



JUDICIAL COUNCIL OF CALIFORNIA

RULES AND PROJECTS
COMMITTEE

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RULES AND PROJECTS COMMITTEE

OPEN MEETING AGENDA

Open to the Public (Cal. Rules of Court, rule 10.75(c)(1))

THIS MEETING IS BEING RECORDED

Date: Tuesday, January 30, 2018
Time: 12:10 – 1:00 p.m.
Location: Conference Call
Public Call-In Number 1-877-820-7831/Participant Access Code: 8083403 (Listen Only)

Meeting materials will be posted on the advisory body web page on the California Courts website at least three business days before the meeting.

Agenda items are numbered for identification purposes only and will not necessarily be considered in the indicated order.

I. OPEN MEETING (CAL. RULES OF COURT, RULE 10.75(C)(1))

Call to Order and Roll Call

II. DISCUSSION AND POSSIBLE ACTION ITEMS

CIVIL JURY INSTRUCTIONS

Item 01

Civil Jury Instructions: Review revisions and new instructions (Action required – recommend for Judicial Council action)

Presenter: Bruce Greenlee

CRIMINAL JURY INSTRUCTIONS

Item 02

Criminal Jury Instructions: Review revised and new instructions (Action required – recommend for Judicial Council action)

Presenter: Robin Seeley

Judicial Administration

Item 03

Judicial Council Forms: Technical Changes to Reflect Federal Poverty Guidelines (Action required – recommend for Judicial Council action)

Presenter: Susan McMullan

III. ADJOURNMENT

Adjourn

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Approve**

RUPRO Meeting: January 30, 2018

Title of proposal (*include amend/revise/adopt/approve + form/rule numbers*):

Civil Jury Instructions (CACI): Approve Posting Online of Instructions With Minor Revisions (Action Required)

Committee or other entity submitting the proposal:

Advisory Committee 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. In October, RUPRO approved new procedures to add online only releases for CACI in odd-numbered months other than May and November, when full releases are presented to the Judicial Council for approval and then published in print by LexisNexis. This release will be numbered 31A and will be the first ever online-only release. Release 31 was approved in November 2017.

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



JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date	Action Requested
January 24, 2018	Review and Approve Online Posting of Instructions With Minor Revisions
To	Deadline
Members of the Rules and Projects Committee	N/A
From	Contact
Advisory Committee on Civil Jury Instructions Hon. Martin J. Tangeman, Chair	Bruce Greenlee, Attorney 415-865-7698 phone 415-865-4319 fax bruce.greenlee@jud.ca.gov
Subject	
Civil Jury Instructions: Instructions With Minor Revisions	

Executive Summary

The Advisory Committee on Civil Jury Instructions has completed revisions to the *Judicial Council of California Civil Jury Instructions (CACI)*. This report addresses 31 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 approve for posting online 31 revised civil jury instructions, prepared by the advisory committee, that contain changes that do not require posting for public comment or Judicial Council approval. Effective with RUPRO's approval, these instructions will be posted online on the California Courts website and on Lexis and Westlaw.

The 31 instructions presented for final RUPRO approval are attached at pages 6–133.

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

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 from CACI, this category (b) is now mostly moot. It still applies 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).

Online-only process

This is the committee's first proposed online-only release, which has been designated as Release 31A.⁵ On October 24, 2017, RUPRO approved adding four additional annual CACI releases in January, March, July, and September.⁶

Official publisher LexisNexis will process the manuscript for electronic delivery. The release will be posted online on Lexis Advance. CACI licensees Thomson Reuters and AmericanLegalNet will also post the release on Westlaw and FormsWorkFlow, respectively. The publishers may, but are not required to, also issue print editions of the release. The instructions will also be posted on the judicial branch's public website at www.courts.ca.gov/partners/317.htm.

The January and March online-only instructions will be collected and included in the May 2018 print CACI supplement. The July and September online-only instructions will be collected and included in the 2019 edition.

Overview of updates

Of the 31 revised instructions that are presented for final RUPRO approval:

- 19 have revisions under category (a) above only (additional cases added to Sources and Authority);
- 10 have revisions under category (c) above only (additions or changes to the Directions for Use);
- 1 (CACI No. 1203) falls under both categories (a) and (c) (additions to Sources and Authority and additions or changes to the Directions for Use); and
- 1 (CACI No. 4002) falls under both categories (c) and (e) (additions or changes to the Directions for Use and changes to the instruction required by subsequent developments).

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 The new 2018 edition, approved November 2017, was Release 31.

⁶ Full substantive releases will continue to be presented to RUPRO for recommendation for Judicial Council approval in May (Release 32) and November (Release 33). These releases will continue to be posted for public comment.

5. Only one case excerpt should be included for each legal point.
6. California Supreme Court authority should always be included, if available.
7. If no Supreme Court authority is available, the most recent California appellate court authority for a point should be included.
8. A U.S. Supreme Court case should be included on any point for which it is the controlling authority.
9. A Ninth Circuit Court of Appeals case may be included if the case construes California law or federal law that is the subject of the *CACI* instruction.
10. Other cases may be included if deemed particularly useful to the users.
11. The fact that the committee chooses to include a case excerpt in the Sources and Authority does not mean that the committee necessarily believes that the language is binding precedent. The standard is simply whether the language would be useful or of interest to users.

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

Nonfinal cases and incomplete citations

All cases included in this release are final. There are no incomplete citations.

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 pay royalties to the council. With respect to other commercial publishers, the council will register the copyright in this work and will continue to license its publication of the instructions under provisions that govern accuracy,

completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the council will provide a broad public license for their noncommercial use and reproduction.

Attachments

1. Full text of 31 instructions, at pages 6–133

<p>CIVIL JURY INSTRUCTIONS</p> <p>TABLE OF CONTENTS</p>

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Essential Factual Elements (*Directions for Use Revised and Authority Added*) p. 22
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1723. Common Interest Privilege—Malice (*Authority Added*) p. 65

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2331. Breach of the Implied Obligation of Good Faith and Fair Dealing—
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2505. Retaliation—Essential Factual Elements (*Authority Added*) p. 87

2512. Limitation on Remedies—Same Decision (*Authority Added*) p. 94

2513. Business Judgment (*Authority Added*) p. 98

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2701. Nonpayment of Minimum Wage—Essential Factual Elements (*Authority Added*) p. 100

2704. Damages—Waiting-Time Penalty for Nonpayment of Wages (*Authority Added*) p. 103

2720. Affirmative Defense—Nonpayment of Overtime—Executive Exemption
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2721. Affirmative Defense—Nonpayment of Overtime—Administrative Exemption
(*Authority Added*) p. 112

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4002. “Gravely Disabled” Explained (*Instruction and Directions for Use Revised*) p. 117

UNLAWFUL DETAINER SERIES

4321. Affirmative Defense—Retaliatory Eviction—Tenant’s Complaint
(*Directions for Use Revised*) p. 120

4322. Affirmative Defense—Retaliatory Eviction—Engaging in Legally Protected Activity
(*Directions for Use Revised*) p. 124

CONSUMER LEGAL REMEDIES ACT SERIES

4700. Consumers Legal Remedies Act—Essential Factual Elements (*Authority Added*) p. 127

CONCLUDING INSTRUCTIONS SERIES

5012. Introduction to Special Verdict Form (*Authority Added*) p. 131

333. Affirmative Defense—Economic Duress

[Name of defendant] claims that there was no contract because [his/her/its] consent was given under duress. To succeed, [name of defendant] must prove all of the following:

1. That [name of plaintiff] used a wrongful act or wrongful threat to pressure [name of defendant] into consenting to the contract;
2. That a reasonable person in [name of defendant]’s position would have believed that he or she had no reasonable alternative except to consent to the contract; and
3. That [name of defendant] would not have consented to the contract without the wrongful act or wrongful threat.

An act or a threat is wrongful if [insert relevant rule, e.g., “a bad-faith breach of contract is threatened”].

If you decide that [name of defendant] has proved all of the above, then no contract was created.

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

Directions for Use

Different elements may apply if economic duress is alleged to avoid an agreement to settle a debt. (See *Perez v. Uline, Inc.* (2007) 157 Cal.App.4th 953, 959–960 [68 Cal.Rptr.3d 872].)

Element 2 requires that the defendant have had “no reasonable alternative” other than to consent. Economic duress to avoid a settlement agreement may require that the creditor be placed in danger of imminent bankruptcy or financial ruin. (See *Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1156–1157, 204 Cal.Rptr. 86[.] At least one court has stated this standard in a case not involving a settlement (see *Uniwill v. City of Los Angeles* (2004) 124 Cal.App.4th 537, 545 [21 Cal.Rptr.3d 464]), though most cases do not require that the only alternative be bankruptcy or financial ruin. (See, e.g., *Chan v. Lund* (2010) 188 Cal.App.4th 1159, 1173–1174 [116 Cal.Rptr.3d 122].)

In the next-to-last paragraph, state the rule that makes the alleged conduct wrongful. ([See Restatement 2d of Contracts, § 176, When a Threat is Improper.](#)) The conduct must be something more than the breach or threatened breach of the contract itself. An act for which a party has an adequate legal remedy is not duress. (*River Bank America v. Diller* (1995) 38 Cal.App.4th 1400, 1425 [45 Cal.Rptr.2d 790].)

Sources and Authority

- When Consent Not Freely Given. Civil Code sections 1567, 1568.
- “The doctrine of ‘economic duress’ can apply when one party has done a wrongful act which is

sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. The party subjected to the coercive act, and having no reasonable alternative, can then plead ‘economic duress’ to avoid the contract.” (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644 [76 Cal.Rptr.2d 615], internal citation omitted.)

- The nonexistence of a “reasonable alternative” is a question of fact. (*CrossTalk Productions, Inc., supra*, 65 Cal.App.4th at p. 644.)
- “ ‘At the outset it is helpful to acknowledge the various policy considerations which are involved in cases involving economic duress. Typically, those claiming such coercion are attempting to avoid the consequences of a modification of an original contract or of a settlement and release agreement. On the one hand, courts are reluctant to set aside agreements because of the notion of freedom of contract and because of the desirability of having private dispute resolutions be final. On the other hand, there is an increasing recognition of the law’s role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power and a greater willingness to not enforce agreements which were entered into under coercive circumstances.’ ” (*Rich & Whillock, Inc., supra*, 157 Cal.App.3d at p. 1158.)
- “ ‘As it has evolved to the present day, the economic duress doctrine is not limited by early statutory and judicial expressions requiring an unlawful act in the nature of a tort or a crime. ... Instead, the doctrine now may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator’s pressure. ... The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress doctrine. ... Further, a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin. ...’ ” (*Chan, supra*, 188 Cal.App.4th at pp. 1173–1174.)
- “ ‘It is not duress . . . to take a different view of contract rights, even though mistaken, from that of the other contracting party, and it is not duress to refuse, in good faith, to proceed with a contract, even though such refusal might later be found to be wrong. [¶] . . . “A mere threat to withhold a legal right for the enforcement of which a person has an adequate [legal] remedy is not duress.” ’ ” (*River Bank America, supra*, 38 Cal.App.4th at p. 1425.)
- “[W]rongful acts will support a claim of economic duress when ‘a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin.’ ” (*Uniwill, supra*, 124 Cal.App.4th at p. 545.)
- “Economic duress has been recognized as a basis for rescinding a settlement. However, the courts, in desiring to protect the freedom of contracts and to accord finality to a privately negotiated dispute resolution, are reluctant to set aside settlements and will apply ‘economic duress’ only in limited circumstances and as a ‘last resort.’ ” (*San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1058 [37 Cal.Rptr.2d 501].)
- “Required criteria that must be proven to invalidate a settlement agreement are: ‘(1) the debtor knew there was no legitimate dispute and that it was liable for the full amount; (2) the debtor nevertheless

refused in bad faith to pay and thereby created the economic duress of imminent bankruptcy; (3) the debtor, knowing the vulnerability its own bad faith had created, used the situation to escape an acknowledged debt; and (4) the creditor was forced to accept an inequitably low amount. ...’ ”
(*Perez, supra*, 157 Cal.App.4th at pp. 959–960.)

Secondary Sources

1 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~ 2017) Contracts, §§ 31~~43~~–31~~56~~

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.22, 215.122 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.24 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions*, 8.07

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence*, 17.03–17.06, 17.20–17.24[2]

350. Introduction to Contract Damages

If you decide that [name of plaintiff] has proved [his/her/its] claim against [name of defendant] for breach of contract, you also must decide how much money will reasonably compensate [name of plaintiff] for the harm caused by the breach. This compensation is called “damages.” The purpose of such damages is to put [name of plaintiff] in as good a position as [he/she/it] would have been if [name of defendant] had performed as promised.

