts. Provide	Ongoing

	expressly for placement of a submitted form in the confidential portion of the case file.	
7	Review and consider recommendations for changes in law, practice, and procedure in limited conservatorships for the developmentally disabled, including rules of court concerning qualifications and continuing education requirements for counsel appointed by the court for (proposed) limited conservatees.	Ongoing
8	Proposal for new Judicial Council forms to implement transfer of conservatorships under the California Conservatorship Jurisdiction Act (Chapter 8 of Part 3 of Division 4 of the Probate Code, commencing with section 1980), added by SB 940 (Stats. 2014, ch. 553), and revised forms to clarify necessary jurisdictional facts under the Act.	Ongoing
9	Modernization Project—Phase 2 (with ITAC): Monitor legislative progress of Judicial Council-sponsored amendments of Probate Code provisions governing service of notice to permit consensual e-service of notice. Revise existing Judicial Council forms to provide for consent to e-service of notice and proof of service by electronic means.	Ongoing
10	Consult with CEAC on proposal to address possible conflict in court records retention statutes affecting retention of original wills and codicils. This proposal carries over from 2016, as CEAC withdrew that element of its legislative proposal addressing records retention (AB 1443; Stats. 2017, ch. 172).	The committee did not work on this project this year and has included it on this year's agenda at CEAC's request.
11	Develop legislative proposal to apply section 2361's requirement that a conservator give notice of the conservatee's death to conservators of the estate and to require notice to all persons entitled under section 2581 of the code.	The committee did not work on this project this year.
12	Consider proposal for rules of court and forms for simplified guardianship accountings in which all funds are held in blocked account.	The committee did not work on this project this year and included it on this year's annual agenda.
13	Consider proposed legislation to dispense with filing fees for petitions to establish a guardianship of the person only, and for petitions filed by appointed guardians in these cases.	Recast as proposal to revoke or revise fee waiver forms.

14	Proposal for legislation to amend Probate Code to permit funeral expenses of a decedent to be treated as administration expenses and thus payable without creditors' claims in his or her estate.	The committee did not work on this project this year and included it on this year's annual agenda.
15	Consider options to assist courts to implement Assembly Bill 2380 (Stats. 2016, ch. 882), which requires a criminal court, at arraignment, to provide specific information about options to arrange child care to a felony defendant who is the sole custodial parent of a minor child.	Disseminated information to courts on Judicial Resource Network regarding options available to defendants who are sole custodial parents. Incorporated elements of this project into ongoing proposal to revise guardianship pamphlets for both probate court proceedings and juvenile court proceedings.
16	Review the Judicial Council forms for proceedings to approve a minor's compromise and, if needed, recommend revisions to resolve inconsistencies with statute or other forms.	Ongoing
17	Review and analyze pending legislation affecting practice and procedure in proceedings under the Probate Code and in mental health law to assist the Judicial Council in developing positions concerning the legislation.	Ongoing
18	Review and analyze reported appellate court decisions in proceedings under the Probate Code and in civil mental health matters during the current year and make recommendations for legislative changes and changes in practice and procedure made necessary or advisable by these decisions.	Ongoing
19	Collaborate with members of the Information Technology Advisory Committee and other advisory bodies to develop rules for remote access to court records by parties, their attorneys, and justice partners; and (2) participate in the joint ad hoc subcommittee authorized by the council oversight committees to develop the rules.	Ongoing

IV. Subgroups/Working Groups—Detail

Subgroups/Working Groups:

Subgroup or working group name: Legislation Subcommittee

Purpose of subgroup or working group: Review current legislation affecting the judicial branch and make recommendations to Judicial Council's Policy Coordination and Liaison Committee for development of the Judicial Council positions on the legislation; provide technical assistance to make improvements in probate-related legislative proposals.

Number of advisory body members on the subgroup or working group: **6**

Number and description of additional members (not on this advisory body): **0**

Date formed: July 1, 2000.

Number of meetings or how often the subgroup or working group meets: Monthly (by teleconference) when the California Legislature is in session.

Ongoing or date work is expected to be completed: Ongoing

Subgroup or working group name: Civil Mental Health Issues Subcommittee

Purpose of subgroup or working group: Review mental health issues that arise in proceedings under the Probate Code and in civil mental health proceedings—including recommendations the Mental Health Issues Implementation Task Force as referred by the Judicial Council—identify issues within committee purview, and recommend appropriate Judicial Council action. Provide technical assistance to other advisory committees considering proposals related to mental health issues as they arise in criminal, family, and juvenile law.

Number of advisory body members on the subgroup or working group: **4**

Number and description of additional members (not on this advisory body): **0**

Date formed: February 26, 2016

Number of meetings or how often the subgroup or working group meets: As needed by teleconference

Ongoing or date work is expected to be completed: As needed.

Subgroup or working group name: New Legal Mental Capacity Working Group

Purpose of subgroup or working group: Examine proposals to update and refine procedures for determining legal mental capacity in various contexts, including proposal to revise the *Capacity Declaration—Conservatorship* (form GC-335) and the *Dementia Attachment to Capacity Declaration—Conservatorship* (form GC-335A).

Number of advisory body members on the subgroup or working group: **4**

Number and description of additional members (not on this advisory body): **3** (1 judicial officer, 2 clinical experts)

Date formed: November 1, 2017

Number of meetings or how often the subgroup or working group meets: Monthly by teleconference

Ongoing or date work is expected to be completed: January 1, 2019

Subgroup or working group name: New Guardianship Process Working Group

Purpose of subgroup or working group: Develop ways of simplifying the process for filing and adjudicating guardianship petitions and for making the process more accessible to self-represented litigants, including petitioners, parents, and children.

Number of advisory body members on the subgroup or working group: **5**

Number and description of additional members (not on this advisory body): **2** court attorneys

Date formed: November 1, 2017

Number of meetings or how often the subgroup or working group meets: Monthly by teleconference

Ongoing or date work is expected to be completed: January 1, 2020

Subgroup or working group name: Joint Ad Hoc Subcommittee on Remote Access

Purpose of subgroup or working group: Develop rules, standards, and guidelines for online access to court records for parties, their attorneys, local justice partners, and other governmental agencies. (This is part of the Tactical Plan for Technology, 2017-2018, adopted by the Judicial Council.)

Number of advisory body members on the subgroup or working group: **1**

Number and description of additional members (not on this advisory body): **11**

Date formed: April 19, 2017

Number of meetings or how often the subgroup or working group meets: As needed by teleconference (1 meeting has been held; approximately 4 more are anticipated)

Ongoing or date work is expected to be completed: January 1, 2019

Traffic Advisory Committee
Annual Agenda—2018
Approved by RUPRO: TBD,

I. ADVISORY BODY INFORMATION

Chair:	Hon. Gail Dekreon
Staff:	Ms. Jamie Schechter and Ms. Kimberly DaSilva, Criminal Justice Services

Advisory Body's Charge: Under rule 10.54 of the California Rules of Court, the committee makes recommendations to the council for improving the administration of justice in the area of traffic procedure, practice, and case management and in other areas as set forth in the fish and game, boating, forestry, public utilities, parks and recreation, and business licensing bail schedules. Over the course of the past few years, a significant amount of changes has occurred in traffic procedure. We anticipate that trend will continue and that this committee will respond to those changes as it has done so in the past.

Advisory Body's Membership: Thirteen members; 6 trial court judicial officers, 1 juvenile traffic hearing officer, 2 judicial administrators, 1 criminal defense lawyer, 1 representative from the California Highway Patrol, 1 representative from the Department of Motor Vehicles, and 1 representative from the California Office of Traffic Safety.

Subgroups/Working Groups: None

Advisory Body's Key Objectives for 2018:

Provide recommendations to the Judicial Council that:

1. Support rule, form, and bail schedule proposals to promote timely, effective, technologically current, fair, and accessible processing of traffic proceedings;
2. Support proposals on traffic fines, fees, assessments, and forfeitures to promote improved and fair imposition and collection, while also improving access;
3. Assist Governmental Affairs in developing Judicial Council-sponsored legislation involving proceedings in traffic court, and responding to proposed legislative developments;
4. Investigate the development of a statewide form repository for traffic court forms;
5. Create tools to assist bench officers, court staff, justice partners, and the public in traffic proceedings;
6. Educate bench officers, court staff, justice partners, and the public on procedures in traffic court; and
7. Investigate methods to notify criminal justice partners, including law enforcement, of changes to relevant forms.

II. ADVISORY BODY PROJECTS

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
1	**2018 Bail Schedules Revision.** Revise the annual Uniform Bail and Penalty Schedules.	1 – Must be done	Judicial Council Direction: Strategic Plan Goal III. Modernization of Management and Administration; Operational Plan Objective: III.4. Uphold the integrity of court orders, protect court user safety, and improve public understanding of compliance requirements; improve the collection of fines, fees, and forfeitures statewide. Origin of Project: Vehicle Code section 40310 requires the Judicial Council to adopt an annual schedule for nonparking traffic infractions. California Rule of Court 4.103 requires the Judicial Council to adopt annual schedules of the following other schedules: traffic misdemeanors, boating, forestry, fish and game, public utilities, parks and recreation, and business licensing. Resources: Governmental Affairs (GA) staff assists committee and Criminal Justice Services staff with tracking legislation affecting the bail schedules.	December, 2018. The committee will circulate an invitation to comment in October and will report to the council for adoption prior to the January 1, 2019 effective date.	Adoption of revised statewide Uniform Bail and Penalty Schedules to conform to changes in the law and for use updating courts' county bail schedules as required by Penal Code section 1269b and California Rule of Court 4.102.

[1] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.
[2] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Key Objectives Supported: 1, 4.		
2	**Rules Modernization Project** a. In collaboration with ITAC, identify and develop priorities for potential rule and statutory modifications so that the rules and statutes will be consistent with modern business practices. (For example, consider electronic notification to replace mail, paying fines online, etc.). b. Review rules and statutes in a systematic manner and develop recommendations for comprehensive changes. c. Assist in developing rules for remote access to court records by parties, their attorneys, and justice partners, and participate in the joint ad hoc subcommittee authorized by RUPRO that will be developing these rules.	1(d)-(f) or 2(b) depending on rule or statute	Judicial Council Direction: Strategic Plan Goal: Goal VI – Branchwide Infrastructure for Service Excellence. Operational Plan Objective: VI, Objective 4, Implement new tools to facilitate the electronic exchange of court information while balancing privacy and security. Origin of Project: The Judicial Council mandate based on recommendations from Information Technology Advisory Committee and other advisory committees. Resource: ITAC. Key Objectives Supported: 1.	January 2019.	Amendment and/or adoption of rules or statutes.
3	**Rules and Forms for Access to Justice in Infraction Cases.** Consider development of rules and forms to promote improved access to justice in all infraction cases, including amending rules 4.105 and its progeny.	1(e) – should be done	Judicial Council Direction: Strategic Plan Goal: III. Modernization of Management and Administration. Operational Plan Objective: III.5. Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the	January 2019.	Adoption of revised or new rules and forms.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			fair, timely, consistent, and efficient processing of all types of cases. Origin of Project: This item is added in response to a specific directive by the Judicial Council to consider rule, form or any other recommendations necessary to promote access to justice in all infraction cases. Resources: Criminal Law Advisory Committee, Advisory Committee on Providing Access and Fairness, Court Executives Advisory Committee and Information Technology Advisory Committee to provide recommendations on court practices and procedures. Key Objectives Supported: 1, 2.		
4	**Legislation for Access to Justice in Infraction Cases.** Recommend development of legislation to promote access to justice in all infraction cases.[MS1]	2 – Should be done	Judicial Council Direction: Strategic Plan Goal: III. Modernization of Management and Administration. Operational Plan Objective: III.5. Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases.	Ongoing.	Enactment of or amendment to legislation.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Origin of Project: This item is added in response to a specific directive by the Judicial Council to consider rule, form or any other recommendations necessary to promote access to justice in all infraction cases. Resources: Criminal Law Advisory Committee, Advisory Committee on Providing Access and Fairness, Court Executives Advisory Committee and Information Technology Advisory Committee to provide recommendations on court practices and procedures. Key Objectives Supported: 1, 2, and 3.		
5	**Develop Rules and Forms for Trials Under Vehicle Code Sections 40902 and 40903.** Develop revised rules and forms to clarify, standardize and improve processing of trials by written declaration and trials in absentia for traffic infractions under Vehicle Code sections 40902 and 40903**.**	2(a)	Judicial Council Direction: Strategic Plan Goal: III. Modernization of Management and Administration; VI. Branchwide Infrastructure for Service Excellence. Operational Plan Objective: III.5. Develop and implement effective trial and appellate case management rules, procedures, techniques, and practices to promote the fair, timely, consistent, and efficient processing of all types of cases; Objective IV.1. Foster excellence in public service to ensure that all court users receive satisfactory services and outcomes. Origin of Project: Proposed in response to requests from courts to reduce expense and	January 1, 2019.	Amend rules; adopt new ~~forms,~~ and revised forms.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			clarify rules and procedures for trial by written declaration. As required by Vehicle Code section 40902, the council has adopted rules and forms for trials by written declaration requested by a defendant. Vehicle Code section 40903 provides that a defendant who fails to appear may be deemed to have elected to have a trial by written declaration. Resources: Court Executives Advisory Committee and Trial Court Presiding Judges Advisory Committee to provide recommendations on best practices and development of forms and procedures. Key Objectives Supported: 1.		
6	**Statewide Repository of Forms.** Investigate the development of a statewide form repository for traffic court forms. Many courts utilize different local forms. A repository could provide courts with a reference point for developing their own forms. A member of the Traffic Advisory Committee identified the utility of having a repository of forms, to provide information sharing between different jurisdictions.	2 – Should be done	Judicial Council Direction: Strategic Plan Goal: III.A.6. Modernization of management and administration-Manage and coordinate cases effectively by sharing appropriate information between and within the courts and other justice system partners; Strategic Plan Goal: IV.5. Provide necessary resources to all courts—particularly high-volume courts such as traffic, small claims, juvenile dependency, and family courts—and support the branchwide implementation of effective practices to enhance procedural fairness and reduce the time and expense of court proceedings.	Fall 2018.	Statewide Repository of Forms.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Operational Plan Objective: Goal IV. Objective 1a. Foster excellence in public service to ensure that all court users receive satisfactory services and outcomes by providing necessary resources to all courts to ensure and support quality services. Origin of Project: A member of the Traffic Advisory Committee identified the utility of having a statewide repository of forms. Resources: Legal Services Office to provide recommendations for best practices of developing a repository of forms. Key Objectives Supported: 4		
7	**Notifying Criminal Justice Partners of Changes to Relevant Forms.** Investigate methods to notify criminal justice partners, including law enforcement, of changes to relevant forms. Pursuant to Vehicle Code section 40500, law enforcement must issue a notice to appear (commonly known as a citation), and the Judicial Council must prescribe the notice to appear. Currently, there is no procedure[MS2] for notifying justice partners of changes to relevant Judicial Council forms.	2 – Should be done	Judicial Council Direction: Strategic Plan Goal: IV.1. Quality of Justice and Service to the Public. Maintain a branchwide culture that fosters excellence in public service by building strong working relationships with communities, law and justice system partners, and other state and local leaders. Operational Plan Objective: Goal IV. Objective 3a. Develop and support collaboration to improve court practices, to leverage and share resources, and to create tools to educate court stakeholders and the public by providing methods and mechanisms that help justice system partners	Fall 2018.	Develop notification method or policy.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			identify, assess, and share practices and processes for improving court services. Origin of Project: A law enforcement agency requested information on existing Judicial Council procedures, if any, to notify them when relevant forms, including law enforcement citations were changed. Resources: Legal Services Office to provide recommendations for best practices for notifying justice partners of changes to relevant Judicial Council forms. Key Objectives Supported: 7		
8	**Community Outreach.** Provide advice to Judicial Council staff [MS3]for implementation and maintenance of community outreach materials developed for use by bench officers.	2 – Should be done	Judicial Council Direction: Strategic Plan Goal: I. Access, Fairness, and Diversity; IV. Quality of Justice and Service to the Public. Operational Plan Objective: I.2. Identify and eliminate barriers to all levels of service; ensure that interactions with the court are understandable, convenient, and perceived as fair; Objective IV.1. Foster excellence in public service to ensure that all court users receive satisfactory services and outcomes. Origin of Project: Outreach materials were developed by the committee in 2001 in response to a directive by the Judicial Council and regularly updated to enhance community outreach and improve public trust and confidence in the courts.	Ongoing.	Revision of traffic outreach materials, including the Self-Help Traffic material, on the California Courts Website, and posting on the Judicial Resources Network.

#	Project[1]	Priority[2]	Specifications	Completion Date/Status	Describe End Product/ Outcome of Activity
			Resource: CJER to provide consultation regarding improvement of outreach educational materials. Key Objectives Supported: 2 and 5.		
9	**Traffic Bench Officer and Temporary Judge Training.** Provide advice as requested by the Center for Judicial Education and Research with development of traffic training programs and materials for bench officers and temporary judges assigned to traffic proceedings.	2 – Should be done	Judicial Council Direction: Strategic Plan Goal: V. Education for Branchwide Professional Excellence. Operational Plan Objective: V.1. Provide relevant and accessible education and professional development opportunities for all judicial officers (including court-appointed temporary judges) and court staff. Origin of Project: Recommended by committee to support the Center for Judicial Education and Research (CJER) and research in preparation and presentation of statewide training programs for traffic bench officers. Resource: CJER Governing Committee to provide advice and recommendations to CJER as requested for traffic training programs and materials. Key Objectives Supported: 4 and 5.	Ongoing.	Provide assistance for CJER training programs for traffic bench officers.

III. STATUS OF 2017 PROJECTS:

#	Project	Completion Date/Status
1	Jointly proposed, with the Criminal Law Advisory Committee and in consultation with the Advisory Committee on Providing Access and Fairness, rules and rule amendments to improve communication to infraction defendants about fines, failures to appear or pay, and ability-to-pay determinations.	Implementation deadline, May 1, 2017.
2	Jointly proposed, with the Criminal Law Advisory Committee and the Advisory Committee on Providing Access and Fairness, forms and a rule on ability to pay in traffic and other infraction cases.	Anticipated completion November 2017 or Spring 2018.
3	Submitted proposed legislation to revise Penal Code section 1209.5 related to community service in lieu of infractions.	Anticipated completion November 2017.
4	Assisted in developing rules for remote access to court records by parties, their attorneys, and justice partners, and participate in the joint ad hoc subcommittee authorized by RUPRO that will be developing these rules	Anticipated completion January 2019.
5	Bail Schedule Revision.	Ongoing/ revised Uniform Bail and Penalty Schedules will be recommended to the Judicial Council in November for adoption effective January 1, 2018, in accordance with Vehicle Code section 40310.
6.	Remote Video Proceedings.	In conjunction with the Information and Technology Advisory Committee, recommended a revised set of guidelines which were approved by the Judicial Council's Technology Committee in January 2017.
7.	Community Outreach, including revision of California Courts website Self-Help Traffic page.	Revised the California Courts website Self-Help Traffic page / Ongoing. See Item 5 on agenda.
8.	Traffic Bench Officer and Temporary Judge Training.	Ongoing. See Item 6 on agenda.

VI. Subgroups/Working Groups - Detail

Subgroups/Working Groups: *[For each group listed in Section I, including any proposed "new" subgroups/working groups, provide the below information. For working groups that include members who are not on this advisory body, provide information about the additional members (e.g., from which other advisory bodies), and include the number of representatives from this advisory body as well as additional members on the working group.]*

Subgroup or working group name: None

Purpose of subgroup or working group: N/A

Number of advisory body members on the subgroup or working group: N/A

Number and description of additional members (not on this advisory body): N/A

Date formed: N/A.

Number of meetings or how often the subgroup or working group meets: N/A

Ongoing or date work is expected to be completed: N/A

Civil and Small Claims Advisory Committee
Annual Agenda[1]—2017-2018
Approved by RUPRO: [Date??]

I. COMMITTEE INFORMATION

Chair:	Hon. Ann I. Jones, Judge, Superior Court of Los Angeles County
Lead Staff:	Anne M. Ronan, Attorney, Legal Services

Committee's Charge/Membership:

Under rule 10.41 of the California Rules of Court, the Civil and Small Claims Advisory Committee (C&SCAC) is charged with making recommendations to the Judicial Council for improving the administration of justice in civil and small claims proceedings.

C&SCAC currently has 27 voting members and 2 advisory members. The attached term of services chart provides the composition of the committee.

Subcommittees/Working Groups:[2]

Standing Subcommittees:

- Alternative Dispute Resolution Subcommittee
- Legislative Subcommittee
- Protective Orders Subcommittee
- Rules and Forms Subcommittee (formerly Small Claims and Limited Case Subcommittee)[3]
- Futures Recommendations Subcommittee (formerly Unlimited Case and Complex Litigation Subcommittee)

Ad Hoc Working Groups:

- Ad Hoc Working Group on AB 2298 (Gang Database)

[1] The annual agenda outlines the work a committee will focus on in the coming year and identifies areas of collaboration with other advisory bodies and the Judicial Council staff resources.

[2] California Rules of Court, rule 10.30 (c) allows an advisory body to form subgroups, composed entirely of current members of the advisory body, to carry out the body's duties, subject to available resources, with the approval of its oversight committee.

[3] For this year, C&SCAC is reorganizing two of its five standing subcommittees, to allow one to focus on the implementation of the Future Commission recommendations, and another to continue the ongoing work of moving forward with rules, forms, and best practices for small claims and civil courts.

- Ad Hoc Working Group on Small Claims Court Interpreters

II. COMMITTEE PROJECTS

#	New or One-Time Projects[4] *[Group projects by priority number.]*
1.	**New Civil Tiers and Streamlined Litigation** ***Priority 1*** *[at direction of Chief Justice]* ***Project Summary*** Assess and develop recommendations as outlined in Report of the Commission on Future of California's Court System (Futures Commission) for: • Advancing a legislative proposal for increasing the maximum jurisdictional dollar amounts for limited civil cases to $50,000, and creating a new intermediate civil case track with a maximum jurisdictional dollar amount of $250,000. • Developing streamlined methods for litigating and managing all types of civil cases, including o legislative proposal revising discovery statutes to make discovery proportional to amount at issue (based on tiers), require mandatory early disclosures, and expand expert disclosure timelines o amended case management rules and statutes, and amended forms to implement same o legislative proposal to allow partial summary judgments in unlimited cases o legislative proposal, rules, and best practices relating to remote access in certain civil proceedings o increased ADR in all case levels, including, potentially, online ADR for small claims cases • After initial statutory changes to tiers enacted, developing: o new rules and forms as appropriate to facilitate new discovery scheme o amendments and revisions to rules and forms where needed to reflect existence of new intermediate tier o statutory clean-up proposal to reflect new intermediate tier as appropriate, where statutes refer to limited and/or unlimited tiers. Per direction from Chief Justice: Work with various bar groups and legal aid providers to ensure the fairness and equity of any proposals and work with trial court leadership to ensure the courts' ability to implement such changes. ***Status/Timeline*** New project; goal of having first set of statutory and rule proposals, re tiers, discovery, and case management, ready for public comment in spring 2019 and to council at end of 2019; additional rules, forms, and legislation to follow as new law enacted. Proposals re ADR to be worked on in coming year, with more detailed project descriptions to be provided in next year's annual agenda. ***Resources/Partners***

[4] All proposed projects for the year must be included on the Annual Agenda. If a project implements policy or is a program, identify it as *implementation* or *a program* in the project description and attach the Judicial Council authorization/assignment or prior approved Annual Agenda to this Annual Agenda.

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
	JCC Staff Resources: Committee staff; Finance Division and Office of Court Research (for assistance on filing fee and court statistics issues); Information Technology Advisory Committee staff AC Collaboration: Trial Court Presiding Judges Advisory Committee; Court Executives Advisory Committee, Information Technology Advisory Committee, Committee on Providing Access and Fairness External Partners: Stakeholders, including plaintiff and defense bar, insurance industry representatives, in-house counsel and business groups, and legal aid organizations; organizations using online ADR; National Center for State Courts staff.
2.	**Interpreters in Small Claims Court** ***Priority 1(a) and 1(c)*** *[see footnote 5]*[5] ***Project Summary*** Partner with the Language Access Plan Implementation Task Force to address implementation issues that will result from legislation to require court interpreters and eliminate the current informal interpreting option in small claims proceedings. A revised legislative proposal has been developed, and is currently circulating for comment. If enacted, rules of court regarding temporary interpreters will need to be amended to fully implement the law. Various Small Claims forms will be revised or developed to inform parties on the change in law and to facilitate their requesting interpreters as early as possible in the proceedings. ***Status/Timeline*** Legislative proposal to council in January 2018; amended rules of court and revised forms in year following enactment. ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Language Access Plan Implementation Task Force; Court Interpreters Advisory Panel; Court Executives Advisory Committee

[5] For non-rules and forms projects, select priority level 1 (must be done) or 2 (should be done). For rules and forms proposals, select one of the following priority levels: 1(a) Urgently needed to conform to the law; 1(b) Urgently needed to respond to a recent change in the law; 1(c) Adoption or amendment of rules or forms by a specified date required by statute or council decision; 1(d) Provides significant cost savings and efficiencies, generates significant revenue, or avoids a significant loss of revenue; 1(e) Urgently needed to remedy a problem that is causing significant cost or inconvenience to the courts or the public; 1(f) Otherwise urgent and necessary, such as a proposal that would mitigate exposure to immediate or severe financial or legal risk; 2(a) Useful, but not necessary, to implement statutory changes; 2(b) Helpful in otherwise advancing Judicial Council goals and objectives.

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
	External Partners: Small Claims Advisors and court staff
3.	**Gang Database Procedures** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** New legislation, effective January 1, 2017, established a procedure for a person designated in a shared gang database who has contested that designation with the local law enforcement agency and whose challenge has been denied to bring an action in the superior court. New procedural rules and a form were developed on an expedited basis to enable members of the public to utilize the procedure and the courts to implement the legislation. Clean up legislation (Assembly Bill 90) requires some further revision to the rules and forms to conform to law. Comments received in a post-adoption circulation will be addressed at the same time. ***Status/Timeline*** Rules and forms were adopted by council in January 2017; technical amendments to rules to reflect new statute will be submitted to council in November 2017, and further amendments and revisions to rules and forms may be ready for council action spring 2018 ***Resources/Partners*** JCC Staff Resources: Committee staff; Governmental Affairs office AC Collaboration: ad hoc joint working group with Family and Juvenile Law Advisory Committee; Criminal Law Advisory Committee. External Partners: N/A
4.	**Gender Identity and Name Change Forms** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Senate Bill 179 adds a third gender alternative for California residents: nonbinary in addition to male or female, and amends the procedures for seeking name changes to conform to gender (Code Civ. Proc. § 1277.5) and the procedures and legal requirements for seeking changes of gender on birth certificates (Health and Safety Code § 103430). The new law will require revisions to several of the council's Name Change forms, both to add the nonbinary option and to reflect the amendments to procedures for obtaining name changes to reflect gender and changes to birth certificates. Senate Bill 310 will also require amending Name Change forms, to remove the items re status of petitioner being under jurisdiction of Department of Corrections and Rehabilitation and to add information about the additional service of documents that will now be required of those under that jurisdiction.

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
	Pending issues regarding Name Change forms that the committee will consider at the same time, include the following: • Whether form NC-220 should be revised to include language from Code of Civil Procedure section 1277(a)(1) directing interested persons to file in writing any objections to the granting of the petition (suggested by court research attorney) • Whether form NC-110 should be revised to correct an ambiguity in the declaration box, to address a recurring problem for clerks in processing the form (suggested by judicial officer) • Whether date of birth should be removed from the petition form, addressing privacy concerns (suggested by an attorney). ***Status/Timeline*** Statute has September 2018 operative date. Forms to circulate in Winter comment cycle. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office; staff to Family and Juvenile Advisory Committee AC Collaboration: Family and Juvenile Advisory Committee External Partners: Transgender Law Center
5.	**Exemptions from Enforcement of Money Judgements** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Assembly Bill 688 provides for a new exemption, for contributions to ABLE bank accounts, which will need to be added to the forms which list exemptions and amounts of exemptions. ***Status/Timeline*** Statute has September 2018 operative date. Forms to circulate in Winter comment cycle. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office AC Collaboration: External Partners:

#	New or One-Time Projects[4] *[Group projects by priority number.]*
6.	**Confidentiality in Cyber Retaliation Cases** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Senate Bill 157 amends Civil Code 1708.85 to expand rights of privacy for plaintiff in cases alleging cyber retaliation (sexually explicit materials), expanding the types of materials for which redactions of confidential information required. Current form MC-125 (confidential cover sheet) may need to be revised. The bill assumes rules of court may be appropriate, and provides until January 2019 for their adoption by the council. ***Status/Timeline*** Statute sets January 2019 date for rules and forms. Spring comment cycle planned. ***Resources/Partners*** JCC Staff Resources: Committee staff; Governmental Affairs office AC Collaboration: External Partners:
7.	**Consumer Gender Discrimination forms** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Assembly Bill 1615 requires notices be sent out in advance of filing claims based on consumer's being charged different prices for similar services. Council is mandated to publish the notice in several languages. ***Status/Timeline*** Statute has January 2019 deadline for forms. Notices can be submitted without circulation. ***Resources/Partners*** JCC Staff Resources: Committee staff; translation services AC Collaboration: External Partners:
8.	**Exemptions from Mandatory E-filing** ***Priority 1(a)*** *[see footnote 5]* ***Project Summary*** Assembly Bill 976 amends numerous statutes to facilitate e-business in the courts. Among other provisions, it mandates a new form to allow a party to seek an exemption from mandatory electronic filing and service (Code Civ. Proc. §1010.6d(3).)