To recover damages for any harm, [name of plaintiff] must prove that when the contract was made, both parties knew or could reasonably have foreseen that the harm was likely to occur in the ordinary course of events as result of the breach of the contract.

[Name of plaintiff] also must prove the amount of [his/her/its] damages according to the following instructions. [He/She/It] does not have to prove the exact amount of damages. You must not speculate or guess in awarding damages.

[Name of plaintiff] claims damages for [identify general damages claimed].

New September 2003; Revised October 2004, December 2010

Directions for Use

This instruction should always be read before any of the following specific damages instructions. (See CACI Nos. 351–360.)

Sources and Authority

- Contract Damages. Civil Code section 3300.
- Damages Must Be Clearly Ascertainable. Civil Code section 3301.
- Damages No Greater Than Benefit of Full Performance. Civil Code section 3358.
- Damages Must Be Reasonable. Civil Code section 3359.
- “The basic object of damages is compensation, and in the law of contracts the theory is that the party injured by a breach should receive as nearly as possible the equivalent of the benefits of performance. The aim is to put the injured party in as good a position as he would have been had performance been rendered as promised. This aim can never be exactly attained yet that is the problem the trial court is required to resolve.” (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)
- “The damages awarded should, insofar as possible, place the injured party in the same position it would have held had the contract properly been performed, but such damage may not exceed the

benefit which it would have received had the promisor performed.” (*Brandon & Tibbs, supra*, 226 Cal.App.3d at p. 468, internal citations omitted.)

- “ “The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case.’ ” (*Brandon & Tibbs, supra*, 226 Cal.App.3d at p. 455, internal citation omitted.)
- “Contractual damages are of two types—general damages (sometimes called direct damages) and special damages (sometimes called consequential damages).” (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 968 [22 Cal.Rptr.3d 340, 102 P.3d 257].)
- “General damages are often characterized as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. Because general damages are a natural and necessary consequence of a contract breach, they are often said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable the parties at the time of contracting are ‘deemed’ to have contemplated them.” (*Lewis Jorge Construction Management, Inc., supra*, 34 Cal.4th at p. 968, internal citations omitted.)
- “ ‘Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.’ ‘In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered.’ ” (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)
- “ [I]f special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract.’ ” (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697 [42 Cal.Rptr.2d 136], internal citations omitted.)
- “The detriment that is ‘likely to result therefrom’ is that which is foreseeable to the breaching party at the time the contract is entered into.” (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)
- “Where the fact of damages is certain, as here, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation.” (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398 [112 Cal.Rptr.2d 99], footnotes and internal citations omitted.)
- “Under contract principles, the nonbreaching party is entitled to recover only those damages, including lost future profits, which are ‘proximately caused’ by the specific breach. Or, to put it another way, the breaching party is only liable to place the nonbreaching party in the same position as

if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain.” (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1709 [51 Cal.Rptr.2d 365], internal citations omitted.)

- “[D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California.” (*Erlich, supra*, 21 Cal.4th 543 at p. 558, internal citations omitted.)
- “Cases permitting recovery for emotional distress typically involve mental anguish stemming from more personal undertakings the traumatic results of which were unavoidable. Thus, when the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress.” (*Erlich, supra*, 21 Cal.4th at p. 559, internal citations omitted.)
- “The right to recover damages for emotional distress for breach of mortuary and crematorium contracts has been well established in California for many years.” (*Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 803 [7 Cal.Rptr.2d 82], internal citation omitted.)
- “Numerous other cases decided both before and after *Brandt* have likewise recognized that ‘[a]lthough fee issues are usually addressed to the trial court in the form of a posttrial motion, fees as damages are pleaded and proved by the party claiming them and are decided by the jury unless the parties stipulate to a posttrial procedure.’ ” (*Monster, LLC v. Superior Court* (2017) 12 Cal.App.5th 1214, 1229 [219 Cal.Rptr.3d 814].)

Secondary Sources

1 Witkin, Summary of California Law (~~10th ed. 2005~~11th ed. 2017) Contracts, §§ ~~869894–903878~~

California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.1–4.9

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.55–140.56, 140.100–140.106 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.70 et seq. (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.10–50.11 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.20 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.03 et seq.

1001. Basic Duty of Care

A person who [owns/leases/occupies/controls] property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others.

In deciding whether [name of defendant] used reasonable care, you may consider, among other factors, the following:

- (a) The location of the property;
 - (b) The likelihood that someone would come on to the property in the same manner as [name of plaintiff] did;
 - (c) The likelihood of harm;
 - (d) The probable seriousness of such harm;
 - (e) Whether [name of defendant] knew or should have known of the condition that created the risk of harm;
 - (f) The difficulty of protecting against the risk of such harm; [and]
 - (g) The extent of [name of defendant]'s control over the condition that created the risk of harm; [and]
 - (h) [Other relevant factor(s).]
-

New September 2003; Revised June 2010

Directions for Use

Not all of these factors will apply to every case. Select those that are appropriate to the facts of the case.

Under the doctrine of nondelegable duty, a property owner cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 260 [143 P.2d 929].) For an instruction for use with regard to a landowner's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

- “Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties.” (*Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406, fn. 1 [85 Cal.Rptr.2d 838], internal citation omitted.)
- “It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition.” (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], internal citations omitted.)
- “An owner of real property is ‘not the insurer of [a] visitor’s personal safety’ However, an owner is responsible ‘for an injury occasioned to another by [the owner’s] want of ordinary care or skill in the management of his or her property’ Accordingly, landowners are required ‘to maintain land in their possession and control in a reasonably safe condition’, and to use due care to eliminate dangerous conditions on their property.” (*Taylor v. Trimble* (2017) 13 Cal.App.5th 934, 943-944 [220 Cal.Rptr.3d 741], internal citations omitted.)
- “[T]he issue concerning a landlord’s duty is not the *existence* of the duty, but rather the *scope* of the duty under the particular facts of the case. Reference to the *scope* of the landlord’s duty ‘is intended to describe the specific steps a landlord must take in a given specific circumstance to maintain the property’s safety to protect a tenant from a specific class of risk.’” (*Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 23 [179 Cal.Rptr.3d 758], original italics, internal citation omitted.)
- “The proper test to be applied to the liability of the possessor of land ... is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others” (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561].)
- “It is well settled that a property owner is not liable for damages caused by a minor, trivial, or insignificant defect in his property. This principle is sometimes referred to as the ‘trivial defect defense,’ although it is not an affirmative defense but rather an aspect of duty that a plaintiff must plead and prove. ... Moreover, what constitutes a minor defect may be a question of law.” (*Cadam v. Somerset Gardens Townhouse HOA* (2011) 200 Cal.App.4th 383, 388–389 [132 Cal.Rptr.3d 617], internal citations omitted.)
- In this state, duties are no longer imposed on an occupier of land solely on the basis of rigid classifications of trespasser, licensee, and invitee. The purpose of plaintiff’s presence on the land is not determinative. We have recognized, however, that this purpose may have some bearing upon the liability issue. This purpose therefore must be considered along with other factors weighing for and against the imposition of a duty on the landowner.” (*Ann M., supra*, 6 Cal.4th at pp. 674-675, internal citations omitted.)
- “As stated in *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 25 [77 Cal.Rptr. 914], ‘[t]he term “invitee” has not been abandoned, nor have “trespasser” and “licensee.” In the minds of the jury, whether a possessor of the premises has acted as a reasonable man toward a plaintiff, in view of the probability of injury to him, will tend to involve the circumstances under which he came upon defendant’s land; and the probability of exposure of plaintiff and others of his class to the risk of

injury; as well as whether the condition itself presented an unreasonable risk of harm, in view of the foreseeable use of the property.’ Thus, the court concluded, and we agree, *Rowland* ‘does not generally abrogate the decisions declaring the substantive duties of the possessor of land to invitees nor those establishing the correlative rights and duties of invitees.’ (*Id.*, at p. 27.)” (*Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 486-487 [227 Cal.Rptr. 465], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- “The distinction between artificial and natural conditions [has been] rejected.” (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371 [178 Cal.Rptr. 783, 636 P.2d 1121].)
- “It must also be emphasized that the liability imposed is for negligence. The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor’s degree of control over the risk-creating condition are among the factors to be considered by the trier of fact in evaluating the reasonableness of a defendant’s conduct.” (*Sprecher, supra*, 30 Cal.3d at p. 372.)
- “[A] landowner’s duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner’s property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 38 [180 Cal.Rptr.3d 474].)
- “The duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespective of whether the contractor’s negligence lies in his incompetence, carelessness, inattention or delay.” (*Brown, supra*, 23 Cal.2d at p. 260.)
- “[A] defendant property owner’s compliance with a law or safety regulation, in and of itself, does not establish that the owner has utilized due care. The owner’s compliance with applicable safety regulations, while relevant to show due care, is not dispositive, if there are other circumstances requiring a higher degree of care.” (*Lawrence, supra*, 231 Cal.App.4th at p. 31.)

Secondary Sources

6 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Torts, § ~~1086~~~~1228~~

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

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-B, *Landlord Liability For Injuries From Acts Of Others*, ¶ 6:48 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.01 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, §§ 170.01, 170.03, 170.20 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.01 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.50 (Matthew Bender)

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

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

1 California Civil Practice: Torts § 16:3 (Thomson Reuters)

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.)
- “California cases have found that a defendant involved in the marketing/distribution process may be held strictly liable ‘if three factors are present: (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. [Citation.]’ ... ‘The application of strict liability in any particular factual setting is determined largely by the policies that underlie the doctrine.’ ” (Petitpas v. Ford Motor Co. (2017) 13 Cal.App.5th 261, 270 [220 Cal.Rptr.3d 185], internal citation omitted.)

- “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 (11th ed. 2017) Torts, §§ 1591–1601

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)

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

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

1. That [name of defendant] [manufactured/distributed/sold] the [product];
 2. That the [product] did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way;
 3. That [name of plaintiff] was harmed; and
 4. That the [product]’s failure to perform safely was a substantial factor in causing [name of plaintiff]’s harm.
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New September 2003; Revised December 2005, April 2009, December 2009, June 2011, January 2018

Directions for Use

The consumer expectation test and the risk-benefit test for design defect are not mutually exclusive, and depending on the facts and circumstances of the case, both may be presented to the trier of fact in the same case. (Demara v. The Raymond Corp. (2017) 13 Cal.App.5th 545, 554 [221 Cal.Rptr.3d 102].) If both tests (~~the consumer expectation test and the risk-benefit test~~) for design defect are asserted by the plaintiff, the burden-of-proof instructions must make it clear that the two tests are alternatives. (Bracisco v. Beech Aircraft Corp. (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].)

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

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

sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- “A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- “[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts.” (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.2d 158].)
- “[A] product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors ... , the benefits of the challenged design do not outweigh the risk of danger inherent in such design.” (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 418 [143 Cal.Rptr. 225, 573 P.2d 443].)
- “The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits.” (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303 [144 Cal.Rptr.3d 326].)
- “In order to establish a design defect under the consumer expectation test when a ‘ ‘product is one within the common experience of ordinary consumers,’ ’ ’ the plaintiff must ‘ ‘provide[] evidence concerning (1) his or her use of the product; (2) the circumstances surrounding the injury; and (3) the objective features of the product which are relevant to an evaluation of its safety.’ [Citation.] The test is that of a hypothetical reasonable consumer, not the expectation of the particular plaintiff in the case.’ ’ ” (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 157 [220 Cal.Rptr.3d 127].)
- “The rationale of the consumer expectations test is that ‘[t]he purposes, behaviors, and dangers of certain products are commonly understood by those who ordinarily use them.’ Therefore, in some cases, ordinary knowledge of the product’s characteristics may permit an inference that the product did not perform as safely as it should. ‘If the facts permit such a conclusion, and if the failure resulted from the product’s design, a finding of defect is warranted without any further proof,’ and the manufacturer may not defend by presenting expert evidence of a risk/benefit analysis. ... Nonetheless, the inherent complexity of the product itself is not controlling on the issue of whether the consumer expectations test applies; a complex product ‘may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers.’ ” (*Saller, supra*, 187 Cal.App.4th at p. 1232, original italics, internal citations omitted.)
- “The critical question, in assessing the applicability of the consumer expectation test, is not whether

the product, when considered in isolation, is beyond the ordinary knowledge of the consumer, but whether the product, *in the context of the facts and circumstances of its failure*, is one about which the ordinary consumers can form minimum safety expectations.” (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1311–1312 [120 Cal.Rptr.3d 605].)