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
	Status/Timeline No deadline stated in statute; Spring 2018 comment cycle planned. ***Resources/Partners*** JCC Staff Resources: Committee staff; ITAC committee staff AC Collaboration: Information Technology Advisory Committee External Partners:
9.	**Privacy of Minor's Information in Protective Orders** ***Priority 1(b)*** *[see footnote 5]* ***Project Summary*** Assembly Bill 953 authorizes a minor or a minor's guardian to petition the court to keep all information regarding the minor that was submitted to the court for issuance of a civil harassment or domestic violence protective order in a confidential case file, if the court expressly finds that the minor's right to privacy overcomes the right of public access to the information and no less restrictive means exist to protect the minor's privacy. The confidential information includes the minor's name, address, and the circumstances surrounding the protective order with respect to that minor. Forms to implement these provisions would likely include a petition, information sheet, and possibly an order form. ***Status/Timeline*** While the statute does not mandate the forms, in light of the concerns addressed, goal would be to have forms go out in the normal comment cycle, with January 1, 2019 effective date. ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Joint Protective Order Working Group, Family and Juvenile Advisory Committee External Partners:

#	**New or One-Time Projects**[4] *[Group projects by priority number.]*
10.	**Remote Access to Court Records for Parties, Attorneys and Justice Partners.** ***Priority 1*** *[see footnote 5]* ***Project Summary*** Participate in newly formed joint working group to develop rules, standards, and guidelines for online access to court records for parties, their attorneys, local justice partners, and other government agencies. ***Status/Timeline*** ongoing; January 2019 goal for proposed rules. One member of advisory committee taking part in ad hoc committee. ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Information Technology Advisory Committee, Family and Juvenile Advisory Committee, Probate and Mental Health Advisory Committee, Criminal Advisory Committee, Traffic Advisory Committee, Advisory Committee on Providing Access and Fairness External Partners:
11.	***Civil Subject Matter Resource for Futures Commission Recommendations*** ***Priority 1*** *[at direction of Chief Justice]* ***Project Summary*** Provide consultation and review of civil and small claims procedural matters to other advisory committees working on implementation of recommendations of the Futures Committee, per direction of Chief Justice in May 2017 letter. The advisory committee has been expressly asked to review the proposed traffic court procedures as they are changed to a civil model. It may also be asked to review proposals for providing for video remote appearances in non-criminal matters, and for developing educational programs for self-represented litigants in civil matters. ***Status/Timeline*** as needed ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Traffic Futures Working Group; Information Technology Advisory Committee, Advisory Committee on Providing Access and Fairness

#	New or One-Time Projects[4] *[Group projects by priority number.]*
12.	**CLRC Mediations Confidentiality Recommendations** ***Priority 2*** *[see footnote 5]* ***Project Summary*** Review and submit further comments on the California Law Revision Commission's (CLRC) recommendation regarding amendments to the mediation confidentiality statutes. The recommended changes could adversely impact court-related ADR programs, as well as ultimately increasing judicial actions relating to mediation proceedings. ***Status/Timeline*** Initial comments were completed in September 2017; further comments may be submitted in December 2017 based on recent hearings. If further recommendations circulate in 2018, additional comments may be appropriate. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office AC Collaboration: External Partners: California Law Revision Commission
13.	**Informing Mediation Participants About Confidentiality** ***Priority 2(b)*** *[see footnote 5]* ***Project Summary*** Consider whether to recommend rule amendments to address what further information, if any, should be provided to court-related ADR program participants regarding mediation confidentiality, considering CLRC work on this matter. ***Status/Timeline*** January 2019 planned effective date. ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office AC Collaboration: External Partners:
14.	**Meet and Confer Forms for Motions to Strike/Judgment on Pleadings** ***Priority 2(b)*** *[see footnote 5]* ***Project Summary*** Assembly Bill 644 requires attorneys to meet and confer prior to filing motions to strike or judgments on the pleadings, and to file declarations with the court that the requirements have been met, or that more time is needed, similar to the requirements

#	New or One-Time Projects[4] *[Group projects by priority number.]*
	relating to demurrers, for which parties may use forms CIV-140 and CIV-141. Those forms should be revised to apply to these additional motions as well. The invitation to comment on the forms will seek the information RUPRO requested be gathered as to how helpful courts are finding the current forms. Form CIV-140 language should also be revised to more closely conform to the statutory provisions regarding deadlines. ***Status/Timeline*** The statute does not mandate that forms be adopted. Goal is to send out in normal comment cycle with effective date of January 1, 2019, to ensure that the reference to deadlines on current CIV-140 is corrected. ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: External Partners:
15.	**Description of Ammunition in Protective Orders** ***Priority 2(b)*** *[see footnote 5]* ***Project Summary*** Examine whether description of ammunition in protective orders should be expanded to expressly include "high volume magazines." Proposal is suggestion of employee of Department of Justice. ***Status/Timeline*** When Joint Protective Order Working Group is meeting to work on forms to facilitate new minors' privacy rights bill, the group can also consider this issue. Expected January 1, 2020 end date. ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Joint Protective Order Working Group, Family and Juvenile Advisory Committee External Partners: Department of Justice

#	**Ongoing Projects and Activities** *[Group projects by priority number.]*
16.	**Review Suggestions** ***Priority 1*** *[see footnote 5]* ***Project Summary*** As mandated by rule 10.21(c), review suggestions from members of the judicial branch and the public for improving civil practice and procedure, court-connected ADR, and case management and recommend actions by the council or one of its committees. ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: as appropriate based on proposal received. External Partners:
17.	**Review of Pending Legislation** ***Priority 1*** *[see footnote 5]* ***Project Summary*** Review pending legislation on civil procedure and court administration and make recommendations to the council's Policy Coordination and Liaison Committee, as required by Rule 10.34(a)(3) ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff, Governmental Affairs office AC Collaboration: External Partners:
18.	**Review of Enacted Legislation** ***Priority 1*** *[see footnote 5]* ***Project Summary*** Review all enacted legislation referred to the committee by the Judicial Council's Governmental Affairs office office that may have an impact on issues within the advisory committee's purview and, where appropriate, propose to the council rules and forms to implement the legislation or to bring rules and forms into conformity with it. ***Status/Timeline*** Ongoing

	Resources/Partners JCC Staff Resources: Committee staff; Governmental Affairs office AC Collaboration: External Partners:
19.	**Provide Subject Matter Expertise** ***Priority 2(b)*** *[see footnote 5]* ***Project Summary*** Serve as subject matter resource for other advisory groups to avoid duplication of efforts and contribute to the development of recommendations for council action. Such efforts may include providing civil and small claims procedural expertise and review to working groups, advisory committees, and subcommittees as needed ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: as appropriate for project on which advice or consultation requested. External Partners:
20.	**Rules Modernization Project** ***Priority 2(b)*** *[see footnote 5]* ***Project Summary*** Assist Information Technology Advisory Committee (ITAC) it its Rules Modernization Project, a collaborative multi-year effort to comprehensively review and modernize statutes and rules so that they will be consistent with and foster modern e-business practices. ***Status/Timeline*** Ongoing ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration: Information Technology Advisory Committee

	External Partners:
21.	**Update Deskbook on the Management of Complex Civil Litigation** ***Priority 2*** *[see footnote 5]* ***Project Summary*** Implementation project; charge for work was made to CSCAC by the council at October 22, 1999 meeting in which the council received the report of the Complex Civil Litigation Task Force and voted to adopt the Task Force's recommendations (see attached; item 3 from the minutes, beginning at page 17). ***Status/Timeline*** Ongoing; substantial revision currently underway, expected to be completed in 2018. ***Resources/Partners*** JCC Staff Resources: Committee staff AC Collaboration External Partners:

III. LIST OF 2017 PROJECT ACCOMPLISHMENTS:

highlights and achievements of projects that were included in the 2017 Annual Agenda

#	**Project Highlights and Achievements** *[Provide brief, broad outcome(s) and completed date.]*
	Enforcement of Judgment Forms. Revised Writ of Execution and Memo of Costs After Judgment, and developed new information sheet (form MC-012), to clarify for parties how to calculate credits for partial payment and apply post-judgment interest. Forms will go into effect January 1, 2018.
	Default in Consumer Credit Cases. In order to clarify procedures for parties and courts, created new Request for Entry of Default and Default Judgment, to be used only in cases brought under the Fair Debt Collections Act, which have different requirements for default than other civil cases. Forms will go into effect January 1, 2018.
	Civil Protective Order Forms. The committee made significant improvements to Civil Harassment (CH), Elder Abuse (EA), Private Postsecondary School Violence (SV), and Workplace Violence (WV) sets of forms. New forms were developed in each form set for the modification and termination of protective orders. Response forms were amended to provide space for the respondent to state why he or she disagrees with the orders requested by the petitioner. The temporary restraining order form in each set was amended to provide for certain exceptions to the firearms surrender provisions. In addition, a new legislative proposal was developed to clarify the court procedures for issuing Gun Violence Prevention Emergency Protective Orders
	Consideration of Case Management Rules. Current emergency exemption to statewide rules and procedures (rule 3.720(b)) will sunset at the end of 2019. During the past year, the committee began to review and evaluate the procedures being employed by those courts currently exempted from the case management rules, along with the benefits and burdens of the current statewide rules, in order to be prepared to make a recommendation as to whether the council should continue to permit exemptions, return to statewide case management rules, amend the current rules, or take other action. This project will be folded into the new Civil Tiers and Streamlined Litigation project.
	Legislative Proposal Regarding Small Claims Court Interpreters. The committee worked with the Language Access Plan Implementation Task Force to address implementation issues that would result from proposed legislation to require court interpreters and eliminate the informal interpreting option in small claims proceedings. The group gathered information from courts that already provide court interpreters in small claims proceedings, considered other models that may provide guidance (such as traffic), and worked with courts as stakeholders and partners in the process. The two groups have worked out revisions to the proposed litigation which they think will provide improved quality of interpretation for small claims parties with limited English proficiency, without making the process so burdensome that the parties loose realistic access to the courts. The proposed legislation is out for comment and expected to go to the council in January 2019.

Item number: 16

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: 10/24/2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Amend Cal. Rules of Court, rules 2.250, 2.251, 2.252, 2.253, 2.254, 2.255, 2.256, 2.257, and 2.259

Committee or other entity submitting the proposal:
Information Technology Advisory Committee (ITAC)

Staff contact (name, phone and e-mail): Andrea Jaramillo, 916-263-0991, andrea.jaramillo@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: Judicial Council Technology Committee approved ITAC's Annual Agenda on January 9, 2017.
Project description from annual agenda: ITAC's Annual Agenda Item 8
Modernize Rules of Court for the Trial Courts to Modernize Trial Court Rules to Support E-Business
In collaboration with other advisory committees, continue review of rules and statutes in a systematic manner and develop recommendations for more comprehensive changes to align with modern business practices (e.g., eliminating paper dependencies).

If requesting July 1 or out of cycle, explain:
The substantive material in the proposal was dependent on the outcome of Assembly Bill 976, which was revised several times through the legislative cycle. The legislation passed the Legislature on September 14, 2017 and was signed by the Governor on September 27, 2017.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In recommending the proposal, ITAC worked in cooperation with the Civil and Small Claims Advisory Committee.

JUDICIAL COUNCIL OF CALIFORNIA

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

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: November 16-17, 2017

Title
Rules: Electronic Filing and Service

Rules, Forms, Standards, or Statutes Affected
Cal. Rules of Court, rules 2.250, 2.251, 2.252, 2.253, 2.254, 2.255, 2.256, 2.257, and 2.259

Recommended by
Information Technology Advisory Committee
Hon. Sheila F. Hanson, Chair
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Agenda Item Type
Action Required

Effective Date
January 1, 2018

Date of Report
October 19, 2017

Contact
Andrea L. Jaramillo, (916) 263-0991
andrea.jaramillo@jud.ca.gov

Executive Summary

As part of the Rules Modernization Project, the Information Technology Advisory Committee (ITAC) and Civil and Small Claims Advisory Committee (CSCAC) recommend amending several rules related to electronic service and electronic filing. The amendments are intended to improve the organization of the rules; improve the rules' consistency with the Code of Civil Procedure, including consistency with recently enacted legislation; and reduce redundancies between the rules and the Code of Civil Procedure.

Recommendation

ITAC and CSCAC recommend that the Judicial Council, effective January 1, 2018:

1. Amend rules 2.250, 2.251, 2.252, 2.253, 2.254, 2.255, 2.256, 2.257, and 2.259 to ensure consistency, improve clarity, and reduce redundancy between the rules and the Code of Civil Procedure.

The text of the amended rules is attached at pages 7-26.

Previous Council Action

The Judicial Council sponsored legislation this year to amend section 1010.6 and enact section 1013b in the Code of Civil Procedure (hereafter, section 1010.6 and 1013b). The legislation passed the Legislature in Assembly Bill 976 on September 14, 2017 and was signed by the Governor on September 27, 2017. In brief, the legislation:

- Authorizes electronic filing and service by and on persons other than parties,
- Authorizes electronic signatures on electronically filed documents,
- Provides for a consistent effective date of filing across courts and case types,
- Codifies the effective date of electronic service,
- Consolidates mandatory electronic filing provisions,
- Codifies mandatory electronic service provisions,
- Codifies protections for self-represented persons, and
- Codifies procedures governing proof of electronic service.

Rationale for Recommendation

The proposed amendments improve consistency and reduce redundancy between the rules and the Code of Civil Procedure, including ensuring the rules are consistent with statutory changes that will be effective January 1, 2018. The proposed amendments also make limited organizational changes to the rules to improve their logical ordering. The benefits of these changes will be improved clarity in the rules and avoidance of rule language that conflicts with statutory language.

Add provisions related to electronic filing and service by or on a nonparty

With the enactment of AB 976, section 1010.6 will authorize electronic filing by and electronic service by and on "other persons" rather than just parties. To ensure that the trial court rules are consistent with this change, the proposal amends rules 2.250–2.253 and 2.257 to reference "other persons" in addition to parties.