- “Whether the jury should be instructed on either the consumer expectations test or the risk/benefit test depends upon the particular facts of the case. In a jury case, the trial court must initially determine as a question of foundation, within the context of the facts and circumstances of the particular case, whether the product is one about which the ordinary consumer can form reasonable minimum safety expectations. ‘If the court concludes it is not, no consumer expectation instruction should be given. ... If, on the other hand, the trial court finds there is sufficient evidence to support a finding that the ordinary consumer can form reasonable minimum safety expectations, the court should instruct the jury, consistent with Evidence Code section 403, subdivision (c), to determine whether the consumer expectation test applies to the product at issue in the circumstances of the case [or] to disregard the evidence about consumer expectations unless the jury finds that the test is applicable. If it finds the test applicable, the jury then must decide whether the product failed to perform as safely as an ordinary consumer would expect when the product is used in an intended or reasonably foreseeable manner.’ ” (*Saller, supra*, 187 Cal.App.4th at pp. 1233–1234, internal citations omitted.)
- “[The] dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety or that, on balance, are not as safely designed as they should be.” (*Barker, supra*, 20 Cal.3d at p. 418.)
- “The consumer expectation test “acknowledges the relationship between strict tort liability for a defective product and the common law doctrine of warranty, which holds that a product’s presence on the market includes an implied representation ‘that it [will] safely do the jobs for which it was built.’ ” (*Soule, supra*, 8 Cal.4th at p. 562, internal citations omitted.)
- “[T]he jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses. Unless the facts actually permit an inference that the product’s performance did not meet the minimum safety expectations of its ordinary users, the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*. Accordingly, as *Barker* indicated, instructions are misleading and incorrect if they allow a jury to avoid this risk-benefit analysis in a case where it is required.” (*Soule, supra*, 8 Cal.4th at p. 568.)
- “[T]he consumer expectation test does not apply merely because the consumer states that he or she did not expect to be injured by the product.” (*Trejo, supra*, 13 Cal.App.5th at p. 159.)
- “[T]he consumer expectation test is reserved for cases in which the *everyday experience* of the product’s users permits a conclusion that the product’s design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*.” (*Soule, supra*, 8 Cal.4th at p. 567, original italics.)
- “[A] product's users include anyone whose injury was ‘reasonably foreseeable.’ ” (*Demara, supra*, 13 Cal.App.5th at p. 559.)

- “If the facts permit an inference that the product at issue is one about which consumers may form minimum safety assumptions in the context of a particular accident, then it is enough for a plaintiff, proceeding under the consumer expectation test, to show the circumstances of the accident and ‘the objective features of the product which are relevant to an evaluation of its safety’ [citation], leaving it to the fact finder to ‘employ “[its] own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence.” ’ [Citations.] Expert testimony as to what consumers ordinarily ‘expect’ is generally improper.” (*Chavez, supra*, 207 Cal.App.4th at p. 1303.)
- “That causation for a plaintiff’s injuries was proved through expert testimony does not mean that an ordinary consumer would be unable to form assumptions about the product’s safety. Accordingly, the trial court properly instructed the jury on the consumer expectations test.” (*Romine v. Johnson Controls, Inc.* (2014) 224 Cal.App.4th 990, 1004 [169 Cal.Rptr.3d 208], internal citations omitted.)
- “ An exception [to the rule that expert testimony is generally improper] exists where the product is in specialized use with a limited group of consumers. In such cases, ‘if the expectations of the product’s limited group of ordinary consumers are beyond the lay experience common to all jurors, expert testimony on the limited subject of what the product’s actual consumers do expect may be proper.’ ” (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1120 fn. 3 [123 Cal.Rptr.2d 303], internal citations omitted.)
- “In determining whether a product’s safety satisfies [the consumer expectation test], the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case.” (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126, fn. 6 [184 Cal.Rptr. 891, 649 P.2d 224].)
- “[E]vidence as to what the scientific community knew about the dangers ... and when they knew it is not relevant to show what the ordinary consumer of [defendant]’s product reasonably expected in terms of safety at the time of [plaintiff]’ s exposure. It is the knowledge and reasonable expectations of the consumer, not the scientific community, that is relevant under the consumer expectations test.” (*Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 Cal.App.4th 1529, 1536 [40 Cal.Rptr.2d 22].)
- “Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge.” (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)
- “ ‘[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. ... [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact.’ ” (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422].)
- “[T]he plaintiff bears an initial burden of making ‘a prima facie showing that the injury was proximately caused by the product’s design.’ This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff’s ability to avoid injury was frustrated by the absence of a safety device, or by the nature of

the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra*, 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)

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

Secondary Sources

6 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Torts, §§ ~~14491615–14671631~~

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

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

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

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

**1204. Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—
Shifting Burden of Proof**

[Name of plaintiff] claims that the [product]’s design caused harm to [name of plaintiff]. 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 [name of plaintiff] was harmed; and**
- 3. That the [product]’s design was a substantial factor in causing harm to [name of plaintiff].**

If [name of plaintiff] has proved these three facts, then your decision on this claim must be for [name of plaintiff] unless [name of defendant] proves that the benefits of the [product]’s design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:

- (a) The gravity of the potential harm resulting from the use of the [product];**
 - (b) The likelihood that this harm would occur;**
 - (c) The feasibility of an alternative safer design at the time of manufacture;**
 - (d) The cost of an alternative design; [and]**
 - (e) The disadvantages of an alternative design; [and]**
 - [(f) [Other relevant factor(s)].]**
-

New September 2003; Revised February 2007, April 2009, December 2009, December 2010, June 2011, January 2018

Directions for Use

The consumer expectation test and the risk-benefit test for design defect are not mutually exclusive, and depending on the facts and circumstances of the case, both may be presented to the trier of fact in the same case. (*Demara v. The Raymond Corp.* (2017) 13 Cal.App.5th 545, 554 [221 Cal.Rptr.3d 102].) If the plaintiff asserts both tests ~~for design defect (the consumer expectation test and the risk-benefit test)~~, the instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].) Risk-benefit weighing is not a formal part of, nor may it serve as a defense to, the consumer expectations test. (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1303 [144 Cal.Rptr.3d 326].)

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]; 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*.

Aesthetics might be an additional factor to be considered in an appropriate case in which there is evidence that appearance is important in the marketability of the product. (See *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131 [105 Cal.Rptr.3d 485].)

Sources and Authority

- “A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- “[T]he term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts.” (*Johnson v. United States Steel Corp.* (2015) 240 Cal.App.4th 22, 31 [192 Cal.Rptr.2d 158].)
 - “ ‘[O]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the product’s design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.’ Appellants are therefore correct in asserting that it was not their burden to show that the risks involved in the loader’s design—the lack of mechanical safety devices, or of a warning—outweighed the benefits of these aspects of its designs. The trial court’s instruction to the jury, which quite likely would have been understood to place this burden on appellants, was therefore an error.” (*Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 497–498 [200 Cal.Rptr. 387], internal citations omitted.)
 - “[U]nder the risk/benefit test, the plaintiff may establish the product is defective by showing that its design proximately caused his injury and the defendant then fails to establish that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design. In such case, the jury must evaluate the product’s design by considering the gravity of the danger posed by the design, the likelihood such danger would occur, the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the consumer resulting from an alternative design. ‘In such cases, the jury

must consider the manufacturer's evidence of competing design considerations . . . , and the issue of design defect cannot fairly be resolved by standardless reference to the "expectations" of an "ordinary consumer." ” (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233 [115 Cal.Rptr.3d 151], internal citations omitted.)

- “[T]he defendant’s burden is one ‘affecting the burden of proof, rather than simply the burden of producing evidence.’ ” (*Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487].)
- “The [consumer-expectation and risk-benefit] tests provide alternative means for a plaintiff to prove design defect and do not serve as defenses to one another. A product may be defective under the consumer expectation test even if the benefits of the design outweigh the risks. [Citation.] On the other hand, a product may be defective if it satisfies consumer expectations but contains an excessively preventable danger in that the risks of the design outweigh its benefits.” (*Chavez, supra*, 207 Cal.App.4th at p. 1303.)
- “Under *Barker*, in short, the plaintiff bears an initial burden of making ‘a prima facie showing that the injury was proximately caused by the product’s design.’ This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff’s ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product’s design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff’s prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff’s injury resulted from a misuse of the product.” (*Perez, supra*, 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)
- “ ‘[I]n evaluating the adequacy of a product’s design pursuant to [the risk-benefit] standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.’ ” (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 786–787 [64 Cal.Rptr.3d 908], internal citations omitted.)
- “[E]xpert evidence about compliance with industry standards can be considered on the issue of defective design, in light of all other relevant circumstances, even if such compliance is not a complete defense. An action on a design defect theory can be prosecuted and defended through expert testimony that is addressed to the elements of such a claim, including risk-benefit considerations.” (*Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 426 [136 Cal.Rptr.3d 739].)
- “Plaintiffs contend aesthetics is not a proper consideration in the risk-benefit analysis, and the trial court’s ruling to the contrary was an ‘[e]rror in law.’ We disagree. In our view, much

of the perceived benefit of a car lies in its appearance. A car is not a strictly utilitarian product. We believe that a jury properly may consider aesthetics in balancing the benefits of a challenged design against the risk of danger inherent in the design. Although consideration of the disadvantages of an alternative design (CACI No. 1204, factor (e)) would encompass any impact on aesthetics, we conclude that there was no error in the trial court’s approval of the modification listing aesthetics as a relevant factor.” (*Bell, supra*, 181 Cal.App.4th at p. 1131, internal citations omitted.)

- “Taken together, section 2, subdivision (b), and section 5 of the Restatement indicate that a component part manufacturer may be held liable for a defect in the component. When viewed in its entirety, the Restatement does not support [defendant]’s argument that ‘[o]nly if the component part analysis establishes sufficient control over the design of the alleged defect should the component manufacturer be held to the standard of the risk-benefit test.’ Instead, the test considering foreseeable risks of harm and alternative designs is applied to the component part manufacturer when the alleged defect is in the component.” (*Gonzalez, supra*, 154 Cal.App.4th at pp. 789–790.)
- “Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge.” (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

Secondary Sources

6 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Torts, §§ ~~1449~~~~1615–1467~~~~1631~~

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1223–2:1224 (The Rutter Group)

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

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

19 California Points and Authorities, Ch. 190, *Products Liability*, §§ 190.110, 190.118–190.122 (Matthew Bender)

1222. Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] was negligent by not using reasonable care to warn [or instruct] about the [product]’s dangerous condition or about facts that made the [product] likely to be dangerous. 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 [name of defendant] knew or reasonably should have known that the [product] was dangerous or was likely to be dangerous when used or misused in a reasonably foreseeable manner;**
- 3. That [name of defendant] knew or reasonably should have known that users would not realize the danger;**
- 4. That [name of defendant] failed to adequately warn of the danger [or instruct on the safe use of the [product]];**
- 5. That a reasonable [manufacturer/distributor/seller] under the same or similar circumstances would have warned of the danger [or instructed on the safe use of the [product]];**
- 6. That [name of plaintiff] was harmed; and**
- 7. That [name of defendant]’s failure to warn [or instruct] 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 or side effects 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 June 2011, December 2012

Directions for Use

Give this instruction in a case involving product liability in which a claim for failure to warn is included under a negligence theory. For an instruction on failure to warn under strict liability and for additional sources and authority, see CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*. For instructions on design and manufacturing defect under a negligence theory, see CACI No. 1220, *Negligence—Essential Factual Elements*, and CACI No. 1221, *Negligence—Basic Standard of Care*.

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] [strict liability design defect risk-benefit case].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

The last bracketed paragraph is to be used in prescription drug cases only.

Sources and Authority

- “[T]he manufacturer has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use, if the manufacturer has reason to believe that they will not realize its dangerous condition.” (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1076–1077 [91 Cal.Rptr. 319].)
- “Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about.” (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1305 [144 Cal.Rptr.3d 326], internal citation omitted.)
- “Thus, the question defendants wanted included in the special verdict form—whether a reasonable manufacturer under the same or similar circumstances would have given a warning—is an essential inquiry in the negligent failure to warn claim.” (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 137 [220 Cal.Rptr.3d 127] [citing this instruction].)
- “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], 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].)
- “(1) [T]he strict liability instructions ‘more than subsumed the elements of duty to warn set forth in the negligence instructions’; (2) under the instructions, there is no ‘real difference between a warning to ordinary users about a product use that involves a substantial danger, and a warning about a product that is dangerous or likely to be dangerous for its intended use’; (3) [defendant]’s duty under the strict liability instructions ‘to warn of potential risks and side effects envelope[d] a broader set of risk factors than the duty, [under the] negligence instructions, to warn of facts which make the product “likely to be dangerous” for its intended use’; (4) the reference in the strict liability instructions here to ‘potential risks ... that were known or knowable through the use of scientific knowledge’ encompasses the concept in the negligence instructions of risks [defendant] ‘knew or reasonably should have known’; and (5) for all these reasons, the jury’s finding that [defendant] was not liable under a strict liability theory ‘disposed of any liability for failure to warn’ on a negligence theory.” (*Trejo, supra*, 13 Cal.App.5th at pp. 132–133, original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Torts, §§ ~~1171~~~~1317~~–~~1174A~~~~1321~~

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1271, 2:1295 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.21, Ch. 7, *Proof*, § 7.05 (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*, § 190.165 et seq. (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, January 2018

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 the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(~~db~~); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782] [litigation privilegeprivileged 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].)
- “ ‘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) Torts, §§ 623–654, 705–718

Chin, et al., *California Practice Guide: Employment Litigation*, Ch. 5(I)-D, *Employment Torts And Related Claims—Defamation*, ¶ 5:472, [5:577](#) (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)

1701. Defamation per quod—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 quod defamatory statements]*.

Liability

To establish this claim, *[name of plaintiff]* must prove that all of the following are more likely true than not true:

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 because of the facts and circumstances known to the *[listener(s)/reader(s)]* of the statement(s), *[it/they]* tended to injure *[name of plaintiff]* in *[his/her]* occupation *[or to expose [him/her] to hatred, contempt, ridicule, or shame]* *[or to discourage others from associating or dealing with [him/her]]*;
4. That the statement(s) *[was/were]* false;
5. That *[name of plaintiff]* suffered harm to *[his/her]* property, business, profession, or occupation *[including money spent as a result of the statement(s)]*; and
6. That the statement(s) *[was/were]* a substantial factor in causing *[name of plaintiff]*'s harm.

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 if *[he/she]* proves it is more likely true than not true that *[name of defendant]*'s wrongful conduct was a substantial factor in causing any of the following actual damages:

- 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.

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, January 2018

Directions for Use

Special verdict form CACI No. VF-1701, *Defamation per quod (Public Officer/Figure and Limited Public Figure)*, should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

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 the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].) ~~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].)~~

See also the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

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.
- Special Damages. Civil Code section 48a(4)(b).
- “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* (2011) 189 Cal.App.4th 1354, 1369 [117 Cal.Rptr.3d 747].)
- “ ‘ “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].)
- “If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and 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.” (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73], internal citation omitted.)
- “The question whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. However, ... , some statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. ‘In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion’ ” (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244].)
- “In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader’s special knowledge of extrinsic facts but must specially plead and prove those facts.” (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 7.)
- “A libel ‘per quod,’ ... requires that the injurious character or effect be established by allegation and proof.” (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr. 244, 649 P.2d 886].)
- “In the libel context, ‘inducement’ and ‘innuendo’ are terms of art: ‘[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the “innuendo,” ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the “inducement”).’ ” (*Barnes-Hind, Inc.*

v. Superior Court (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354], internal citations omitted.)

- “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.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th ed. 2005~~ **11th ed. 2017**) Torts, §§ ~~529-623~~ **529-623**, ~~601-705~~ **601-705**–~~612-718~~

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*, §§ 340.10–340.75 (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)

1702. Defamation per se—Essential Factual Elements (Private Figure—Matter of Public Concern)

[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 statement(s)]*. **To establish this claim, *[name of plaintiff]* must prove all of the following:**

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”]*;**
- 4. That the statement(s) [was/were] false; and**
- 5. That *[name of defendant]* failed to use reasonable care to determine the truth or falsity 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

If *[name of plaintiff]* has not proved any actual damages for harm to reputation or shame, mortification, or hurt feelings but proves by clear and convincing evidence that *[name of defendant]* knew the statement(s) [was/were] false or that [he/she] had serious doubts about the truth of the statement(s), then the law assumes that *[name of plaintiff]*'s reputation has been harmed and that [he/she] has suffered shame, mortification, or hurt feelings. 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] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she] acted with malice, oppression, or fraud.

[For specific provisions, see CACI Nos. 3940–3949.]

New September 2003; Revised April 2008, October 2008, December 2009, June 2016, December 2016, January 2018

Directions for Use

Special verdict form CACI No. VF-1702, *Defamation per se (Private Figure—Matter of Public Concern)*, should be used in this type of case.

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

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 the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation

~~privilege].) 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 is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.” (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)
- “The question whether a plaintiff is a public figure is to be determined by the court, not the jury.” (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)
- A private plaintiff is not required to prove malice to recover actual damages. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 347-348 [94 S.Ct. 2997, 41 L.Ed.2d 789]; *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 742 [257 Cal.Rptr. 708, 771 P.2d 406].)
- “ ‘[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.’ ” (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845 [52 Cal.Rptr.2d 831].)
- “[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.)
- The jury should be instructed that the defendant’s negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)
- “When the speech involves a matter of public concern, a private-figure plaintiff has the burden of proving the falsity of the defamation.” (*Brown, supra*, 48 Cal.3d at p. 747.)

- “Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.” (*Gertz, supra*, 418 U.S. at p. 350.)
- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273-274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)
- “A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice ... to recover presumed or punitive damages. This malice must be established by ‘clear and convincing proof.’ ” (*Brown, supra*, 48 Cal.3d at p. 747, internal citations omitted.)
- When the court is instructing on punitive damages, it is error to fail to instruct that *New York Times* malice is required when the statements at issue involve matters of public concern. (*Carney, supra*, 221 Cal.App.3d at p. 1022.)
- “To prove actual malice ... a plaintiff must ‘demonstrate with clear and convincing evidence that the defendant realized that his statement was false or that he subjectively entertained serious doubts as to the truth of his statement.’ ” (*Khawar, supra*, 19 Cal.4th at p. 275, internal citation omitted.)
- “Because actual malice is a higher fault standard than negligence, a finding of actual malice generally includes a finding of negligence” (*Khawar, supra*, 19 Cal.4th at p. 279.)
- “The inquiry into the protected status of speech is one of law, not fact.” (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781], quoting *Connick v. Myers* (1983) 461 U.S. 138, 148, fn. 7 [103 S.Ct. 1684, 75 L.Ed.2d 708].)
- “For the *New York Times* standard to be met, ‘the publisher must come close to willfully blinding itself to the falsity of its utterance.’ ” (*Brown, supra*, 48 Cal.3d at p. 747, internal citation omitted.)
- “ ‘While such speech is not totally unprotected by the First Amendment, its protections are less stringent’ [than that applying to speech on matters of public concern].” (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Torts, §§ ~~529623–555654, 613719–615721~~

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*, §§ 340.12–340.13, 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.30–142.40, 142.87 et seq. (Matthew Bender)

California Civil Practice: Torts, §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1703. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Public Concern)

[Name of plaintiff] claims that *[name of defendant]* harmed *[him/her]* by making *[one or more of]* the following statement(s): *[insert all claimed per quod defamatory statements]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

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 because of the facts and circumstances known to the *[listener(s)/reader(s)]* of the statement(s), *[it/they]* tended to injure *[name of plaintiff]* in *[his/her]* occupation *[or to expose [him/her] to hatred, contempt, ridicule, or shame]* *[or to discourage others from associating or dealing with [him/her]]*;
4. That the statement(s) *[was/were]* false;
5. That *[name of defendant]* failed to use reasonable care to determine the truth or falsity of the statement(s);
6. That *[name of plaintiff]* suffered harm to *[his/her]* property, business, profession, or occupation *[including money spent as a result of the statement(s)]*; and
7. That the statements *[was/were]* a substantial factor in causing *[name of plaintiff]*'s harm.

Actual Damages

If *[name of plaintiff]* has proved all of the above, then *[he/she]* is entitled to recover if *[he/she]* proves that *[name of defendant]*'s wrongful conduct was a substantial factor in causing any of the following actual damages:

- 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.

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*] either knew the statement(s) [was/were] false or had serious doubts about the truth of the statement(s), and that [he/she] acted with malice, oppression, or fraud.

[For specific provisions, see CACI Nos. 3940–3949.]

New September 2003; Revised April 2008, December 2009, June 2016, December 2016, January 2018

Directions for Use

Special verdict form VF-1703, *Defamation per quod (Private Figure—Matter of Public Concern)*, should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

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 the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].) 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].)

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Sources and Authority

- Libel per se. Civil Code section 45a.
- Special Damages. Civil Code section 48a(4)(b).
- “Libel is recognized as either being per se (on its face), or per quod (literally meaning, ‘whereby’), and each requires a different standard of pleading.” (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)
- “If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and 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.” (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 5, internal citation omitted.)
- “In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader’s special knowledge of extrinsic facts but must specially plead and prove those facts.” (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 7, footnote omitted.)
- “A libel ‘per quod’ ... requires that the injurious character or effect be established by allegation and proof.” (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153–154 [185 Cal.Rptr. 244, 649 P.2d 886].)
- “In the libel context, ‘inducement’ and ‘innuendo’ are terms of art: ‘[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) Allege his interpretation of the defamatory meaning of the language (the “innuendo,” ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the “inducement”).’ ” (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)
- “A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof.” (*Selleck v. Globe Int’l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)
- “The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood.” (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)
- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are only required to prove negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)
- “ ‘[I]f the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants, it was a public controversy.’ ” (*Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845 [52

Cal.Rptr.2d 831], quoting *Waldbaum v. Fairchild Publications, Inc.* (D.C. Cir. 1980) 627 F.2d 1287, 1297.)

- If the language is not defamatory on its face, there is no distinction between libel and slander: “In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages.” (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)
- A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345–347 [94 S.Ct. 2997, 41 L.Ed.2d 789].)
- “The question whether a plaintiff is a public figure is to be determined by the court, not the jury.” (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203–204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th ed. 2005~~ 11th ed. 2017) Torts, §§ ~~529623–555654, 613719–615721~~

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*, §§ 340.11, 340.13 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.30–142.40 (Matthew Bender)

California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1704. Defamation per se—Essential Factual Elements (Private Figure—Matter of Private Concern)

[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 statement(s)]. To establish this claim, [name of plaintiff] must prove all of the following:

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”];**
- 4. That [name of defendant] failed to use reasonable care to determine the truth or falsity 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 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, December 2009, June 2016, December 2016, January 2018

Directions for Use

Special verdict form VF-1704, *Defamation per se—Affirmative Defense—Truth (Private Figure—Matter of Private Concern)*, may 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 the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].) ~~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].)~~

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1700, *Defamation per se—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Sources and Authority

- “Defamation is an invasion of the interest in reputation. The tort involves the intentional publication

of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage.” (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645 [85 Cal.Rptr.2d 397].)

- “The question whether a plaintiff is a public figure [or not] is to be determined by the court, not the jury.” (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal.Rptr.2d 740], internal citation omitted.)
- The jury should be instructed that the defendant’s negligence is an element of libel if the plaintiff is a private figure. (*Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1016 [271 Cal.Rptr. 30].)
- “A private-figure plaintiff must prove at least negligence to recover any damages and, when the speech involves a matter of public concern, he must also prove *New York Times* malice ... to recover presumed or punitive damages.” (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 747 [257 Cal.Rptr. 708, 771 P.2d 406].)
- “The First Amendment trumps the common law presumption of falsity in defamation cases involving private-figure plaintiffs when the allegedly defamatory statements pertain to a matter of public interest.” (*Nizam-Aldine v. City of Oakland* (1996) 47 Cal.App.4th 364, 375 [54 Cal.Rptr.2d 781].)
- “Thus, in a defamation action the burden is normally on the defendant to prove the truth of the allegedly defamatory communications. However, in accommodation of First Amendment considerations (which are implicated by state defamation laws), where the plaintiff is a public figure, the ‘public-figure plaintiff must show the falsity of the statements at issue in order to prevail in a suit for defamation.’ ” (*Stolz, supra*, 30 Cal.App.4th at p. 202, internal citations omitted.)
- “Since the statements at issue here involved a matter of purely private concern communicated between private individuals, we do not regard them as raising a First Amendment issue. ‘While such speech is not totally unprotected by the First Amendment, its protections are less stringent’ [than that applying to speech on matters of public concern].” (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305], quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 760 [105 S.Ct. 2939, 86 L.Ed.2d 593], internal citation omitted.)
- “We conclude that permitting recovery of presumed and punitive damages in defamation cases absent a showing of ‘actual malice’ does not violate the First Amendment when the defamatory statements do not involve matters of public concern.” (*Dun & Bradstreet, Inc., supra*, 472 U.S. at p. 763.)
- “When the speech is of exclusively private concern and the plaintiff is a private figure, as in *Dun & Bradstreet*, the constitutional requirements do not necessarily force any change in at least some of the features of the common-law landscape.” (*Philadelphia Newspapers, Inc. v. Hepps* (1986) 475 U.S. 767, 775 [106 S.Ct. 1558, 89 L.Ed.2d 783].)
- “[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.” (*Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1382 [88 Cal.Rptr.2d 802].)