"Other person" was intentionally not defined in section 1010.6 because comprehensively identifying those who fall in the category of "other person" who may be involved in a case without being a party would be overly complicated and variable. However, in a few instances in the rules, the addition of "other person" without any limiting language may result in an overly broad scope or confusion. Accordingly, ITAC recommends using limiting language to provide clarity. For example, under the proposed amendment to rule 2.251(e), governing maintenance of electronic service lists, a court would need to "maintain and make available electronically to the parties or other persons *in the case* an electronic service list. . ." (Italics added.) This would ensure that the electronic service list does not need to be made available to all other persons in the world who might request it, but rather is limited to other persons involved in the case. In addition, under the proposed amendment to rule 2.251(f)(1), governing service by parties and other persons, "parties and other persons *that have consented to or are required to serve*

documents electronically are responsible for electronic service on all other parties and other persons *required to be served* in the case." (Italics added.) The purpose of the limiting language here is to ensure the scope of responsibility for performing electronic service is not overly broad. Even if an "other person" agreed to electronic service, there is no obligation created by electronic service rules to electronically serve that particular document on the "other person" if that person is not someone required to be served a particular document.

Add provisions for electronic signatures on electronically filed documents.
With the enactment of AB 976, section 1010.6 will authorize the use of electronic signatures on electronically filed documents signed under penalty of perjury. To remain consistent with section 1010.6, the proposal amends rule 2.257, governing requirements for signatures on documents, to include a provision for electronic signatures. Section 1010.6 leaves the creation of specific procedures, standards, or guidelines under the authority of the Judicial Council.

Eliminate references to "close of business" and "regular filing hours" for effective date of electronic filing and service
Effective January 1, 2018, section 1010.6 will set a consistent effective date of filing and service across courts and case types. Under the amendments enacted in AB 976, documents received electronically by a court between 12:00 a.m. and 11:59:59 p.m. on a court day are deemed filed on that court day. Similarly, documents served electronically between 12:00 a.m. and 11:59:59 p.m. on a court day are deemed served on that court day. To remain consistent with section 1010.6, the proposal eliminates the definition of "close of business" under rule 2.250(b)(10), governing definitions. In addition, the proposal eliminates references to close of business in rule 2.251, which relates to electronic service, and rules 2.253 and 2.259, which relate to electronic filing. Finally, the proposal eliminates the definition of and references to "regular filing hours" found in rules 2.250(b)(9), 2.254(b), and 2.259(d).

Eliminate mandatory electronic filing and service fee provisions that will become redundant
With the enactment of AB 976, section 1010.6 will no longer have the provision that authorized a mandatory electronic filing and service pilot project in the Superior Court of Orange County, which included fee provisions. Rather, section 1010.6 will authorize mandatory electronic filing and service by local rule in any court. The fee provisions in rule 2.253(b)(5)–(6) will be duplicative of section 1010.6 and are largely eliminated in favor of a succinct provision that any fees charged by a court or electronic filing service provider shall be consistent with section 1010.6.

Eliminate provisions governing proof of electronic service that will become redundant
AB 976 added section 1013b to the Code of Civil Procedure to codify proof of electronic service requirements. Because section 1013b will fill the statutory gap that a rule had been filling, the proposal eliminates rule provisions that are duplicative of section 1013b.

Clarify that issuances by a court can fall within the definition of "document"
Section 1010.6(a)(3) allows the court to electronically serve "any document issued by the court." However, Section 1010.6 does not define "document." Rather, rule 2.250(b) provides a definition but currently does not include any documents issued by a court within its scope. The proposal adds that a notice, order, judgment, or other issuance by the court is included in the definition of "document."

Reorganize rules on electronic filing and electronic service required by court order
Section 1010.6(c) authorizes courts to require parties to file and serve documents electronically by court order in certain types of cases. Under the rules, both electronic filing and electronic service required by court order are addressed in rule 2.253(c). However, the heading of rule 2.253, "Permissive electronic filing, mandatory electronic filing, and electronic filing by court order," indicates that only electronic filing is within its scope. Rule 2.251, "Electronic service," includes some provisions for electronic service by court order but is not comprehensive, as additional provisions are located in rule 2.253. To resolve this inconsistency and improve clarity, the proposal adds a new subdivision (d) to rule 2.251 concerning electronic service by court order. In addition, the scope of subdivision (c) of rule 2.253 is narrowed to encompass only electronic filing by court order to keep it topically consistent with the rest of the rule.

Eliminate rule provisions that are duplicative of section 1010.6
Owing to the historical development of the rules and section 1010.6 (with the rules sometimes preceding the statutes in addressing electronic filing and electronic service), duplicative provisions exist between the two. The proposal eliminates some rule provisions that duplicate those in section 1010.6. The benefit of eliminating redundant provisions is that the Judicial Council will not need to make rule amendments to replicate changes to section 1010.6. In turn, this will reduce the risk of the rules and section 1010.6 becoming inconsistent with one another.

Specifically, the proposal eliminates provisions for the extension of time associated with electronic service under rule 2.251(h) (relettered (i) under the proposal) as those provisions merely duplicate section 1010.6(a)(4)(A). The proposal also eliminates those provisions in rule 2.252(c)(1) on the legal effect of documents filed electronically that duplicate those in section 1010.6(b)(1).

The proposal does not eliminate the definitions of "electronic service," "electronic transmission," and "electronic notification" that are the same as those in section 1010.6. Rule 2.250(b) provides a more comprehensive scheme of definitions than does section 1010.6 and includes terms that are undefined in that section (e.g., the term "document").

Amend fee provisions to be more consistent with section 1010.6
Rule 2.255 provides for contracting between the courts and electronic filing service providers (EFSPs). Rule 2.255(b) allows permissible provisions of any such contract to include "reasonable fees" charged by an EFSP and "reasonable requirements" imposed by the EFSP for users to access the electronic filing system. The proposal splits rule 2.255(b) into two

subdivisions: (b)(1) contains the same permissive language that existed in the rule previously, and (b)(2) includes a new mandatory provision that the contract must comply with the requirements of section 1010.6. The proposal will help avoid any gaps between what a contract may provide and what it must provide. By statute, any fees an EFSP charges for processing a payment for filing fees and other court fees "shall not exceed the costs incurred for processing the payment." (§ 1010.6(b)(7).) Existing rule 2.255(b) does not take this specific requirement into account. Retaining the permissive language in the proposal continues to allow "reasonable fees" to be charged and for providers to make "reasonable requirements," but adding in the mandatory piece places a limit. The mandatory piece refers back to section 1010.6 generally, rather than duplicating specific language such as the new limit on fees for processing a payment in section 1010.6(b)(7). This is to avoid redundancy with existing section 1010.6, and inconsistency with amendments to section 1010.6 that the Legislature may make in the future.

Finally, rule 2.252, which provides general rules for electronic filing, includes permissive language on whether a court permits applications for fee waivers in proceedings in which the court accepts electronic filings. Under rule 2.252(f), a court "may" permit the application to be filed electronically. This is inconsistent with section 1010.6(b)(6), which states, "The court *shall* permit a party or attorney to file an application for waiver of court fees and costs, in lieu of requiring the payment of the filing fee, *as part of the process involving the electronic filing of a document*." (Italics added.) Accordingly, the proposal amends rule 2.252(f) to reflect section 1010(b)(6)'s requirement that courts to allow the application for fee waiver to be filed electronically in any proceeding in which the court accepts electronic filings.

Clarify responsibilities of electronic filers

Rule 2.256 governs the responsibilities of electronic filers. Under the existing rules, as a condition of electronic filing, an electronic filer must "[f]urnish one or more electronic service addresses, in the manner specified by the court, at which the electronic filer agrees to accept service." (Rule 2.256(a)(4).) The proposal strikes the phrase "at which the electronic filer agrees to accept electronic service" because, by definition, an electronic service address *is* an electronic address through which one has authorized electronic service. (Rule 2.250(b)(5) [defining "electronic service address"].)

In addition, the proposal adds the following limitation to rule 2.256(a)(4): "This only applies when the electronic filer has consented to or is required to accept electronic service." Under rule 2.251(b)(1)(B), the act of electronically filing a document acts as consent to receive electronic service except with self-represented parties, who must affirmatively consent to receive electronic service. Accordingly, a self-represented party may be an electronic filer but may not have the responsibility to provide an electronic service address because he or she has not affirmatively consented to receive electronic service. Accordingly, the rule amendment is intended to clarify which electronic filers have the responsibility to furnish an electronic service address. Similarly, under rule 2.256(a)(5), an electronic filer must "[i]mmediately provide the court and all parties with any change to the electronic filer's electronic service address." The proposal adds that

"[t]his only applies when the electronic filer has consented to or is required to accept electronic service" to clarify the scope of electronic filers that must provide such notice.

Alternatives Considered

With the enactment of AB 976, the committees believe many of the proposed rule changes will be necessary to avoid inconsistency and confusion between the rules and Code of Civil Procedure. Other changes, though not strictly necessary, would improve and clarify the rules. Hence, alternatives to the proposed changes were not considered appropriate.

Implementation Requirements, Costs, and Operational Impacts

The advisory committees expect that the rule proposal will provide greater clarity in the rules for parties, attorneys, courts, and other court users, and improved consistency between the rules and the Code of Civil Procedure.

Attachments and Links

1. Text of proposed amendments to the California Rules of Court, rules 2.250, 2.251, 2.252, 2.253, 2.254, 2.255, 2.256, 2.257, and 2.259, at pages 7-26.
2. Chart of comments, at pages 27-37.
3. AB 976 (Stats. 2017, ch. 319), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB976

Rules 2.250, 2.251, 2.252, 2.253, 2.254, 2.255, 2.256, 2.257, and 2.259 of the California Rules of Court would be amended, effective January 1, 2018, to read:

Rule 2.250. Construction and definitions

(a) * * *

(b) Definitions

As used in this chapter, unless the context otherwise requires:

(1) A "document" is a pleading, a paper, a declaration, an exhibit, or another filing submitted by a party or other person, or by an agent of a party or other person on the party's or other person's behalf. A document is also a notice, order, judgment, or other issuance by the court. A document may be in paper or electronic form.

(2) "Electronic service" is service of a document on a party or other person by either electronic transmission or electronic notification. Electronic service may be performed directly by a party or other person, by an agent of a party or other person, including the party's or other person's attorney, through an electronic filing service provider, or by a court.

(3) "Electronic transmission" means the transmission of a document by electronic means to the electronic service address at or through which a party or other person has authorized electronic service.

(4) "Electronic notification" means the notification of a party or other person that a document is served by sending an electronic message to the electronic service address at or through which the party or other person has authorized electronic service, specifying the exact name of the document served and providing a hyperlink at which the served document can be viewed and downloaded.

(5) "Electronic service address" ~~of a party~~ means the electronic address at or through which the party or other person has authorized electronic service.

(6) An "electronic filer" is a party or other person filing a document in electronic form directly with the court, by an agent, or through an electronic filing service provider.

(7) "Electronic filing" is the electronic transmission to a court of a document in electronic form. For the purposes of this chapter, this definition concerns the activity of filing and does not include the processing and review of the document, and its entry into the court records, which are necessary for a document to be officially filed.

(8) An "electronic filing service provider" is a person or entity that receives an electronic filing from a party or other person for retransmission to the court or for electronic service on other parties or other persons, or both. In submission of filings, the electronic filing service provider does so on behalf of the electronic filer and not as an agent of the court.

~~(9) "Regular filing hours" are the hours during which a court accepts documents for filing at its filing counter.~~

~~(10) "Close of business" is 5 p.m. or any other time on a court day at which the court stops accepting documents for filing at its filing counter, whichever is earlier. The court must provide notice of its close-of-business time electronically. The court may give this notice in any additional manner it deems appropriate~~.

Advisory Committee Comment

The definition of "electronic service" has been amended to provide that a party may effectuate service not only by the electronic transmission of a document, but also by providing electronic notification of where a document served electronically may be located and downloaded. This amendment is intended to modify the rules on electronic service to expressly authorize electronic notification as a legally effective alternative means of service to electronic transmission. This rules amendment is consistent with the amendment of Code of Civil Procedure section 1010.6, effective January 1, 2011, to authorize service by electronic notification. (See Stats. 2010, ch. 156 (Sen. Bill 1274).) The amendments change the law on electronic service as understood by the appellate court in *Insyst, Ltd. v. Applied Materials, Inc.* (2009) 170 Cal.App.4th 1129, which interpreted the rules as authorizing electronic transmission as the only effective means of electronic service.

Rule 2.251. Electronic service

(a) Authorization for electronic service

When a document may be served by mail, express mail, overnight delivery, or fax transmission, the document may be served electronically under Code of Civil Procedure section 1010.6 and the rules in this chapter.

(b) Electronic service by consent of the parties

(1) Electronic service may be established by consent ~~of the parties in an action~~. A party or other person indicates that the party or other person agrees to accept electronic service by:

(A) Serving a notice on all parties and other persons that the party or other person accepts electronic service and filing the notice with the court. The notice must include the electronic service address at which the party or other person agrees to accept service; or

(B) Electronically filing any document with the court. The act of electronic filing is evidence that the party or other person agrees to accept service at the electronic service address the party or other person has furnished to the court under rule 2.256(a)(4). This subparagraph (B) does not apply to self-represented parties or other self-represented persons; they must affirmatively consent to electronic service under subparagraph (A).

(2) A party or other person that has consented to electronic service under (1) and has used an electronic filing service provider to serve and file documents in a case consents to service on that electronic filing service provider as the designated agent for service for the party or other person in the case, until such time as the party or other person designates a different agent for service.

(c) Electronic service required by local rule or court order

(1) A court may require parties to serve documents electronically in specified actions by local rule or court order, as provided in Code of Civil Procedure section 1010.6 and the rules in this chapter.

(2) A court may require other persons to serve documents electronically in specified actions by local rule, as provided in Code of Civil Procedure section 1010.6 and the rules in this chapter.

(3)~~(2)~~ Except when personal service is otherwise required by statute or rule, a party or other person that is required to file documents electronically in an action must also serve documents and accept service of documents electronically from all other parties or persons, unless:

(A) The court orders otherwise, or

(B) The action includes parties or persons that are not required to file or serve documents electronically, including self-represented parties or other self-represented persons; those parties or other persons are to be served by non-electronic methods unless they affirmatively consent to electronic service.

(4)~~(3)~~ Each party or other person that is required to serve and accept service of documents electronically must provide all other parties or other persons in the action with its electronic service address and must promptly notify all other parties, other persons, and the court of any changes under ~~(f)~~(g).