Secondary Sources

5 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Torts, §§ ~~529623–555654~~, ~~615721~~

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*, § 340.18 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.87 (Matthew Bender)

California Civil Practice: Torts, §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1705. Defamation per quod—Essential Factual Elements (Private Figure—Matter of Private Concern)

[Name of plaintiff] claims that [name of defendant] harmed [him/her] by making [one or more of] the following statement(s): [insert all claimed per quod defamatory statements]. To establish this claim, [name of plaintiff] must prove all of the following:

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 because of the facts and circumstances known to the [listener(s)/reader(s)] of the statement(s), [it/they] tended to injure [name of plaintiff] in [his/her] occupation [or to expose [him/her] to hatred, contempt, ridicule, or shame] [or to discourage others from associating or dealing with [him/her]];**
- 4. That [name of defendant] failed to use reasonable care to determine the truth or falsity of the statement(s);**
- 5. That [name of plaintiff] suffered harm to [his/her] property, business, profession, or occupation [including money spent as a result of the statement(s)]; and**
- 6. That the statement(s) [was/were] a substantial factor in causing [name of plaintiff]'s harm.**

Actual Damages

If [name of plaintiff] has proved all of the above, then [he/she] is entitled to recover if [he/she] proves that [name of defendant]'s wrongful conduct was a substantial factor in causing any of the following actual damages:

- 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.**

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, December 2009, June 2016, December 2016, January 2018

Directions for Use

Special verdict form VF-1705, *Defamation per quod (Private Figure—Matter of Private Concern)*, should be used in this type of case.

Presumed damages either are not available or will likely not be sought in a per quod case.

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 the privilege of Civil Code section 47(d) for a privileged publication or broadcast is at issue, give CACI No. 1724, *Fair and True Reporting Privilege*. (See *J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87 [201 Cal.Rptr.3d 782].) If some other privilege is at issue, an additional element or instruction targeting that privilege will be required. (See, e.g., Civ. Code, § 47(b); *Argentieri v. Zuckerberg* (2017) 8 Cal.App.5th 768, 780–787 [214 Cal.Rptr.3d 358] [litigation privilege].) 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].)

For statutes and cases on libel and slander and on the difference between defamation per se and defamation per quod, see the Sources and Authority to CACI No. 1701, *Defamation per quod—Essential Factual Elements (Public Officer/Figure and Limited Public Figure)*.

Sources and Authority

- Libel per se. Civil Code section 45a.
- Special Damages. Civil Code section 48a(4)(b).
- “Libel is recognized as either being per se (on its face), or per quod (literally meaning, ‘whereby’),

and each requires a different standard of pleading.” (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 5 [86 Cal.Rptr.2d 73].)

- “If [a] defamatory meaning would appear only to readers who might be able to recognize it through some knowledge of specific facts and/or circumstances, not discernible from the face of the publication, and 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.” (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 5, internal citation omitted.)
- “In pleading a case of libel per quod the plaintiff cannot assume that the court has access to the reader’s special knowledge of extrinsic facts but must specially plead and prove those facts.” (*Palm Springs Tennis Club, supra*, 73 Cal.App.4th at p. 7, footnote omitted.)
- “A libel ‘per quod’ ... requires that the injurious character or effect be established by allegation and proof.” (*Slaughter v. Friedman* (1982) 32 Cal.3d 149, 153-154 [185 Cal.Rptr. 244, 649 P.2d 886].)
- “In the libel context, ‘inducement’ and ‘innuendo’ are terms of art: ‘[W]here the language is ambiguous and an explanation is necessary to establish the defamatory meaning, the pleader must do two things: (1) allege his interpretation of the defamatory meaning of the language (the “innuendo,” ...); (2) support that interpretation by alleging facts showing that the readers or hearers to whom it was published would understand it in that defamatory sense (the “inducement”).’ ” (*Barnes-Hind, Inc. v. Superior Court* (1986) 181 Cal.App.3d 377, 387 [226 Cal.Rptr. 354].)
- “A defamatory publication not libelous on its face is not actionable unless the plaintiff alleges that he has suffered special damages as a result thereof.” (*Selleck v. Globe Int’l, Inc.* (1985) 166 Cal.App.3d 1123, 1130 [212 Cal.Rptr. 838].)
- “The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court. Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood.” (*Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 647 [85 Cal.Rptr.2d 397], internal citations omitted.)
- Private-figure plaintiffs must prove actual malice to recover punitive or presumed damages for defamation if the matter is one of public concern. They are required to prove only negligence to recover damages for actual injury to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273-274 [79 Cal.Rptr.2d 178, 965 P.2d 696].)
- If the language is not defamatory on its face, there is no distinction between libel and slander: “In either case, the fact that a statement is not defamatory on its face requires only that the plaintiff plead and prove the defamatory meaning and special damages.” (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 447 [26 Cal.Rptr.2d 305].)
- A plaintiff must prove that the defendant was at least negligent in failing to ascertain the truth or falsity of the statement. (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 345-347 [94 S.Ct. 2997, 41 L.Ed.2d 789].)

- “The question whether a plaintiff is a public figure is to be determined by the court, not the jury.” (*Stolz v. KSFM 102 FM* (1994) 30 Cal.App.4th 195, 203-204 [35 Cal.Rptr.2d 740], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th ed. 2005~~ **11th ed. 2017**) Torts, §§ ~~529-623~~ **555-654, 615-721**

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*, §§ 340.12–340.13 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, §§ 142.20–142.32 (Matthew Bender)

California Civil Practice: Torts §§ 21:1–21:2, 21:22–21:25, 21:51 (Thomson Reuters)

1707. Fact Versus Opinion

For [name of plaintiff] to recover, [name of defendant]’s statement(s) must have been [a] statement(s) of fact, not opinion. A statement of fact is one that can be proved to be true or false. In some circumstances, [name of plaintiff] may recover if a statement phrased as an opinion implies that a false statement of fact is true.

In deciding this issue, you should consider whether the average [reader/listener] would conclude from the language of the statement and its context that [name of defendant] was implying that a false statement of fact is true.

New September 2003; Revised June 2013

Directions for Use

Give this instruction only if the court concludes that a statement could reasonably be construed as implying a false assertion of fact. (See *Campanelli v. Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 572, 578 [51 Cal.Rptr.2d 891].)

Sources and Authority

- “ ‘Because [a defamatory] statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected. [Citation.]’ That does not mean that statements of opinion enjoy blanket protection. On the contrary, where an expression of opinion implies a false assertion of fact, the opinion can constitute actionable defamation. The ‘crucial question of whether challenged statements convey the requisite factual imputation is ordinarily a question of law for the court. [Citation.]’ ‘Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood. [Citations.]’ ” (*Summit Bank v. Rogers* (2012) 206 Cal.App.4th 669, 695–696 [142 Cal.Rptr.3d 40], internal citations omitted.)
- “Thus, our inquiry is not merely whether the statements are fact or opinion, but ‘ “whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.” ’ ” (*Hawran v. Hixson* (2012) 209 Cal.App.4th 256, 289 [147 Cal.Rptr.3d 88].)
- “In defining libel and slander, Civil Code sections 45 and 46 both refer to a ‘false ... publication’ This statutory definition can be meaningfully applied only to statements that are capable of being proved as false or true.” (*Savage v. Pacific Gas & Electric Co.* (1993) 21 Cal.App.4th 434, 445 [26 Cal.Rptr.2d 305].)
- “Thus, ‘rhetorical hyperbole,’ ‘vigorous epithet[s],’ ‘lusty and imaginative expressions[s] of ... contempt,’ and language used ‘in a loose, figurative sense’ have all been accorded constitutional

protection.” (*Ferlauto v. Hamsher* (1999) 74 Cal.App.4th 1394, 1401 [88 Cal.Rptr.2d 843].)

- “Deprecatory statements regarding the merits of litigation are “nothing more than ‘the predictable opinion’ of one side to the lawsuit” and cannot be the basis for a defamation claim.” (*GetFugu, Inc. v. Patton Boggs LLP* (2013) 220 Cal.App.4th 141, 156 [162 Cal.Rptr.3d 831].)
- “If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.” (*Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, 18 [110 S.Ct. 2695, 111 L.Ed.2d 1].)
- “[W]hen a communication identifies non-defamatory facts underlying an opinion, or the recipient is otherwise aware of those facts, a negative statement of opinion is not defamatory. As explained in the Restatement Second of Torts, a ‘pure type of expression of opinion’ occurs ‘when both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts and does not imply the existence of other facts in order to justify the comment. The assumption of the facts may come about because someone else has stated them or because they were assumed by both parties as a result of their notoriety or otherwise.’ Actionable statements of opinion are ‘the mixed type, [where] an opinion in form or context, is apparently based on facts regarding the plaintiff or his conduct that have not been stated by the defendant [but] gives rise to the inference that there are undisclosed facts that justify the forming of the opinion.’” (*John Doe 2 v. Superior Court* (2016) 1 Cal.App.5th 1300, 1314 [206 Cal.Rptr.3d 60], internal citation omitted.)
- “Even if an opinion can be understood as implying facts capable of being proved true or false, however, it is not actionable if it also discloses the underlying factual bases for the opinion and those statements are true.” (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 100 [201 Cal.Rptr.3d 782].)
- “California courts have developed a ‘totality of the circumstances’ test to determine whether an alleged defamatory statement is one of fact or of opinion. First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense. Where the language of the statement is ‘cautiously phrased in terms of apparency,’ the statement is less likely to be reasonably understood as a statement of fact rather than opinion.” (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260 [228 Cal.Rptr. 206, 721 P.2d 87].)
- “The court must put itself in the place of an average reader and decide the natural and probable effect of the statement.” (*Hofmann Co. v. E.I. Du Pont de Nemors & Co.* (1988) 202 Cal.App.3d 390, 398 [248 Cal.Rptr. 384].)
- “[S]ome statements are ambiguous and cannot be characterized as factual or nonfactual as a matter of law. ‘In these circumstances, it is for the jury to determine whether an ordinary reader would have understood the article as a factual assertion’” (*Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1608 [284 Cal.Rptr. 244], internal citations omitted.)
- “Use of ‘hyperbolic, informal’ ‘“crude, [or] ungrammatical” language, satirical tone, [or]

vituperative, “juvenile name-calling” ’ provide support for the conclusion that offensive comments were nonactionable opinion. Similarly, overly vague statements, and ‘ “generalized” comments ... “lack[ing] any specificity as to the time or place of” alleged conduct may be a “further signal to the reader there is no factual basis for the accusations.” ’ On the other hand, if a statement is ‘factually specific,’ ‘earnest,’ or ‘serious’ in tone, or the speaker ‘represents himself as “unbiased,” ’ ‘ “having specialized” ’ or ‘ “first-hand experience,” ’ or ‘ “hav[ing] personally witnessed ... abhorrent behavior” ’, this may signal the opposite, rendering the statement actionable.’ (ZL Technologies, Inc. v. Does 1–7 (2017) 13 Cal.App.5th 603, 624 [220 Cal.Rptr.3d 569], internal citations omitted.)