(d) Additional provisions for electronic service required by court order

(1) If a court has adopted local rules for permissive electronic filing, then the court may, on the motion of any party or on its own motion, provided that the order would not cause undue hardship or significant prejudice to any party, order all parties in any class action, a consolidated action, a group of actions, a coordinated action, or an action that is complex under rule 3.403 to serve all documents electronically, except when personal service is required by statute or rule.

(2) A court may combine an order for mandatory electronic service with an order for mandatory electronic filing as provided in rule 2.253(c).

(3) If the court proposes to make any order under (1) on its own motion, the court must mail notice to any parties that have not consented to receive electronic service. The court may electronically serve the notice on any party that has consented to receive electronic service. Any party may serve and file an opposition within 10 days after notice is mailed, electronically served, or such later time as the court may specify.

(4) If the court has previously ordered parties in a case to electronically serve documents and a new party is added that the court determines should also be ordered to do so under (1), the court may follow the notice procedures under (2) or may order the party to electronically serve documents and in its order state that the new party may object within 10 days after service of the order or by such later time as the court may specify.

~~(d)~~(e) Maintenance of electronic service lists

A court that permits or requires electronic filing in a case must maintain and make available electronically to the parties and other persons in the case an electronic service list that contains the parties' or other persons' current electronic service addresses, as provided by the parties or other persons that have filed electronically in the case.

~~(e)~~(f) Service by the parties and other persons

(1) Notwithstanding ~~(d)~~(e), parties and other persons that have consented to or are required to serve documents electronically are responsible for electronic service on all other parties and other persons required to be served in the case. A party or other person may serve documents electronically directly, by an agent, or through a designated electronic filing service provider.

(2) A document may not be electronically served on a nonparty unless the nonparty consents to electronic service or electronic service is otherwise provided for by law or court order.

~~(f)~~(g) Change of electronic service address

(1) A party or other person whose electronic service address changes while the action or proceeding is pending must promptly file a notice of change of address electronically with the court and must serve this notice electronically on all other parties and all other persons required to be served.

(2) A party's or other person's election to contract with an electronic filing service provider to electronically file and serve documents or to receive electronic service of documents on the party's or other person's behalf does not relieve the party or other person of its duties under (1).

(3) An electronic service address is presumed valid for a party or other person if the party or other person files electronic documents with the court from that address and has not filed and served notice that the address is no longer valid.

~~(g)~~(h)Reliability and integrity of documents served by electronic notification

A party or other person that serves a document by means of electronic notification must:

(1) Ensure that the documents served can be viewed and downloaded using the hyperlink provided;

(2) Preserve the document served without any change, alteration, or modification from the time the document is posted until the time the hyperlink is terminated; and

(3) Maintain the hyperlink until either:

(A) All parties in the case have settled or the case has ended and the time for appeals has expired; or

(B) If the party or other person is no longer in the case, the party or other person has provided notice to all other parties and other persons required to receive notice that it is no longer in the case and that they have 60 days to download any documents, and 60 days have passed after the notice was given.

~~(h)~~(i) When service is complete

(1) Electronic service of a document is complete ~~at the time of the electronic transmission of the document or at the time that the electronic notification of service of the document is sent.~~ as provided in Code of Civil Procedure section 1010.6 and the rules in this chapter.

(2) If an electronic filing service provider is used for service, the service is complete at the time that the electronic filing service provider electronically transmits the document or sends electronic notification of service.

~~(2) If a document is served electronically, any period of notice, or any right or duty to act or respond within a specified period or on a date certain after service of the document, is extended by two court days, unless otherwise provided by a statute or a rule.~~

~~(3) The extension under (2) does not extend the time for filing:~~

~~(A) A notice of intent to move for a new trial;~~

~~(B) A notice of intent to move to vacate the judgment under Code of Civil Procedure section 663a; or~~

~~(C) A notice of appeal.~~

~~(4) Service that occurs after the close of business is deemed to have occurred on the next court day.~~

~~(i)~~(j) Proof of service

(1) Proof of electronic service ~~may be by any of the methods~~ shall be made as provided in Code of Civil Procedure section 1013b. ~~1013a, with the following exceptions:~~

~~(A) The proof of electronic service does not need to state that the person making the service is not a party to the case.~~

~~(B) The proof of electronic service must state:~~

~~(i) The electronic service address of the person making the service, in addition to that person's residence or business address;~~

~~(ii) The date of the electronic service, instead of the date and place of deposit in the mail;~~

~~(iii) The name and electronic service address of the person served, in place of that person's name and address as shown on the envelope; and~~

~~(iv) That the document was served electronically, in place of the statement that the envelope was sealed and deposited in the mail with postage fully prepaid.~~

~~(2) Proof of electronic service may be in electronic form and may be filed electronically with the court.~~

~~(3)~~(2) Under rule 3.1300(c), proof of electronic service of the moving papers must be filed at least five court days before the hearing.

~~(4)~~(3) ~~The party filing the proof of electronic service must maintain the printed form of the document bearing the declarant's original signature and must make the document available for inspection and copying on the request of the court or any party to the action or proceeding in which it is filed, in the manner provided in rule 2.257(a).~~ If a person signs a printed form of a proof of electronic service, the party or other person filing the proof of electronic service must comply with the provisions of rule 2.257(a).

~~(j)~~(k) Electronic service by or on court

(1) The court may electronically serve documents ~~any notice, order, judgment, or other document issued by the court in the same manner that parties may serve documents by electronic service.~~ as provided in Code of Civil Procedure section 1010.6 and the rules in this chapter.

(2) A document may be electronically served on a court if the court consents to electronic service or electronic service is otherwise provided for by law or court order. A court indicates that it agrees to accept electronic service by:

(A) Serving a notice on all parties and other persons in the case that the court accepts electronic service. The notice must include the electronic service address at which the court agrees to accept service; or

(B) Adopting a local rule stating that the court accepts electronic service. The rule must indicate where to obtain the electronic service address at which the court agrees to accept service.

Advisory Committee Comment

Subdivisions (c)–(d). Court-ordered electronic service is not subject to the provisions in Code of Civil Procedure section 1010.6 requiring that, where mandatory electronic filing and service are established by local rule, the court and the parties must have access to more than one electronic filing service provider.

Rule 2.252. General rules on electronic filing of documents

(a) In general

A court may provide for electronic filing of documents in actions and proceedings as provided under Code of Civil Procedure section 1010.6 and the rules in this chapter.

(b) Direct and indirect electronic filing

Except as otherwise provided by law, a court may provide for the electronic filing of documents directly with the court, indirectly through one or more approved electronic filing service providers, or through a combination of direct and indirect means.

(c) ~~Effect of document filed electronically~~ No effect on filing deadline

~~(1) A document that the court or a party files electronically under the rules in this chapter has the same legal effect as a document in paper form.~~

~~(2)~~ Filing a document electronically does not alter any filing deadline.

(d) Filing in paper form

When it is not feasible for a party or other person to convert a document to electronic form by scanning, imaging, or another means, a court may allow that party or other person to file the document in paper form.

(e) Original documents

In a proceeding that requires the filing of an original document, an electronic filer may file an electronic copy of a document if the original document is then filed with the court within 10 calendar days.

(f) Application for waiver of court fees and costs

The court ~~may~~ must permit electronic filing of an application for waiver of court fees and costs in any proceeding in which the court accepts electronic filings.

(g) Orders and judgments

The court may electronically file any notice, order, minute order, judgment, or other document prepared by the court.

(h) Proposed orders

Proposed orders may be filed and submitted electronically as provided in rule 3.1312.

Rule 2.253. Permissive electronic filing, mandatory electronic filing, and electronic filing by court order

(a) Permissive electronic filing by local rule

A court may permit parties by local rule to file documents electronically in any types of cases~~, directly or through approved electronic service providers,~~ subject to the conditions in Code of Civil Procedure section 1010.6 and the rules in this chapter.

(b) Mandatory electronic filing by local rule

A court may require parties by local rule to electronically file documents in civil actions directly with the court, or directly with the court and through one or more approved electronic filing service providers, or through more than one approved electronic filing service provider, subject to the conditions in Code of Civil Procedure section 1010.6, the rules in this chapter, and the following conditions:

(1) The court must specify the types or categories of civil actions in which parties or other persons are required to file and serve documents

electronically. The court may designate any of the following as eligible for mandatory electronic filing and service:

(A) All civil cases;

(B) All civil cases of a specific category, such as unlimited or limited civil cases;

(C) All civil cases of a specific case type, including but not limited to, contract, collections, personal injury, or employment;

(D) All civil cases assigned to a judge for all purposes;

(E) All civil cases assigned to a specific department, courtroom or courthouse;

(F) Any class actions, consolidated actions, or group of actions, coordinated actions, or actions that are complex under rule 3.403; or

(G) Any combination of the cases described in subparagraphs (A) to (F), inclusive.

(2) Self-represented parties or other self-represented persons are exempt from any mandatory electronic filing and service requirements adopted by courts under this rule and Code of Civil Procedure section 1010.6.

(3) In civil cases involving both represented and self-represented parties or other persons, represented parties or other persons may be required to file and serve documents electronically; however, in these cases, each self-represented party or other person is to file, serve, and be served with documents by non-electronic means unless the self-represented party or other person affirmatively agrees otherwise.

(4) A party or other person that is required to file and serve documents electronically must be excused from the requirements if the party or other person shows undue hardship or significant prejudice. A court requiring the electronic filing and service of documents must have a process for parties or other persons, including represented parties or other represented persons, to apply for relief and a procedure for parties or other persons excused from filing documents electronically to file them by conventional means.

(5) Any fees charged by the court or an electronic filing service provider shall be consistent with the fee provisions of Code of Civil Procedure section 1010.6.

~~for no more than the cost actually incurred by the court in providing for the electronic filing and service of the documents. Any fees charged by an electronic filing service provider shall be reasonable.~~

~~(6) Any fees for electronic filing charged by the court or by an electronic filing service provider must be waived when deemed appropriate by the court, including providing a waiver of the fees for any party that has received a fee waiver.~~

~~(7)~~(6) ~~Any document required to be electronically filed with the court under this subdivision that is received electronically after the close of business on any day is deemed to have been filed on the next court day, unless by local rule the court provides that any document required to be electronically filed with the court under this subdivision that is received electronically before midnight on a court day is deemed to have been filed on that court day, and any document received electronically after midnight is deemed filed on the next court day.~~ The effective date of filing any document received electronically is prescribed by Code of Civil Procedure section 1010.6. This ~~paragraph~~ provision concerns only the effective date of filing. Any document that is received electronically must be processed and satisfy all other legal filing requirements to be filed as an official court record.

~~(8)~~(7) A court that adopts a mandatory electronic filing program under this subdivision must report semiannually to the Judicial Council on the operation and effectiveness of the court's program.

(c) Electronic filing ~~and service required~~ by court order

(1) If a court has adopted local rules for permissive electronic filing, then ~~The~~ the court may, on the motion of any party or on its own motion, provided that the order would not cause undue hardship or significant prejudice to any party, order all parties in any class action, a consolidated action, a group of actions, a coordinated action, or an action that is complex under rule 3.403 to~~:~~

~~(A) Serve all documents electronically, except when personal service is required by statute or rule;~~

~~(B) File~~ file all documents electronically~~;~~. ~~or~~

~~(C) Serve and file all documents electronically, except when personal service is required by statute or rule.~~

(2) A court may combine an order for mandatory electronic filing with an order for mandatory electronic service as provided in rule 2.252(d).

(3)~~(2)~~ If the court proposes to make any order under (1) on its own motion, the court must mail notice to ~~the~~ any parties that have not consented to receive electronic service. The court may electronically serve the notice on any party that has consented to receive electronic service. Any party may serve and file an opposition within 10 days after notice is mailed, electronically served, or such later time as the court may specify.

(4)~~(3)~~ If the court has previously ordered parties in a case to electronically ~~serve or~~ file documents and a new party is added that the court determines should also be ordered to do so under (1), the court may follow the notice procedures under (2) or may order the party to electronically ~~serve or~~ file documents and in its order state that the new party may object within 10 days after service of the order or by such later time as the court may specify.

(5)~~(4)~~ The court's order may also provide that:

(A) Documents previously filed in paper form may be resubmitted in electronic form; and

(B) When the court sends confirmation of filing to all parties, receipt of the confirmation constitutes service of the filing if the filed document is available electronically.

Advisory Committee Comment

Subdivision (b)(1). This subdivision allows courts to institute mandatory electronic filing and service in any type of civil case for which the court determines that mandatory electronic filing is appropriate. The scope of this authorization is meant to be broad. It will enable courts to implement mandatory electronic filing in a flexible yet expansive manner. However, in initiating mandatory electronic filing, courts should take into account the fact that some civil case types may be easier and more cost-effective to implement at the outset while other types may require special procedures or other considerations (such as the need to preserve the confidentiality of filed records) that may make them less appropriate for inclusion in initial mandatory e-filing efforts.

Subdivision (b)(2). Although this rule exempts self-represented parties from any mandatory electronic filing and service requirements, these parties are encouraged to participate voluntarily in electronic filing and service. To the extent feasible, courts and other entities should assist self-represented parties to electronically file and serve documents.

Subdivision (c). Court-ordered electronic filing ~~and service~~ under this subdivision ~~are~~ is not subject to the provisions in (b) and Code of Civil Procedure section 1010.6 requiring that, where mandatory electronic filing and service are established by local rule, the court and the parties must have access to more than one electronic filing service provider.

Rule 2.254. Responsibilities of court

(a) Publication of electronic filing requirements

Each court that permits or mandates electronic filing must publish, in both electronic and print formats, the court's electronic filing requirements.

(b) Problems with electronic filing

If the court is aware of a problem that impedes or precludes electronic filing ~~during the court's regular filing hours~~, it must promptly take reasonable steps to provide notice of the problem.

(c) Public access to electronically filed documents

Except as provided in rules 2.250–2.259 and 2.500–2.506, an electronically filed document is a public document at the time it is filed unless it is sealed under rule 2.551(b) or made confidential by law.

Rule 2.255. Contracts with electronic filing service providers

(a) Right to contract

(1) A court may contract with one or more electronic filing service providers to furnish and maintain an electronic filing system for the court.

(2) If the court contracts with an electronic filing service provider, it may require electronic filers to transmit the documents to the provider.

(3) If the court contracts with an electronic service provider or the court has an in-house system, the provider or system must accept filing from other electronic filing service providers to the extent the provider or system is compatible with them.

(b) Provisions of contract

~~The court's contract with an electronic filing service provider may allow the provider to charge electronic filers a reasonable fee in addition to the court's filing fee. The contract may also allow the electronic filing service provider to make other reasonable requirements for use of the electronic filing system.~~

(1) The court's contract with an electronic filing service provider may:

(a) Allow the provider to charge electronic filers a reasonable fee in addition to the court's filing fee;

(b) Allow the provider to make other reasonable requirements for use of the electronic filing system.