- “Whether a challenged statement ‘declares or implies a provable false assertion of fact is a question of law for the court to decide ... , unless the statement is susceptible of both an innocent and a libelous meaning, in which case the jury must decide how the statement was understood.’ ” (*Overhill Farms, Inc. v. Lopez* (2010) 190 Cal.App.4th 1248, 1261 [119 Cal.Rptr.3d 127].)
- “We next turn to the broader context of his statements—posting on an Internet site under an assumed user name. [Defendant] contends Internet fora are notorious as ‘places where readers expect to see strongly worded opinions rather than objective facts,’ and that ‘anonymous, or pseudonymous,’ opinions should be ‘ “discount[ed] ... accordingly.” ’ However, the mere fact speech is broadcast across the Internet by an anonymous speaker does not ipso facto make it nonactionable opinion and immune from defamation law.” (*Bently Reserve LP v. Papaliolios* (2013) 218 Cal.App.4th 418, 429 [160 Cal.Rptr.3d 423], internal citation omitted.)
- “Rather, a defendant's anonymity, the name of the Internet forum, the nature, language, tone, and complete content of the remarks all are relevant.” (ZL Technologies, Inc., *supra*, 13 Cal.App.5th at p. 625.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th–11th~~ ed. ~~2005~~2017) Torts, §§ ~~643–646~~546, 547, 549

4 Levy et al., California Torts, Ch. 45, *Defamation*, §§ 45.05–45.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.16 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.86 (Matthew Bender)

California Civil Practice: Torts §§ 21:20–21:21 (Thomson Reuters)

1723. Common Interest Privilege—Malice (Civ. Code, § 47(c))

[Name of plaintiff] cannot recover damages from [name of defendant], even if the statement(s) [was/were] false, unless [name of plaintiff] also proves either:

1. That in making the statement(s), [name of defendant] acted with hatred or ill will toward [him/her], showing [name of defendant]’s willingness to vex, annoy, or injure [him/her]; or
 2. That [name of defendant] had no reasonable grounds for believing the truth of the statement(s).
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New September 2003; Revised June 2014

Directions for Use

This instruction involves what is referred to as the “common interest” privilege of Civil Code section 47(c). This statute grants a privilege against defamation to communications made without malice on subjects of mutual interest. The defendant bears the initial burden of showing facts to bring the communication within the privilege. The plaintiff then must prove malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].)

Sources and Authority

- Common-Interest Privilege: Civil Code section 47(c).
- Malice Not Inferred: Civil Code section 48.
- “So, defendants contended, any publication was protected by the common interest privilege in Civil Code section 47, subdivision (c), which extends a privilege to statements made ‘without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.’ ” (*Barker v. Fox & Associates* (2015) 240 Cal.App.4th 333, 353 [192 Cal.Rptr.3d 511].)
- “Civil Code section 47 ‘extends a conditional privilege against defamation to statements made without malice on subjects of mutual interests. [Citation.] This privilege is “recognized where the communicator and the recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest.” [Citation.] The “interest” must be something other than mere general or idle curiosity, such as where the parties to the communication share a contractual, business or similar relationship or the defendant is protecting his own pecuniary interest. [Citation.] Rather, it is restricted to ‘proprietary or narrow private interests.’ ” (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118–1119 [166 Cal.Rptr.3d 569].)
- “For the purposes of section 47’s qualified privilege, ‘malice’ means that the defendant (1) ‘was

motivated by hatred or ill will towards the plaintiff,” or (2) “lacked reasonable grounds for [its] belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff’s rights.”’” (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1337 [220 Cal.Rptr.3d 408] ~~The malice necessary to defeat a qualified privilege is ‘actual malice’ which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff’s rights.”~~ (*Taus v. Loftus* (2007) 40 Cal.4th 683, 721 [54 Cal.Rptr.3d 775, 151 P.3d 1185], original italics.)

- “[M]alice [as used in Civil Code section 47(c)] has been 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], internal citation omitted.)
- “[M]alice may not be inferred from the mere fact of the communication.” (*Barker, supra*, 240 Cal.App.4th at p. 354.)
- “For purposes of establishing a triable issue of malice, ‘the issue is not the truth or falsity of the statements but whether they were made recklessly without reasonable belief in their truth.’ A triable issue of malice would exist if [defendant] made a statement in reckless disregard of Employee’s rights that [defendant] either did not believe to be true (i.e., he actually knew better) or unreasonably believed to be true (i.e., he should have known better). In either case, a fact finder would have to ascertain what [defendant] subjectively knew and believed about the topic at the time he spoke.” (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1540 [152 Cal.Rptr.3d 154], internal citation omitted.)
- “[M]aliciousness cannot be derived from negligence. Malice entails more than sloppiness or, as in this case, an easily explained typo.” (*Bierbower v. FHP, Inc.* (1999) 70 Cal.App.4th 1, 9 [82 Cal.Rptr.2d 393].)
- “[I]f malice is shown, the privilege is not merely overcome; it never arises in the first instance. ... [T]he characterization of the privilege as qualified or conditional is incorrect to the extent that it suggests the privilege is defeasible.” (*Brown, supra*, 48 Cal.3d at p. 723, fn. 7.)

Secondary Sources

5 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Torts, §§ ~~16392, 556655, 585690–600704~~

Chin, et al., California Practice Guide: Employment Litigation, Ch. 5(I)-D, *Employment Torts And Related Claims—Defamation*, ¶ 5:~~435–471~~ et seq. (The Rutter Group)

4 Levy et al., California Torts, Ch. 45, *Defamation*, § 45.12 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.66 (Matthew Bender)

14 California Points and Authorities, Ch. 142, *Libel and Slander (Defamation)*, § 142.53 (Matthew Bender)

California Civil Practice: Torts §§ 21:40–21:41 (Thomson Reuters)

2308. Affirmative Defense—Misrepresentation or Concealment in Insurance Application

[*Name of insurer*] **claims that no insurance contract was created because** [*name of insured*] **[concealed an important fact/made a false representation] in [his/her/its] application for insurance. To establish this defense, [*name of insurer*] must prove all of the following:**

1. **That** [*name of insured*] **submitted an application for insurance with** [*name of insurer*];
 2. **That in the application for insurance** [*name of insured*], **whether intentionally or unintentionally, [failed to state/represented] that** [*insert omission or alleged misrepresentation*];
 3. **[That the application asked for that information;]**
 4. **That** [*name of insured*] **knew that** [*specify facts that were misrepresented or omitted*]; **and**
 5. **That** [*name of insurer*] **would not have issued the insurance policy if** [*name of insured*] **had stated the true facts in the application.**
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New September 2003; Revised April 2004, October 2004, June 2015

Directions for Use

This instruction presents an insurer's affirmative defense to a claim for coverage. The defense is based on a misrepresentation or omission made by the insured in the application for the insurance. (See *Douglas v. Fid. Nat'l Ins. Co.* (2014) 229 Cal.App.4th 392, 408 [177 Cal.Rptr.3d 271].) If the policy at issue is a standard fire insurance policy, replace "intentionally or unintentionally" in element 2 with "willfully." (See Ins. Code, § 2071.) Otherwise, the insurer is not required to prove an intent to deceive; negligence or inadvertence is enough if the misrepresentation or omission is material. (*Douglas, supra*, 229 Cal.App.4th at p. 408.) Element 5 expresses materiality.

Element 3 applies only if plaintiff omitted information, not if he or she misrepresented information.

While no intent to mislead is required, the insured must know the facts that constitute the omission or misrepresentation (see element 4). For example, if the application does not disclose that property on which insurance is sought is being used commercially, the applicant must have known that the property is being used commercially. (See Ins. Code, § 332.) It is not a defense, however, if the insured gave incorrect or incomplete responses on the application because he or she failed to appreciate the significance of some information known to him or her. (See *Thompson v. Occidental Life Insurance Co. of California* (1973) 9 Cal.3d 904, 916 [109 Cal.Rptr. 473, 513 P.2d 353].)

If it is alleged that omission occurred in circumstances other than a written application, this instruction should be modified accordingly.

Sources and Authority

- Rescission of Contract. Civil Code section 1689(b)(1).
- Time of Insurer’s Rescission of Policy. Insurance Code section 650.
- Concealment by Failure to Communicate. Insurance Code section 330.
- Concealment Entitles Insurer to Rescind. Insurance Code section 331.
- Duty to Communicate in Good Faith. Insurance Code section 332.
- Materiality. Insurance Code section 334.
- Intentional Omission of Information Tending to Prove Falsity. Insurance Code section 338.
- False Representation: Time for Rescission. Insurance Code section 359.
- “It is well established that material misrepresentations or concealment of material facts in an application for insurance entitle an insurer to rescind an insurance policy, even if the misrepresentations are not intentionally made. Additionally, “[a] misrepresentation or concealment of a material fact in an insurance application also establishes a complete defense in an action on the policy. [Citations.] As with rescission, an insurer seeking to invalidate a policy based on a material misrepresentation or concealment as a defense need not show an intent to deceive. [Citations.]” (*Douglas, supra*, 229 Cal.App.4th at p. 408, internal citations omitted.)
- “When the [automobile] insurer fails ... to conduct ... a reasonable investigation [of insurability] it cannot assert ... a right of rescission” under section 650 of the Insurance Code as an affirmative defense to an action by an injured third party. (*Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659, 678 [79 Cal.Rptr. 106, 456 P.2d 674].)
- “[A]n insurer has a right to know all that the applicant for insurance knows regarding the state of his health and medical history. Material misrepresentation or concealment of such facts [is] grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect [that] truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law.” (*Thompson, supra*, 9 Cal.3d at pp. 915-916, internal citations omitted.)
- “[A]lthough an insurer generally ‘has the right to rely on the applicant’s answers without verifying their accuracy[.] ... [¶] ... [t]he insurer cannot rely on answers given where the applicant-insured was misled by vague or ambiguous questions.’” (*Duarte v. Pacific Specialty Ins. Co.* (2017) 13 Cal.App.5th 45, 54 [220 Cal.Rptr.3d 170], original italics.)
- “[I]f the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate

the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission. Moreover, “[questions] concerning illness or disease do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the general health.’ Finally, as the misrepresentation must be a material one, ‘incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer.’ And the trier of fact is not required to believe the ‘post mortem’ testimony of an insurer’s agents that insurance would have been refused had the true facts been disclosed.” (*Thompson, supra*, 9 Cal.3d at p. 916, internal citations omitted.)

- “[T]he burden of proving misrepresentation [for purposes of rescission] rests upon the insurer.” (*Thompson, supra*, 9 Cal.3d at p. 919.)
- “To prevail, the insurer must prove that the insured made a material ‘false representation’ in an insurance application. ‘A representation is false when the facts fail to correspond with its assertions or stipulations.’ The test for materiality of the misrepresentation or concealment is the same as it is for rescission, ‘a misrepresentation or concealment is material if a truthful statement would have affected the insurer’s underwriting decision.’ ” (*Douglas, supra*, 229 Cal.App.4th at p. 408, internal citations omitted.)
- “The materiality of a representation made in an application for a contract of insurance is determined by a *subjective* standard (i.e., its effect on the *particular* insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured’s violation of the standard fraud and concealment clause ... , the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the *objective* standard of its effect upon a *reasonable* insurer.” (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568], original italics, internal citation omitted.)
- “The insurer is not required to show a causal relationship between the material misrepresentation or concealment of material fact and the nature of the claim.” (*Duarte, supra*, 13 Cal.App.5th at p. 53.)
- “Cancellation and rescission are not synonymous. One is prospective, while the other is retroactive.” (*Fireman’s Fund American Insurance Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619 [145 Cal.Rptr. 785].)
- “[U]pon a rescission of a policy of insurance, based upon a material concealment or misrepresentation, all rights of the insured thereunder (except the right to recover any consideration paid in the purchase of the policy) are extinguished” (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639].)
- “The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. ... [T]his would require the refund by [the insurer] of any premiums and the repayment by the defendants of any proceed advance which they may have received.” (*Imperial Casualty & Indemnity Co., supra*, 198 Cal.App.3d at p. 184, internal citation omitted.)

Secondary Sources

Croskey et al., California Practice Guide: Insurance Litigation ¶¶ 5:143–5:146, 5:153–5:159.1, 5:160–5:287, 15:241–15:256 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) Rescission and Reformation, §§ 21.2–21.12, 21.35–21.37

2 California Insurance Law & Practice, Ch. 8, *The Insurance Contract*, § 8.10[1] (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, § 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.18 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, §§ 120.250–120.251, 120.260 (Matthew Bender)

2330. Implied Obligation of Good Faith and Fair Dealing Explained

In every insurance policy there is an implied obligation of good faith and fair dealing that neither the insurance company nor the insured will do anything to injure the right of the other party to receive the benefits of the agreement.

To fulfill its implied obligation of good faith and fair dealing, an insurance company must give at least as much consideration to the interests of the insured as it gives to its own interests.

To breach the implied obligation of good faith and fair dealing, an insurance company must unreasonably act or fail to act in a manner that deprives the insured of the benefits of the policy. To act unreasonably is not a mere failure to exercise reasonable care. It means that the insurer must act or fail to act without proper cause. However, it is not necessary for the insurer to intend to deprive the insured of the benefits of the policy.