(2) The court's contract with an electronic filing service provider must comply with requirements of Code of Civil Procedure section 1010.6.

(c) Transmission of filing to court

An electronic filing service provider must promptly transmit any electronic filing and any applicable filing fee to the court.

(d) Confirmation of receipt and filing of document

(1) An electronic filing service provider must promptly send to an electronic filer its confirmation of the receipt of any document that the filer has transmitted to the provider for filing with the court.

(2) The electronic filing service provider must send its confirmation to the filer's electronic service address and must indicate the date and time of receipt, in accordance with rule 2.259(a).

(3) After reviewing the documents, the court must promptly transmit to the electronic filing service provider and the electronic filer the court's confirmation of filing or notice of rejection of filing, in accordance with rule 2.259.

(e) Ownership of information

All contracts between the court and electronic filing service providers must acknowledge that the court is the owner of the contents of the filing system and has the exclusive right to control the system's use.

Rule 2.256. Responsibilities of electronic filer

(a) Conditions of filing

Each electronic filer must:

(1) Comply with any court requirements designed to ensure the integrity of electronic filing and to protect sensitive personal information;

(2) Furnish information the court requires for case processing;

(3) Take all reasonable steps to ensure that the filing does not contain computer code, including viruses, that might be harmful to the court's electronic filing system and to other users of that system;

(4) Furnish one or more electronic service addresses~~,~~ in the manner specified by the court~~, at which the electronic filer agrees to accept service~~ . This only applies when the electronic filer has consented to or is required to accept electronic service;

(5) Immediately provide the court and all parties with any change to the electronic filer's electronic service address. This only applies when the electronic filer has consented to or is required to accept electronic service; and

(6) If the electronic filer uses an electronic filing service provider, provide the electronic filing service provider with the electronic address at which the filer is to be sent all documents and immediately notify the electronic filing service provider of any change in that address.

(b) Format of documents to be filed electronically

A document that is filed electronically with the court must be in a format specified by the court unless it cannot be created in that format. The format adopted by a court must meet the following requirements:

(1) The software for creating and reading documents must be in the public domain or generally available at a reasonable cost.

(2) The printing of documents must not result in the loss of document text, format, or appearance.

(3) The document must be text searchable when technologically feasible without impairment of the document's image.

If a document is filed electronically under the rules in this chapter and cannot be formatted to be consistent with a formatting rule elsewhere in the California Rules of Court, the rules in this chapter prevail.

Advisory Committee Comment

Subdivision (b)(3). The term "technologically feasible" does not require more than the application of standard, commercially available optical character recognition (OCR) software.

Rule 2.257. Requirements for signatures on documents

(a) Documents signed under penalty of perjury

When a document to be filed electronically provides for a signature under penalty of perjury~~,~~ of any person, ~~the following applies~~ the document is deemed to have been signed by that person if filed electronically provided that either of the following conditions is satisfied:

(1) The declarant has signed the document using a computer or other technology in accordance with procedures, standards, and guidelines established by the Judicial Council; or

~~(1)~~(2) The declarant ~~The document is deemed signed by the declarant if~~, before filing, ~~the declarant~~ has physically signed a printed form of the document. ~~(2)~~ By electronically filing the document, the electronic filer certifies ~~that (1) has been complied with and~~ that the original, signed document is available for inspection and copying at the request of the court or any other party. ~~Local child support agencies may maintain original, signed pleadings by way of an electronic copy in the statewide automated child support system and must maintain them only for the period of time stated in Government Code section 68152(a). If the local child support agency maintains an electronic copy of the original, signed pleading in the statewide automated child support system, it may destroy the paper original.~~ In the event this second method of submitting documents electronically under penalty of perjury is used, the following conditions apply:

(A)~~(3)~~ At any time after the electronic version of the document is filed, any ~~other~~ party may serve a demand for production of the original signed document. The demand must be served on all other parties but need not be filed with the court.

(B)~~(4)~~Within five days of service of the demand under ~~(3)~~(A), the party or other person on whom the demand is made must make the original signed document available for inspection and copying by all other parties.

(C)~~(5)~~At any time after the electronic version of the document is filed, the court may order the filing party or other person to produce the original signed document in court for inspection and copying by the court. The order must specify the date, time, and place for the production and must be served on all parties.

(D) Notwithstanding (A)–(C), local child support agencies may maintain original, signed pleadings by way of an electronic copy in the statewide automated child support system and must maintain them only for the period of time stated in Government Code section 68152(a). If the local child support agency maintains an electronic copy of the original, signed pleading in the statewide automated child support system, it may destroy the paper original.

(b) Documents not signed under penalty of perjury

If a document does not require a signature under penalty of perjury, the document is deemed signed by the party if the document is filed electronically.

(c) Documents requiring signatures of opposing parties

When a document to be filed electronically, such as a stipulation, requires the signatures of opposing parties, the following procedure applies:

(1) The party filing the document must obtain the signatures of all parties on a printed form of the document.

(2) The party filing the document must maintain the original, signed document and must make it available for inspection and copying as provided in (a)(2) of this rule and Code of Civil Procedure section 1010.6. The court and any other party may demand production of the original signed document in the manner provided in (a)~~(3)–(5)~~(2)(A)–(C).

(3) By electronically filing the document, the electronic filer indicates that all parties have signed the document and that the filer has the signed original in his or her possession.

(d) Digital signature

A party is not required to use a digital signature on an electronically filed document.

(e) Judicial signatures

If a document requires a signature by a court or a judicial officer, the document may be electronically signed in any manner permitted by law.

Advisory Committee Comment

Subdivision (a)(1). The standards and guidelines for electronic signatures that satisfy the requirements for an electronic signature under penalty of perjury are [will be] contained in the *Trial Court Records Manual*.

Rule 2.259. Actions by court on receipt of electronic filing

(a) Confirmation of receipt and filing of document

(1) *Confirmation of receipt*

When a court receives an electronically submitted document, the court must promptly send the electronic filer confirmation of the court's receipt of the document, indicating the date and time of receipt. A document is considered received at the date and time the confirmation of receipt is created.

(2) *Confirmation of filing*

If the document received by the court under (1) complies with filing requirements and all required filing fees have been paid, the court must promptly send the electronic filer confirmation that the document has been filed. The filing confirmation must indicate the date and time of filing and is proof that the document was filed on the date and at the time specified. The filing confirmation must also specify:

(A) Any transaction number associated with the filing;

(B) The titles of the documents as filed by the court; and

(C) The fees assessed for the filing.

(3) *Transmission of confirmations*

The court must send receipt and filing confirmation to the electronic filer at the electronic service address the filer furnished to the court under rule 2.256(a)(4). The court must maintain a record of all receipt and filing confirmations.

(4) *Filer responsible for verification*

In the absence of the court's confirmation of receipt and filing, there is no presumption that the court received and filed the document. The electronic filer is responsible for verifying that the court received and filed any document that the electronic filer submitted to the court electronically.

(b) Notice of rejection of document for filing

If the clerk does not file a document because it does not comply with applicable filing requirements or because the required filing fee has not been paid, the court must promptly send notice of the rejection of the document for filing to the electronic filer. The notice must state the reasons that the document was rejected for filing.

~~**(c) Document received after close of business**~~

~~A document that is received electronically by the court after the close of business is deemed to have been received on the next court day, unless the court has provided by local rule, with respect to documents filed under the mandatory electronic filing provisions in rule 2.253(b)(7), that documents received electronically before midnight on a court day are deemed to have been filed on that court day, and documents received electronically after midnight are deemed filed on the next court day. This provision concerns only the effective date of filing; any document that is electronically filed must be processed and satisfy all other legal filing requirements to be filed as an official court record.~~

(c)~~(d)~~ Delayed delivery

If a technical problem with a court's electronic filing system prevents the court from accepting an electronic filing ~~during its regular filing hours~~ on a particular court day, and the electronic filer demonstrates that he or she attempted to electronically file the document on that day, the court must deem the document as filed on that day. This subdivision does not apply to the filing of a complaint or any other initial pleading in an action or proceeding.

(d)~~(e)~~ Endorsement

(1) The court's endorsement of a document electronically filed must contain the following: "Electronically filed by Superior Court of California, County of _____, on _____ (date)," followed by the name of the court clerk.

(2) The endorsement required under (1) has the same force and effect as a manually affixed endorsement stamp with the signature and initials of the court clerk.

(3) A complaint or another initial pleading in an action or proceeding that is filed and endorsed electronically may be printed and served on the defendant or respondent in the same manner as if it had been filed in paper form.

(e)~~(f)~~ Issuance of electronic summons

(1) On the electronic filing of a complaint, a petition, or another document that must be served with a summons, the court may transmit a summons electronically to the electronic filer in accordance with this subdivision and Code of Civil Procedure section 1010.6.

(2) The electronically transmitted summons must contain an image of the court's seal and the assigned case number.

(3) Personal service of the printed form of a summons transmitted electronically to the electronic filer has the same legal effect as personal service of a copy of an original summons.

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Technology: Rules Modernization Project (amend Cal. Rules of Court, rules 2.250, 2.251, 2.252, 2.253, 2.254, 2.255, 2.256, 2.257, and 2.259)

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

	Commentator	Position	Comment	Committee Response
1.	Litigation By The Numbers By Julie Goren, Author/Publisher 13351 Cumpston St. Sherman Oaks, California 91401 Telephone: 818-787-9799 Email: julie@litigationbythenumbers.com	AM	With regard to the specific comments requested, I agree with the third option: retain the terms but refer to 1010.6. Other comments are as follows: 1. Rule 2.250(b)(1): I realize this language has been around for years, and is likely beyond the scope of the Invitation, but I am just now noticing it. Why is there a need to provide a specific definition of "document" for this chapter? The term is used in 157 different C.C.P. sections (including 1010.6) and has never before required definition. I suggest deleting it entirely. Alternatively, it should be revised. The phrase "or another filing submitted," can easily be interpreted to mean that the term refers only to filed documents, i.e., not written discovery demands or responses. It would follow, then, that Rule 2.250(b)(2)'s definition of electronic service refers only to filed documents. This is obviously not the intent nor the practice. 2. Rule 2.250(b)(8): Is the insertion of "or persons" supposed to be "or other persons"? 3. Rule 2.251(a): We unfortunately won't know how C.C.P. section 1010.6 will read until AB 976 is passed. The	The committees appreciate the comment responding to this question. The modification suggested does go beyond the scope of proposal. However, the committees may consider the suggestion as a part of a future proposal. Yes. The committees have modified the language to include "other persons." The committees appreciate the attention to AB 976, which has now. The express consent requirement will apply January 1, 2019 and

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	Commentator	Position	Comment	Committee Response
			iteration drafted on 4/20/17 seems inconsistent with Rule 2.251(a). The amendment states: "(2) (A) If a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of the document is not authorized unless a party or other person has expressly consented on the appropriate Judicial Council form to receive electronic delivery in that specific action or the court has ordered electronic service on a represented party or other represented person under subdivision (c) or (d). (B) If a document is required to be served by certified or registered mail, electronic service of the document is not authorized." I suggest that, in order not to be inconsistent with whatever C.C.P. section 1010.6 ultimately says, Rule 2.251(a) be amended to something like: "A document may be served electronically where authorized by [C.C.P. section 1010.6]."	the committees anticipate developing a rules proposal to conform the rules to statute.
			4. Rule 2.251(b)(1): The first sentence should be deleted. I don't believe that "established" has any meaning here. Electronic service is agreed to, authorized, effected ...what is "established" supposed to mean?	The modification suggested is beyond the scope of the proposal. However, the committees may consider the suggestion as a part of a future proposal.
			5. Rule 2.251(b)(1)(A): The first insertion of "or other persons" is incorrect; service of the notice must be on all parties, so it should be "and other persons."	The committees agree with the modification.

SPR17-25
Technology: Rules Modernization Project (amend Cal. Rules of Court, rules 2.250, 2.251, 2.252, 2.253, 2.254, 2.255, 2.256, 2.257, and 2.259)

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	Commentator	Position	Comment	Committee Response
			6. Rule 2.251(b)(1)(B): The current iteration of C.C.P. section 1010.6 seems to indicate that the parties can only expressly consent. If so, this subsection is inconsistent. Again, perhaps something like: "A party or other person may consent to accept electronic service as provided in [C.C.P. section 1010.6]."	AB 976 has passed with an express consent requirement added to Code of Civil Procedure section 1010.6 to apply January 1, 2019. The committees anticipate developing a rules proposal to conform the rules to statute.
			7. Rule 2.251(e): The first insertion of "or other persons" is incorrect; the list must be made available to the parties, so it should be "and other persons."	The committees agree with the modification.
			8. Rule 2.251(i): Insert "deemed" ... "Electronic service of a document is deemed complete." That term is included in the current iteration of the proposed amendment to C.C.P. section 1010.6. In addition, instead of "as provided for under [C.C.P. section 1010.6] it should say "as provided in ..." [The revisions variously use: "provided in," "provided for under," and "provided under."]	AB 976 passed with the "deemed complete" language. The committees may consider the insertion of "deemed complete" as part of a future proposal. The committees agree with the modification to "as provided in."
			9. Rule 2.251(j): The reference to rule 257(a) needs to be changed to 2.257(a).	The committees agree with the modification.
			10. Rule 2.251(k): Instead of "as provided for under [C.C.P. section 1010.6] it should say "as provided in ..."	The committees agree with the modification to "as provided in."

SPR17-25
Technology: Rules Modernization Project (amend Cal. Rules of Court, rules 2.250, 2.251, 2.252, 2.253, 2.254, 2.255, 2.256, 2.257, and 2.259)

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	Commentator	Position	Comment	Committee Response
2.	One Legal, LLC. By Mark L. Schwartz, Court Integration Manager 504 Redwood Blvd. #223 Novato, CA 94947 mschwartz@onelegal.com Tel. 415-475-6254	NI	1. Page 7, Request for Specific Comments: We like the 3rd bullet point option "Retain the terms, but refer back to section 1010.6…" While eService is not a new concept to us, it is to many law firms and so to define it is helpful. Our eService trainings touch on the rule and statute for that reason which is why we think eliminating these definitions entirely would be a bad idea. Keeping it in both the rule and the statute, however, *is* unnecessary. 2. Page 8, (b)(1) "document": This current definition of a document (…or another filing), including the additional language, could be construed as meaning a document that IS NOT a filing, notice, order, judgment or other issuance, cannot be eServed since (b)(2) below defines eService as "service of a document." Interrogatories and Notices of Deposition are two (2) examples of documents that do not fall within the definition of a document as described in section (b)(1).	The committees appreciate the comment responding to this question. The modification suggested is beyond the scope of proposal. However, the committees may consider the suggestion as a part of a future proposal.

SPR17-25
Technology: Rules Modernization Project (amend Cal. Rules of Court, rules 2.250, 2.251, 2.252, 2.253, 2.254, 2.255, 2.256, 2.257, and 2.259)

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	Commentator	Position	Comment	Committee Response
			3. Page 9, (b)(9) and (b)(10) "Regular filing hours and Close of business": We completely agree with removing these two sub-sections. They were confusing, especially since many courts have different hours on different days.	The committees appreciate the comment.
			4. Page 14, *new* (j)(3) "The party filing the proof…": The added last sentence is missing the "2." Should be 2.257(a) not 257(a).	The committees agree with the modification.
			5. Page 16, (3) Original documents: Many "eFiling courts" have specifically listed documents which cannot be eFiled, including Wills. Since a Will is, or can be, an original document, perhaps some clarifying language is needed as this section conflicts with what those courts are doing.	The committees may consider the suggestion as a part of a future proposal.
			6. Page 17, 2.253(b)(1): While no changes were made to this rule it made us realize there may be an issue with some eFiling courts that are mandating case types OTHER than Civil (e.g. Family, Probate). I don't believe the definition of "Civil"	The committees appreciate the comment, but it is beyond the scope of the proposed rule amendments. Under rule 1.6(3), "'Civil case' means a case prosecuted by one party against another for the declaration, enforcement, or protection of a

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

	Commentator	Position	Comment	Committee Response
			includes these case types and I suggest adding more specific language while the "hood is open." Here are a couple of reasons why we don't think the definition of Civil includes such case types as Family and Probate: a. CRC 2.300(a) (A section of the Filing and Service by Fax rules) reads in part (emphasis added): The rules in this chapter apply to ***civil, probate, and family law*** proceedings in all trial courts. b. CCP section 308 defines parties in a ***civil action*** as ***plaintiff*** and ***defendant***. 7. Page 23, 2.257(a)(1) Documents signed under penalty of perjury: The additional language allowing for "either 1 or 2" is a great improvement because it will allow filers to submit documents without first scanning them. We also like the addition of electronic signatures as that language will ameliorate confusion and lessen rejections of submitted eFilings for those filers who choose to "e-Sign" their documents. A great step in the right direction!	right or the redress or prevention of a wrong. Civil cases include all cases except criminal cases and petitions for habeas corpus." Accordingly, it is broadly inclusive of many civil case types. A "general civil case" has a more narrow definition and excludes various case types including family and probate cited as examples in the comment. (Cal. Rules of Court, rule 1.6(4).) The committees appreciate the support.

SPR17-25
Technology: Rules Modernization Project (amend Cal. Rules of Court, rules 2.250, 2.251, 2.252, 2.253, 2.254, 2.255, 2.256, 2.257, and 2.259)

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	Commentator	Position	Comment	Committee Response
3.	Orange County Bar Association By Michael L. Baroni, President P.O. Box 6130 Newport Beach, CA 92658	A	OCBA'S only concern with this proposal is that it pre-supposes an effective date of Jan 1, 2018 for the Judicial Council legislation amending C.C.P. §1010.6 and enacting a new C.C.P. §1013b, which legislation is necessary for some but not all of these proposed rule changes. The timing for adoption of these Rule changes must be specifically coordinated with the legislation enactment or else many changes herein will have to be delayed or removed. The OCBA is confused by the request for specific comments: Some members believe that the request seeks clarification as to whether all definitions contained in Rule 2.250(b) should be retained while other members believe the request only seeks advice on keeping the three statutory definitions in one form or another. With regard to the request for specific comments, the OCBA believes that it would be preferrable for ease of administration to retain each of the terms, but refer back to section 1010.6 for the statutory definitions and also preferable to retain the additional	The committees appreciate the comment and the rules proposal is timed to coincide with the effective date of AB 976, the legislation impacting the proposal. AB 976 has passed. The committees anticipate developing rule changes in the future to coincide with provisions of AB 976 that apply on January 1, 2019. The committees appreciate the comments responding to the specific questions.

SPR17-25
Technology: Rules Modernization Project (amend Cal. Rules of Court, rules 2.250, 2.251, 2.252, 2.253, 2.254, 2.255, 2.256, 2.257, and 2.259)

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	Commentator	Position	Comment	Committee Response
			non-statutory definitions at (1),(5),(6),(7), and (8) as within the Council's authority and helpful to the Court, parties, and other persons.	
4.	State Bar of California Standing Committee on the Delivery of Legal Services By Sharon Djemal, Chair 180 Howard Street San Francisco, California 94105 Tel: 415-538-2267 Fax: 415-538-2552	A	**Specific Comments** • Section 1010.6 and rule 2.250(b) contain definitions of "electronic service," "electronic transmission," and "electronic notification." The rule 2.250(b) definitions mirror the section 1010.6 definitions, but the rule provides a more comprehensive scheme of definitions than does section 1010.6. The advisory committee retained the duplicative definitions to preserve this comprehensive scheme. With respect to the definitions of "electronic service," "electronic transmission," and "electronic notification" in rule 2.250(b), the advisory committee seeks comments on whether it should: ▪ Continue to include the terms and their definitions in the rules;	The committees appreciate the comments responding to the specific questions.

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

	Commentator	Position	Comment	Committee Response
			▪ Eliminate the terms and their definitions; ▪ Retain the terms, but refer back to section 1010.6 for the definitions (e.g.," 'Electronic service' has the same meaning as defined in Code of Civil Procedure section 1010.6"); or ▪ Modify the definitions in some other way. It is better to retain the duplicative terms and their definitions in the rule so that practitioners and especially self-represented litigants have the full comprehensive scheme without having to refer back to section 1010.6. **Additional Comments** With respect to the "reasonable requirements" to access the electronic filing system, it would greatly benefit low income clients to explicitly state that Electronic Filing Services Providers (EFSPs) cannot require indigents to have either a credit card, debit card, or bank account to utilize the EFSP's services. In the past, some	The committees appreciate the comments, but it is beyond the scope of the proposed rule changes. However, the committees may consider the suggestion as a part of a future proposal.

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

	Commentator	Position	Comment	Committee Response
			EFSPs have required a credit card to create an account, even if that credit card was never billed, and that creates an insurmountable barrier to those without access to credit or banking services. Additionally, EFSPs should have to comply with accessibility requirements under the Americans with Disabilities Act, which is another way they cannot require users not use, for example, a screen reader to use the site in a reasonable manner.	
5.	Superior Court of Los Angeles County 111 N. Hill Street Los Angeles, CA 90012	A	No specific comment.	The committees appreciate the support.
6.	Superior Court of San Diego County By Mike Roddy, Court Executive Officer County Courthouse 220 West Broadway San Diego, California 92101	AM	The proposal to eliminate references to "close of business" and "regular filing hours" in rule 2.250(b)(9) and (10) appears to provide different levels of access to the courts. A litigant without access to the internet would be limited to the office hours of a legal aid provider or the public library, neither of which are typically open until midnight.	The committees appreciate the comments. The elimination of "close of business" and "regular filing hours" conform the rules to statute. AB 976 changed the applicable electronic service and filing time frames in Code of Civil Procedure section 1010.6 to "12:00 a.m. and 11:59:59 p.m."

SPR17-25
Technology: Rules Modernization Project (amend Cal. Rules of Court, rules 2.250, 2.251, 2.252, 2.253, 2.254, 2.255, 2.256, 2.257, and 2.259)

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	Commentator	Position	Comment	Committee Response
			This would also provide different levels of access for counties with permissive e-filing. Those who do not utilize e-filing would be limited to submit filings in a drop-box by 5 p.m. or when the courthouse closes.	

Item number: 17

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: October 24, 2017

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Rules and Forms: Miscellaneous Technical Changes (amend rules 3.230 and 10.855; revoke form REC-033; revise form MC-200; renumber forms CR-245 and CR-246)

Committee or other entity submitting the proposal:
Judicial Council Staff

Staff contact (name, phone and e-mail): Susan R. McMullan, 415-865-7990; susan.mcmullan@jud.ca.gov

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

If requesting July 1 or out of cycle, explain:
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).)

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 November 16–17, 2017

Title
Rules and Forms: Miscellaneous Technical Changes

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rules 3.230 and 10.855; revise form MC-200; renumber forms CR-245 and CR-246; revoke form REC-033

Recommended by
Judicial Council staff
Susan R. McMullan, Attorney
Legal Services

Agenda Item Type
Action Required

Effective Date
January 1, 2018

Date of Report
October 19, 2017

Contact
Susan R. McMullan, 415-865-7990
susan.mcmullan@jud.ca.gov

Executive Summary

Various members of the judicial 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 recommend making the necessary corrections to avoid causing confusion for court users, clerks, and judicial officers.

Recommendation

Judicial Council staff recommend that the council, effective January 1, 2018

1. Amend rule 3.230 of the California Rules of Court to conform to new law. Assembly Bill 90 (Weber), signed by the Governor October 12, 2017, and effective January 1, 2018, amends Penal Code sections 186.34 and 186.35, which set out procedures for requesting the removal of an individual's name from a shared gang database, and for petitioning the court to review a law enforcement agency's denial of such a request. Among other things, the amendments provide that law enforcement agency's failure to respond to a written request for removal may be considered a "deemed denial" and be subject to court review

just as a written denial is. The proposed amendments to rule 3.200 reflect this change in the law. The rule's cross-references to the statute and statutory text quoted in the Advisory Committee Comment have also been amended to reflect the amended statutes. The Judicial Council form used in conjunction with these rules also needs to be changed, but the changes are more extensive than may appropriately be done as ~~a~~ technical changes.

2. Amend rule 10.855 to strike subdivision (j) entirely and re-letter subdivision (k) as (j) and revoke form REC-003, *Report to The Judicial Council: Superior Court Records Destroyed, Preserved, and Transferred* to conform to recent changes to statute. Assembly Bill 1443 (Levine), effective January 1, 2018, deletes from Government Code section 68153(b) the following sentence: "A list of the court records destroyed within the jurisdiction of the superior court shall be provided to the Judicial Council in accordance with the California Rules of Court. The proposed amendment would delete subdivision (j) of rule 10.855, which details the reporting requirement that has been eliminated by statute and revoke the form used to make the report.

3. Revise *Claim Opposing Forfeiture*, form MC-200 to comply with recent changes to statute addressing when a claim must be made. Specifically, in the Notice box, item 1 is revised so the last lines read "your claim within 30 days <u>after the last time</u> notice is ~~first~~ published in a newspaper." The underlined text has been added, and the stricken text deleted. The same change has been made to the Spanish version of the notice.

4. Renumbering of forms MC-245, *Motion to Vacate Conviction or Sentence* and MC-246, *Order on Motion to Vacate Conviction or Sentence*, which are two new optional forms, effective January 1, 2018. These forms are designed to assist self-represented individuals and the courts in implementing recent legislation that permits criminally convicted individuals no longer in custody to file a motion to vacate a conviction or sentence and withdraw the plea of guilty or nolo contendere based on prejudicial errors related to immigration consequences or newly discovered evidence of actual innocence. These forms were originally designated as "Miscellaneous" forms, with "MC" preceding the form numbers, but it is more appropriate for them to be designated as "Criminal" forms, with "CR" preceding the form numbers because they address post-conviction relief for criminally convicted individuals. In this way, the new forms are similar to forms CR-180, CR-181, CR-183, CR-184, CR-185, and CR-186, all of which address post-conviction relief or relief following arrest. It is especially appropriate to include these forms as "Criminal" forms because it is anticipated that self-represented individuals are likely to be the most common users of these forms, and it would be intuitive for those individuals, who are interested in obtaining post-conviction relief, to look for the forms to accomplish that request in the "Criminal" section. For these reasons, form MC-245 should be renumbered as CR-187 and form MC-246 should be renumbered as CR-188.

Copies of the revised rules and forms are attached at pages 4-16.

Previous Council Action

Although the Judicial Council has acted on these rules, forms, and the bail and penalty schedules previously, this proposal recommends only minor corrections unrelated to any prior action.

Rationale for Recommendation

The changes to these rules, forms, and the bail and penalty schedules 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. Cal. Rules of Court, rules 3.320 and 10.855 at pages 4-7.
2. Forms REC 003, MC-200, MC-245 and MC-246; at pages 8-16.

California Rules of Court, rule 3.200, would be amended, effective January 1, 2018, to read:

Rule 3.2300. Review under Penal Code section 186.35 of law enforcement agency denial of request to remove name from shared gang database

(a) ***

(b) Definitions

For purposes of this rule:

(1) "Request for review" or "petition" means a ~~"notice of appeal"~~ petition under Penal Code section 186.35 requesting review of a law enforcement agency's ~~decision denying~~ denial of a person's request under Penal Code section 186.34 to remove a person's name from a shared gang database.

(2) "Law enforcement agency" means the local law enforcement agency that denied the request under Penal Code section 186.34 to remove a person's name from a shared gang database.

(c) ***

(d) Petition

(1) *Form*

(A) ***

(B) The person seeking review must attach to the petition under (A) the law enforcement agency's written verification, if one was received, of its decision denying the person's request under Penal Code section 186.34 to remove his or her name—or, if the request was filed by a parent or guardian on behalf of a child under 18, the name of the child—from the shared gang database.

(2) *Time for filing*

The petition must be filed within ~~90 calendar days of the date the law enforcement agency mails or personally serves the person filing the petition with written verification of the agency's~~

~~decision denying that person's request under Penal Code section 186.34 to remove the name from the shared gang database.~~ the time frame specified in Penal Code section 186.35(b).

(3)–(5) ***

(e) Record

(1) Filing ***

(2) *Contents*

The record is limited to the documents required by Penal Code section 186.35~~(b)~~ (c).

(3)–(4) ***

(f) Written argument

(1) C*ontents*

(A) The person filing the petition may include in the petition or separately serve and file a written argument about why, based on the record specified in Penal Code section 186.35~~(b)~~ (c), the law enforcement agency has failed to establish by clear and convincing evidence the active gang membership, associate status, or affiliate status of the person so designated or to be so designated by the law enforcement agency in the shared gang database.

(B) The law enforcement agency may serve and file a written argument about why, based on the record specified in Penal Code section 186.35~~(b)~~ (c), it has established by clear and convincing evidence the active gang membership, associate status, or affiliate status of the person.