New September 2003; Revised December 2007, December 2015

Directions for Use

This instruction may be used to introduce a “bad-faith” claim arising from an alleged breach of the implied covenant of good faith and fair dealing.

Sources and Authority

- “There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement.” (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198].)
- “It is important to recognize the reason for the possibility of tort, and perhaps even punitive damages on top of regular tort damages, for an insurance company’s unreasonable breach of an insurance contract. Insurance contracts are unique in that, if the insurance company breaches them, the policyholder suffers a loss (often a catastrophic loss) that cannot, by definition, be compensated by obtaining another contract. [Citations.] [¶] Thus, without the possibility of tort damages hanging over its head when it makes a claims decision, an insurance company may choose not to deal in good faith when a policyholder makes a claim. The insurance company could arbitrarily deny a claim, thus gambling with the policyholder’s ‘benefits of the agreement.’ [Citation.] If the insurance company gambled wrong, it would be no worse off than it would have been if it had honored the claim in the first place. In effect, if the law confined the exposure of the insurance company under such circumstances to only contract damages, it would be pardoned and still retain the fruits of its offense.” (*Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1125.)
- “For the insurer to fulfill its obligation not to impair the right of the insured to receive the benefits of the agreement, it again must give at least as much consideration to the latter’s interests as it does to its own.” (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 818–819 [169 Cal.Rptr. 691,

620 P.2d 141].)

- “[T]o establish the insurer's ‘bad faith’ liability, the insured must show that the insurer has (1) withheld benefits due under the policy, and (2) that such withholding was ‘unreasonable’ or ‘without proper cause.’ The actionable withholding of benefits may consist of the denial of benefits due; paying less than due; and/or unreasonably delaying payments due.” (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1209 [87 Cal.Rptr.3d 556], internal citations omitted.)
- “ ‘[T]he covenant of good faith can be breached for objectively unreasonable conduct, regardless of the actor's motive.’ ... [A]n insured plaintiff need only show, for example, that the insurer unreasonably refused to pay benefits or failed to accept a reasonable settlement offer; there is no requirement to establish *subjective* bad faith.” (*Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744], original italics, internal citations omitted.)
- “Bad faith may involve negligence, or negligence may be indicative of bad faith, but negligence alone is insufficient to render the insurer liable.” (*Brown v. Guarantee Ins. Co.* (1957) 155 Cal.App.2d 679, 689 [319 P.2d 69].)
- “Thus, a breach of the implied covenant of good faith and fair dealing involves something more than a breach of the contract or mistaken judgment. There must be proof the insurer failed or refused to discharge its contractual duties not because of an honest mistake, bad judgment, or negligence, ‘but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement.’ ” (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468], internal citations omitted.)
- “[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages.” (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312].)
- “Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.” (*R. J. Kuhl Corp. v. Sullivan* (1993) 13 Cal.App.4th 1589, 1602 [17 Cal.Rptr.2d 425].)
- “[A]n insurer is not required to pay every claim presented to it. Besides the duty to deal fairly with the insured, the insurer also has a duty to its other policyholders and to the stockholders (if it is such a company) not to dissipate its reserves through the payment of meritless claims. Such a practice inevitably would prejudice the insurance seeking public because of the necessity to increase rates, and would finally drive the insurer out of business.” (*Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 30 [148 Cal.Rptr. 653], overruled on other grounds in *Egan, supra*, 24 Cal.3d at p. 824 fn. 7.)

- “Unique obligations are imposed upon true fiduciaries which are not found in the insurance relationship. For example, a true fiduciary must first consider and always act in the best interests of its trust and not allow self-interest to overpower its duty to act in the trust's best interests. An insurer, however, may give its own interests consideration equal to that it gives the interests of its insured; it is not required to disregard the interests of its shareholders and other policyholders when evaluating claims; and it is not required to pay noncovered claims, even though payment would be in the best interests of its insured.” (*Love v. Fire Ins. Exchange* (1990) 221 Cal.App.3d 1136, 1148–1149 [271 Cal.Rptr. 246], internal citations omitted.)
- “[I]n California, an insurer has the same duty to act in good faith in the uninsured motorist context as it does in any other insurance context.” (*Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 636 [173 Cal.Rptr.3d 854].)
- “[P]erformance of an act specifically authorized by the policy cannot, as a matter of law, constitute bad faith.” [¶] [I]n the insurance context, ... “courts are not at liberty to imply a covenant directly at odds with a contract's express grant of discretionary power.” The possible exception would be “those relatively rare instances when reading the provision literally would, contrary to the parties' clear intention, result in an unenforceable, illusory agreement.” (*Baldwin v. AAA Northern California, Nevada & Utah Ins. Exchange* (2016) 1 Cal.App.5th 545, 557–558 [204 Cal.Rptr.3d 433], internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Insurance, § ~~239~~~~340~~

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 11-B, *Theories For Extracontractual Liability—In General*, ¶¶ 11:7–11:8.1 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-A, *Definition of Terms*, ¶¶ 12:1–12:10 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-B, *Capsule History Of Insurance “Bad Faith” Cases*, ¶¶ 12:13–12:23 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-C, *Theory Of Recovery—Breach Of Implied Covenant Of Good Faith And Fair Dealing (“Bad Faith”)*, ¶¶ 12:27–12:54 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-D, *Who May Sue For Tortious Breach Of Implied Covenant (Proper Plaintiffs)*, ¶¶ 12:56–12:90.17 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-E, *Persons Who May Be Sued For Tortious Breach Of Implied Covenant (Proper Defendants)*, ¶¶ 12:92–12:118 (The Rutter Group)

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 12A-F, *Compare—Breach Of*

Implied Covenant By Insured, ¶¶ 12:119–12:121 (The Rutter Group)

1 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar), Overview of Rights and Obligations of Policy, §§ 2.9–2.15

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.03[1][a]–[c] (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20–24.21, 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24[1] (Matthew Bender)

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17[9] (Matthew Bender)

2331. Breach of the Implied Obligation of Good Faith and Fair Dealing—Failure or Delay in Payment (First Party)—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] breached the obligation of good faith and fair dealing by [failing to pay/delaying payment of] benefits due under the insurance policy. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] suffered a loss covered under an insurance policy with [name of defendant];
2. That [name of defendant] was notified of the loss;
3. That [name of defendant], unreasonably [failed to pay/delayed payment of] policy benefits;
4. That [name of plaintiff] was harmed; and
5. That [name of defendant]’s [failure to pay/delay in payment of] policy benefits was a substantial factor in causing [name of plaintiff]’s harm.

To act or fail to act “unreasonably” means that the insurer had no proper cause for its conduct. In determining whether [name of defendant] acted unreasonably, you should consider only the information that [name of defendant] knew or reasonably should have known at the time when it [failed to pay/delayed payment of] policy benefits.

New September 2003; Revised December 2007, April 2008, December 2009, December 2015

Directions for Use

The instructions in this series assume that the plaintiff is the insured and the defendant is the insurer. The party designations may be changed if appropriate to the facts of the case.

If there is a genuine issue as to the insurer's liability under the policy for the claim asserted by the insured, there can be no bad-faith liability imposed on the insurer for advancing its side of that dispute. This is known as the “genuine dispute” doctrine. The genuine-dispute doctrine is subsumed within the test of reasonableness or proper cause (element 3). No specific instruction on the doctrine need be given. (See *McCoy v. Progressive West Ins. Co.* (2009) 171 Cal.App.4th 785, 792–794 [90 Cal.Rptr.3d 74].)

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

Sources and Authority

- If an insurer “fails to deal *fairly and in good faith* with its insured by refusing, without proper cause,

to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing. ... [¶] ... [W]hen the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.” (*Gruenberg v. Aetna Insurance Co.* (1973) 9 Cal.3d 566, 574-575 [108 Cal.Rptr. 480, 510 P.2d 1032], original italics.)

- “An insurer's obligations under the implied covenant of good faith and fair dealing with respect to first party coverage include a duty not to unreasonably withhold benefits due under the policy. An insurer that unreasonably delays, or fails to pay, benefits due under the policy may be held liable in tort for breach of the implied covenant. The withholding of benefits due under the policy may constitute a breach of contract even if the conduct was reasonable, but liability in tort arises only if the conduct was unreasonable, that is, without proper cause. In a first party case, as we have here, the withholding of benefits due under the policy is not unreasonable if there was a genuine dispute between the insurer and the insured as to coverage or the amount of payment due.” (*Rappaport-Scott v. Interinsurance Exch. of the Auto. Club* (2007) 146 Cal.App.4th 831, 837 [53 Cal.Rptr.3d 245], internal citations omitted.)
- “[T]here are at least two separate requirements to establish breach of the implied covenant: (1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause.” (*Love v. Fire Insurance Exchange* (1990) 221 Cal.App.3d 1136, 1151 [271 Cal.Rptr. 246], internal citations omitted.)
- “The standard of good faith and fairness examines the reasonableness of the insurer's conduct, and mere errors by an insurer in discharging its obligations to its insured ‘ “does not necessarily make the insurer liable in tort for violating the covenant of good faith and fair dealing; to be liable in tort, the insurer's conduct must also have been *unreasonable*. [Citations.]” ’ ” (*Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 425 [179 Cal.Rptr.3d 717], original italics.)
- “ ‘Although an insurer's bad faith is ordinarily a question of fact to be determined by a jury by considering the evidence of motive, intent and state of mind, “[t]he question becomes one of law ... when, because there are no conflicting inferences, reasonable minds could not differ.” ’ ” (*Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1119 [223 Cal.Rptr.3d 47].)
- “Generally, the reasonableness of an insurer's conduct ‘must be evaluated in light of the totality of the circumstances surrounding its actions.’ ” (*Paslay v. State Farm General Ins. Co.* (2016) 248 Cal.App.4th 639, 654 [203 Cal.Rptr.3d 785].)
- “[A]n insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured’s coverage claim is not liable in bad faith even though it might be liable for breach of contract.” (*Chateau Chamberay Homeowners Assn. v. Associated International Insurance Co.* (2001) 90 Cal.App.4th 335, 347 [108 Cal.Rptr.2d 776].)
- “The genuine dispute rule does not relieve an insurer from its obligation to thoroughly and fairly investigate, process and evaluate the insured’s claim. A *genuine* dispute exists only where the

insurer's position is maintained in good faith and on reasonable grounds. ... "The genuine issue rule in the context of bad faith claims allows a [trial] court to grant summary judgment when it is undisputed or indisputable that the basis for the insurer's denial of benefits was reasonable—for example, where even under the plaintiff's version of the facts there is a genuine issue as to the insurer's liability under California law. ... On the other hand, an insurer is not entitled to judgment as a matter of law where, viewing the facts in the light most favorable to the plaintiff, a jury could conclude that the insurer acted unreasonably.'" (*Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 724 [68 Cal.Rptr.3d 746, 171 P.3d 1082], original italics, internal citations omitted.)

- "[T]he reasonableness of the insurer's decisions and actions must be evaluated as of the time that they were made; the evaluation cannot fairly be made in the light of subsequent events that may provide evidence of the insurer's errors. [Citation.]" (*Zubillaga v. Allstate Indemnity Co.* (2017) 12 Cal.App.5th 1017, 1028 [219 Cal.Rptr.3d 620])
~~We evaluate the reasonableness of the insurer's actions and decision to deny benefits as of the time they were made rather than with the benefit of hindsight." (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 949 [43 Cal.Rptr.3d 468].)~~
- "[I]f the insurer denies benefits unreasonably (i.e., without any reasonable basis for such denial), it may be exposed to the full array of tort remedies, including possible punitive damages." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1073 [56 Cal.Rptr.3d 312].)
- "While many, if not most, of the cases finding a genuine dispute over an insurer's coverage liability have involved *legal* rather than *factual* disputes, we see no reason why the genuine dispute doctrine should be limited to legal issues. That does not mean, however, that the genuine dispute doctrine may properly be applied in every case involving purely a factual dispute between an insurer and its insured. This is an issue which should be decided on a case-by-case basis." (*Chateau Chamberay Homeowners Assn., supra*, 90 Cal.App.4th at p. 348, original italics, footnote and internal citations omitted.)
- "[I]f the conduct of [the insurer] in defending this case was objectively reasonable, its subjective intent is irrelevant." (*Bosetti v. United States Life Ins. Co. in the City of New York* (2009) 175 Cal.App.4th 1208, 1236 [96 Cal.Rptr.3d 744]; cf. *Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 372 [6 Cal.Rptr.2d 467, 826 P.2d 710] ["[I]t has been suggested the covenant has both a subjective and objective aspect—subjective good faith and objective fair dealing. A party violates the covenant if it subjectively lacks belief in the validity of its act or if its conduct is objectively unreasonable."].)
- "[W]hile an insurer's subjective bad intentions are not a sufficient basis on which to establish a bad faith cause of action, an insurer's subjective mental state may nonetheless be a circumstance to be considered in the evaluation of the *objective* reasonableness of the insurer's actions." (*Bosetti, supra*, 175 Cal.App.4th at p. 1239, original italics.)
- "[A]n insured cannot maintain a claim for tortious breach of the implied covenant of good faith and fair dealing absent a covered loss. If the insurer's investigation—adequate or not—results in a correct conclusion of no coverage, no tort liability arises for breach of the implied covenant." (*Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1250 [39 Cal.Rptr.3d 650], internal citations omitted; cf. *Brehm v. 21st Century Ins. Co.* (2008) 166 Cal.App.4th 1225, 1236 [83

Cal.Rptr.3d 410] [“[B]reach of a specific provision of the contract is not a necessary prerequisite to a claim for breach of the implied covenant of good faith and fair dealing. ... [E]ven an insurer that pays the full limits of its policy may be liable for breach of the implied covenant, if improper claims handling causes detriment to the insured”].)