(C)–(D) ***

(2)–(3) ***

(g)–(i)

Advisory Committee Comment

Subdivision (d)(1)(B). Penal Code section 186.34~~(f)~~(e) provides that if a person to be designated as a suspected gang member, associate, or affiliate, or his or her parent or guardian, submits written documentation to the local law enforcement agency contesting the designation, the local law enforcement agency "shall provide the person and his or her parent or guardian with written verification of the agency's decision within 30 days of submission of the written documentation contesting the designation. If the law enforcement agency denies the request for removal, the notice of its determination shall state the reason for the denial. If the law enforcement agency does not provide a verification of the agency's decision within the required 30-day period, the request to remove the person from the gang database shall be deemed denied."

Subdivision (e)(2). Penal Code section 186.35~~(b)~~(c) provides that the evidentiary record for this review proceeding "shall be limited to the agency's statement of basis of its designation made pursuant to subdivision ~~(e)~~ (c) or (d) of Section 186.34, and the documentation provided to the agency by the ~~appellant~~ person contesting the decision pursuant to subdivision ~~(f)~~ (e)of Section 186.34."

Penal Code section 186.34~~(e)(1)~~ (d)(1) provides that "[a] person, or, if the person is under 18 years of age, his or her parent or guardian, or an attorney working on behalf of the person may request information of any law enforcement agency as to whether the person is designated as a suspected gang member, associate, or affiliate in a shared gang database" and, if the person is so designated, "information as to the basis for the designation for the purpose of contesting the designation as described in subdivision ~~(f)~~ (e)." Section 186.35~~(e)~~(d)(2) provides that "[t]he law enforcement agency shall provide information requested under paragraph (1), unless doing so would compromise an active criminal investigation or compromise the health or safety of the person if the person is under 18 years of age."

Penal Code section 186.34~~(f)~~(e) provides that "the person to be designated as a suspected gang member, associate, or affiliate, or his or her parent or guardian, may submit written documentation to the local law enforcement agency contesting the designation."

Penal Code section 186.34(g) (f) also provides that "[n]othing in this section shall require a local law enforcement agency to disclose any information protected under Section 1040 or 1041 of the Evidence Code or Section 6254 of the Government Code."

CALIFORNIA RULES OF COURT, RULE 10.855, WOULD BE AMENDED, EFFECTIVE JANUARY 1, 2018, TO READ:

Rule 10.855. Superior court records sampling program

(a)–(i) * * *

~~**(j) Reporting requirement**~~

~~Each superior court must submit semiannually to the Judicial Council a *Report to the Judicial Council: Superior Court Records Destroyed, Preserved, and Transferred* (form REC-003), including the following information:~~

~~(1) A list by year of filing of the court records destroyed;~~

~~(2) A list by year of filing and location of the court records of the comprehensive and sample court records preserved; and~~

~~(3) A list by year of filing and location of the court records transferred to entities under rule 10.856.~~

~~(k)~~(j) Application

The sampling program provided in this rule, as amended effective July 1, 2016, applies retroactively to all superior courts.

Advisory Committee Comment

Subdivision (c)(4). Capital cases are excluded under subdivision (c)(4) because these cases have an automatic right of appeal to the California Supreme Court, and trial court records are retained permanently under Government Code section 68152(c)(1) if the defendant is sentenced to death. Each year, the Judicial Council will make available to the superior courts a list of all noncapital cases in which the California Supreme Court has issued a written opinion.

Subdivision ~~(k)~~(j). Because the destruction of court records is discretionary, all courts may elect to apply the rule retroactively and destroy court records that are not required to be preserved under subdivisions (c), (d), and (f), but they are not required to do so.

Superior courts that destroyed court records under the prior sampling rule may have preserved only 10 percent of their records (formerly known as the "systematic sample") for the year that they are now assigned to preserve the sample defined in subdivision (f). Except for the Superior Court of Los Angeles County, these courts would not be able to meet the requirement in subdivision (f)(1). So long as these courts continue preserving the 10-percent sample for their assigned year, they will be deemed to have satisfied subdivision (f)(1).

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

DEPARTMENT AND DIVISION:
JUDICIAL DISTRICT OR BRANCH COURT:
MAILING ADDRESS:
STREET ADDRESS:
CITY AND ZIP CODE:
TELEPHONE:
FAX:

REPORT TO THE JUDICIAL COUNCIL: SUPERIOR COURT RECORDS DESTROYED, PRESERVED, AND TRANSFERRED

1. You are hereby notified, as required by rule 10.855 of the California Rules of Court, that the following superior court records were *(check only one category per report)*:

   a. ☐ Destroyed by court order *(date of order)*:
      ☐ and preserved in another medium *(specify)*:

   b. ☐ Preserved for the ☐ comprehensive or ☐ sample court records *(specify the location of the records below, if different from the court address above)*.

   c. ☐ Transferred to an entity under rule 10.856 *(specify location of the records below if different from the organization's address)*. **Attach a copy of Judicial Council Form REC-002(R).**

	Record Type	Beginning and Ending Case Numbers	Beginning and Ending Month and Year	Medium
2.				☐ Paper ☐ Microfilm ☐ Electronic ☐ Other *(specify)*:
Location:				
3.				☐ Paper ☐ Microfilm ☐ Electronic ☐ Other *(specify)*:
Location:				
4.				☐ Paper ☐ Microfilm ☐ Electronic ☐ Other *(specify)*:
Location:				

Date: Clerk, by _____, Deputy

(If necessary, use the reverse of this page to continue)

Form Adopted for Mandatory Use
Judicial Council of California
REC-003 [Rev. January 1, 2007]

Calif. Rules of Court, rule 10.855
www.courtinfo.ca.gov

Record Type	Beginning and Ending Case Numbers	Beginning and Ending Month and Year	Medium
5.			☐ Paper ☐ Microfilm ☐ Electronic ☐ Other *(specify)*:
Location:			
6.			☐ Paper ☐ Microfilm ☐ Electronic ☐ Other *(specify)*:
Location:			
7.			☐ Paper ☐ Microfilm ☐ Electronic ☐ Other *(specify)*:
Location:			
8.			☐ Paper ☐ Microfilm ☐ Electronic ☐ Other *(specify)*:
Location:			
9.			☐ Paper ☐ Microfilm ☐ Electronic ☐ Other *(specify)*:
Location:			
10.			☐ Paper ☐ Microfilm ☐ Electronic ☐ Other *(specify)*:
Location:			
11.			☐ Paper ☐ Microfilm ☐ Electronic ☐ Other *(specify)*:
Location:			
12.			☐ Paper ☐ Microfilm ☐ Electronic ☐ Other *(specify)*:
Location:			

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:		
THE PEOPLE OF THE STATE OF CALIFORNIA		
CLAIMED PROPERTY:		
CLAIMANT *(NAME):*		
CLAIM OPPOSING FORFEITURE (Health & Saf. Code, § 11488.5) ☐ In response to a judicial petition for forfeiture *(use existing case No.)* ☐ In response to notice of administrative proceedings		CASE NUMBER:

1. Claimant *(name):*
   is an ☐ individual ☐ corporation ☐ other *(specify):*
2. *Claimed property (describe):*

3. Value of claim is ☐ $5,000 or less ☐ $5,001 or more (Health & Saf. Code, § 11488.5(a)(3).)

NOTICE

1. You must file your claim within 30 days after you receive personal or mailed notice that your property may be forfeited. If you do not receive personal or mailed notice, you must file your claim within 30 days after the last time notice is published in a newspaper.
2. Your claim must be filed in the county where the property was seized. If the property was not seized, file your claim in the county where the property is located. If you have received a notice, you can find the address of the court on that notice.
3. Within 30 days after filing your claim, serve a copy on the District Attorney or Attorney General. The copy must have the court clerk's filing stamp on it.

This notice is urgent. If you do not understand it, you must seek help.

AVISO

1. *Usted debe presentar su demanda dentro de los 30 días siguientes a la fecha en que recibe, personalmente o por correo, el aviso de que sus bienes pueden ser confiscados. Si no recibe dicho aviso, deberá presentar su reclamo dentro de los 30 días siguientes a la fecha en que el aviso se publica por última vez en un periódico.*
2. *Su demanda debe presentarse en el condado donde fueron confiscados los bienes. Si los bienes no han sido confiscados, presente su demanda en el condado donde están ubicados los bienes. Si ha recibido el aviso, busque la dirección de la corte en el aviso.*
3. *Dentro de los 30 días siguientes a la fecha en que presentó su demanda, envíe una copia de la notificación judicial a la oficina del Fiscal (District Attorney) o del Procurador General (Attorney General). La copia debe llevar el sello del actuario de la corte encargado de recibir las demandas.*

Esta notificación es urgente. Si usted no la entiende, debe pedir ayuda.

CLAIMANT *(Name)*: CLAIMED PROPERTY:	CASE NUMBER:

4. Claimant has an interest in the claimed property. Claimant
   a. ☐ is the owner. *For vehicles (cars, boats, planes, etc.) only:* ☐ registered owner ☐ legal owner
   b. ☐ has a security interest or is a lien holder ☐ has a right to possess.
   c. ☐ is the personal representative of the estate of the owner, lessee, or secured party.
   d. ☐ other *(specify):*

5. Claimant's interest in the right to or value of the claimed property is
   a. ☐ all ☐ part *(specify nature, amount, or percentage):*

   b. ☐ unknown.

6. **Claimant requests**
   a. ☐ that the claimed property not be ordered forfeited.
   b. ☐ that claimant's interest in the claimed property not be ordered forfeited.
   c. ☐ costs of suit.
   d. ☐ other *(specify):*

7. ☐ Number of pages attached: _____

Date: _____

_____
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF CLAIMANT)

VERIFICATION

I am the claimant in this proceeding and have read this claim. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

▶ _____
(SIGNATURE OF CLAIMANT)

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:	DATE OF BIRTH:	CASE NUMBER:

MOTION TO VACATE CONVICTION OR SENTENCE
(Pen. Code, §§ 1016.5, 1473.7)

FOR COURT USE ONLY
DATE:
TIME:
DEPARTMENT:

Instructions — Read Carefully

- You must file a separate motion for each separate case number.
- This motion must be clearly handwritten in ink or typed. Make sure all answers are true and correct. If you make a statement that you know is false, you could be convicted of perjury (lying under oath).
- Fill in the requested information. If you need more space, add an extra page and note that your answer is "continued on added page," or use *Attachment to Judicial Council Form* (form MC-025) as your additional page.
- Serve the motion on the prosecuting agency.
- **File the motion in the superior court in the county where the conviction or sentence was imposed.** Only the original motion needs to be filed unless local rules require additional copies.
- Notify the clerk of the court in writing if you change your address after filing your motion.

1. This motion concerns a conviction or sentence in the above case number. On *(date)* , I was convicted of a violation of the following offenses *(list all offenses included in the conviction)*:

CODE	SECTION	TYPE OF OFFENSE *(felony, misdemeanor, or infraction)*

If you need more space for listing offenses, use *Attachment to Judicial Council Form* (form MC-025) or any other additional page.

Form Approved for Optional Use
Judicial Council of California
CR-187 [Rev. January 1, 2018]

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

2. ☐ **MOTION UNDER PENAL CODE SECTION 1016.5**

GROUNDS FOR RELIEF: I am requesting relief based on the following:

a. Before my acceptance of a plea of guilty or nolo contendere to the offense, the court failed to advise me that the conviction might have immigration consequences as required under Penal Code section 1016.5(a).

b. The conviction that was based on my plea of guilty or nolo contendere may result in immigration consequences for me, including possible deportation, exclusion from admission to the United States, or denial of naturalization.

c. I likely would not have pleaded guilty or nolo contendere if the court had advised me of the immigration consequences of my plea. *(People v. Arriaga* (2014) 58 Cal.4th 950.)

• Supporting facts

Tell your story briefly. Describe the facts you allege regarding (1) the court's failure to advise you of the immigration consequences, (2) the possible immigration consequences, and (3) the likelihood that you would not have pleaded guilty or nolo contendere if you had been advised of the immigration consequences by the court. (*If necessary, attach additional pages.You may use* Attachment to Judicial Council Form *(form MC-025) on any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

3. ☐ **MOTION UNDER PENAL CODE SECTION 1473.7**

I am not currently imprisoned or restrained.

GROUNDS FOR RELIEF: I am requesting relief based on the following:

a. ☐ The conviction or sentence is legally invalid due to a prejudicial error (a mistake that causes harm) that damaged my ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere.

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

3. a. • Supporting facts

Tell your story briefly. Describe the facts you allege to be prejudicial error. CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifying what your attorney did or failed to do and how that affected your plea.(*If necessary, attach additional pages. You may use* Attachment to Judicial Council Form *(form MC-025) on any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

3. b. ☐ Newly discovered evidence of actual innocence exists that requires vacation of the conviction or sentence as a matterof law or in the interests of justice.

☐ I discovered the new evidence of actual innocence on *(date):*

• Supporting facts

Tell your story briefly. Describe the facts you allege to constitute newly discovered evidence of actual innocence. (*If necessary, attach additional pages.You may use* Attachment to Judicial Council Form *(form MC-025) on any additional pages. If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

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

4. ☐ I am represented by counsel who will appear at the hearing. I request that the court hold the hearing on this motion without my personal presence for the following reasons:

5. I request that the court vacate the conviction or sentence in the above-captioned matter.

6. I request that the court allow the withdrawal of the plea of guilty or nolo contendere in the above-captioned matter.

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 MOVING PARTY OR 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: DATE OF BIRTH:	CASE NUMBER:
ORDER ON MOTION TO VACATE CONVICTION OR SENTENCE **(Pen. Code, §§ 1016.5, 1473.7)**	***FOR COURT USE ONLY*** DATE: TIME: DEPARTMENT:

1. **FOR PURPOSES OF PENAL CODE SECTION 1016.5 RELEIEF, THE COURT**

   ☐ grants ☐ denies the moving party's request to vacate the judgment and to permit the moving party to withdraw the plea of guilty or nolo contendere and enter a plea of not guilty.

2. **FOR PURPOSES OF PENAL CODE SECTION 1473.7 RELIEF**

   a. The court

   ☐ grants ☐ denies the request that the court hold the hearing *without* the personal presence of the moving party but *with* the presence of counsel.

   b. The moving party ☐ has established ☐ has not established the existence of grounds for relief, as specified below:

   c. The court ☐ grants ☐ denies the moving party's request to vacate the conviction or sentence on the basis that the conviction or sentence is legally invalid due to a prejudicial error.

   d. The court ☐ grants ☐ denies the moving party's request to vacate the conviction or sentence based on newly discovered evidence of actual innocence.

   e. The court ☐ grants ☐ denies the moving party's request to withdraw the plea of guilty or nolo contendere.

Date:

(JUDICIAL OFFICER)

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