- “ [D]enial of a claim on a basis unfounded in the facts known to the insurer, or contradicted by those facts, may be deemed unreasonable. “A trier of fact may find that an insurer acted unreasonably if the insurer ignores evidence available to it which supports the claim. The insurer may not just focus on those facts which justify denial of the claim.” ’ ” (*Maslo v. Ameriprise Auto & Home Ins.* (2014) 227 Cal.App.4th 626, 634 [173 Cal.Rptr.3d 854].)
- “We conclude ... that the duty of good faith and fair dealing on the part of defendant insurance companies is an absolute one. ... [T]he nonperformance by one party of its contractual duties cannot excuse a breach of the duty of good faith and fair dealing by the other party while the contract between them is in effect and not rescinded.” (*Gruenberg, supra*, 9 Cal.3d at p. 578.)
- “Thus, an insurer may be liable for bad faith in failing to attempt to effectuate a prompt and fair settlement (1) where it unreasonably demands arbitration, or (2) where it commits other wrongful conduct, such as failing to investigate a claim. An insurer's statutory duty to attempt to effectuate a prompt and fair settlement is not abrogated simply because the insured's damages do not plainly exceed the policy limits. Nor is the insurer's duty to investigate a claim excused by the arbitrator's finding that the amount of damages was lower than the insured's initial demand. Even where the amount of damages is lower than the policy limits, an insurer may act unreasonably by failing to pay damages that are certain and demanding arbitration on those damages.” (*Maslo, supra*, 227 Cal.App.4th at pp. 638–639 [uninsured motorist coverage case].)
- “[T]he insurer’s duty to process claims fairly and in good faith [is] a nondelegable duty.” (*Hughes v. Blue Cross of Northern California* (1989) 215 Cal.App.3d 832, 848 [263 Cal.Rptr. 850].)
- “[I]n [a bad–faith action] ‘damages for emotional distress are compensable as *incidental damages flowing from the initial breach*, not as a separate cause of action.’ Such claims of emotional distress must be incidental to ‘a substantial invasion of property interests.’ ” (*Major v. Western Home Ins. Co.* (2009) 169 Cal.App.4th 1197, 1214 [87 Cal.Rptr.3d 556], original italics, internal citations omitted.)

Secondary Sources

2 Witkin, Summary of California Law (~~10th ed. 2005~~ **11th ed. 2017**) Insurance, §§ ~~240341–242343~~

Croskey et al., California Practice Guide: Insurance Litigation. Ch. 12C-C, *Bad Faith—Requirements for First Party Bad Faith Action*, ¶¶ 12:822–12:1016 (The Rutter Group)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar) General Principles of Contract and Bad Faith Actions, §§ 24.25–24.45A

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, §§ 13.03[2][a]–[c], 13.06 (Matthew Bender)

1 California Uninsured Motorist Law, Ch. 13, *Rights, Duties, and Obligations of the Parties*, § 13.23 (Matthew Bender)

2 California Uninsured Motorist Law, Ch. 24, *Bad Faith in Uninsured Motorist Law*, §§ 24.10, 24.20–24.21, 24.40 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.140 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.21, 82.50 (Matthew Bender)

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

11 California Legal Forms, Ch. 26A, *Title Insurance*, § 26A.17 (Matthew Bender)

12 California Points and Authorities, Ch. 120, *Insurance*, § 120.208 (Matthew Bender)

2500. Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))

[Name of plaintiff] **claims that** *[name of defendant]* **wrongfully discriminated against [him/her]. 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]* **[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;]**

4. **That** *[name of plaintiff]*'s *[protected status—for example, race, gender, or age]* **was a substantial motivating reason for** *[name of defendant]*'s **[decision to [discharge/refuse to hire/[other adverse employment action]]** *[name of plaintiff]/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.**
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New September 2003; Revised April 2009, June 2011, June 2012, June 2013

Directions for Use

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see CACI No. 2502, *Disparate Impact—Essential Factual Elements*.

If element 1 is given, 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).)

Read the first option for element 3 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 3 and also give CACI No. 2510, “*Constructive Discharge*” Explained. Select “conduct” in element 4 if either the second or third option is included for element 3.

Note that there are two causation elements. There must be a causal link between the discriminatory animus and the adverse action (see element 4), and there must be a causal link between the adverse action and the damage (see element 6). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Element 4 requires that discrimination based on a protected classification 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.) Modify element 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Perception and Association. Government Code section 12926(o).
- “[C]onceptually the theory of ‘disparate treatment’ ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin.” (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)
- “California has adopted the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. ‘This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.’ ” (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)
- “At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently

meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff's prima facie burden is 'not onerous', he must at least 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 . . . '' ...' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- “If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though ‘rebuttable,’ is ‘legally mandatory.’ Thus, in a trial, ‘[i]f the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.’ [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to ‘raise[] a genuine issue of fact’ and to ‘justify a judgment for the [employer],’ that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer’s proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff.” (*Guz, supra*, 24 Cal.4th at pp. 355–356, internal citations omitted.)
- “The trial court decides the first two stages of the *McDonnell Douglas* test as questions of law. If the plaintiff and defendant satisfy their respective burdens, the presumption of discrimination disappears and the question whether the defendant unlawfully discriminated against the plaintiff is submitted to the jury to decide whether it believes the defendant's or the plaintiff's explanation.” (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 965 [181 Cal.Rptr.3d 553].)
- “To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action.” (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)
- “[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. ‘It is the employer’s honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.’ ... [I]f nondiscriminatory, [the employer’s] true reasons need not necessarily have been wise or correct. ... While the objective soundness of an employer’s proffered reasons supports their credibility ... , the ultimate issue is simply whether the employer acted with a

motive to discriminate illegally. Thus, “legitimate” reasons ... in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*. ...” (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)

- “The burden therefore shifted to [plaintiff] to present evidence showing the [defendant] engaged in intentional discrimination. To meet her burden, [plaintiff] had to present evidence showing (1) the [defendant]’s stated reason for not renewing her contract was untrue or pretextual; (2) the [defendant] acted with a discriminatory animus in not renewing her contract; or (3) a combination of the two.” (*Swanson, supra*, 232 Cal.App.4th at p. 966.)
- “Evidence that an employer’s proffered reasons were pretextual does not necessarily establish that the employer intentionally discriminated: ‘ “[I]t is not enough ... to disbelieve the employer; the factfinder must believe the plaintiff’s explanation of intentional discrimination.’ ” However, evidence of pretext is important: ‘ “[A] plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.” ’ ” (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 350–351 [223 Cal.Rptr.3d 173], internal citations omitted.)
- “While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a ‘causal connection’ between the employee’s protected status and the adverse employment decision.” (*Mixon, supra*, 192 Cal.App.3d at p. 1319.)
- “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.)
- “In cases involving a comparison of the plaintiff’s qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer’s decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer’s assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder

can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture.” (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)

- “While not all cases hold that ‘the disparity in candidates’ qualifications “must be so apparent as to jump off the page and slap us in the face to support a finding of pretext” ’ the precedents do consistently require that the disparity be substantial to support an inference of discrimination.” (*Reeves, supra*, 186 Cal.App.4th at p. 675, internal citation omitted.)
- “[D]iscriminatory remarks can be relevant in determining whether intentional discrimination occurred: ‘Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered.’” (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1190–1191 [220 Cal.Rptr.3d 42].)
- “Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes.” (*Guz, supra*, 24 Cal.4th at p. 354.)
- “We have held ‘that, in a civil action under the FEHA, all relief generally available in noncontractual actions ... may be obtained.’ This includes injunctive relief.” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)
- “The FEHA does not itself authorize punitive damages. It is, however, settled that California’s punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Constitutional Law, §§ ~~915~~~~1017–~~~~916~~~~918~~1021

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44–2.82

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*, § 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:2, 2:20 (Thomson Reuters)

2505. Retaliation—Essential Factual Elements (Gov. Code, § 12940(h))

[Name of plaintiff] **claims that** *[name of defendant]* **retaliated against [him/her] for** *[describe activity protected by the FEHA]*. **To establish this claim, [name of plaintiff] must prove all of the following:**

1. **That** *[name of plaintiff]* *[describe protected activity]*;
2. **[That** *[name of defendant]* **[discharged/demoted/[specify other adverse employment action]]** *[name of plaintiff]*];

[or]

[That *[name of defendant]* **subjected** *[name of plaintiff]* **to an adverse employment action;**

[or]

[That *[name of plaintiff]* **was constructively discharged;**
3. **That** *[name of plaintiff]*'s *[describe protected activity]* **was a substantial motivating reason for** *[name of defendant]*'s **[decision to [discharge/demote/[specify other adverse employment action]]** *[name of plaintiff]*/**conduct];**
4. **That** *[name of plaintiff]* **was harmed; and**
5. **That** *[name of defendant]*'s **decision to [discharge/demote/[specify other adverse employment action]]** *[name of plaintiff]* **was a substantial factor in causing [him/her] harm.**

[[Name of plaintiff] does not have to prove [discrimination/harassment] in order to be protected from retaliation. If [he/she] reasonably believed that [name of defendant]'s conduct was unlawful/requested a [disability/religious] accommodation, [he/she] may prevail on a retaliation claim even if [he/she] does not present, or prevail on, a separate claim for [discrimination/harassment/[other]].]

New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010, June 2012, December 2012, June 2013, June 2014, June 2016, December 2016

Directions for Use

In elements 1 and 3, describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person “because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA].” It is also unlawful to retaliate or otherwise discriminate against a person for requesting an accommodation for religious practice or

disability, regardless of whether the request was granted. (Gov. Code, § 12940(l)(4) [religious practice], (m)(2) [disability].)

Read the first option for element 2 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, "*Adverse Employment Action*" Explained, if whether there was an adverse employment action is a question of fact for the jury. For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Give both the first and second options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].) Also select "conduct" in element 3 if the second option or both the first and second options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee's position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].) If constructive discharge is alleged, give the third option for element 2 and also give CACI No. 2510, "*Constructive Discharge*" Explained. Also select "conduct" in element 3 if the third option is included for element 2.

Element 3 requires that the protected activity be a substantial motivating reason for the retaliatory acts. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; *Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 479 [161 Cal.Rptr.3d 758]; see also CACI No. 2507, "*Substantial Motivating Reason*" Explained.)

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

This instruction has been criticized in dictum because it is alleged that there is no element requiring retaliatory intent. (See *Joaquin v. City of Los Angeles* (2012) 202 Cal.App.4th 1207, 1229–1231 [136 Cal.Rptr.3d 472].) The court urged the Judicial Council to redraft the instruction and the corresponding special verdict form so as to clearly state that retaliatory intent is a necessary element of a retaliation claim under FEHA.

The jury in the case was instructed per element 3 "that Richard Joaquin's reporting that he had been sexually harassed was a motivating reason for the City of Los Angeles' decision to terminate Richard Joaquin's employment or deny Richard Joaquin promotion to the rank of sergeant." The committee believes that the instruction as given is correct for the intent element in a retaliation case. (Cf. *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 127–132 [199 Cal.Rptr.3d 462] [for disability discrimination, "substantial motivating reason" is only language required to express intent].) However, in cases such as *Joaquin* that involve allegations of a prohibited motivating reason (based on a report of

sexual harassment) and a permitted motivating reason (based on a good faith belief that the report was falsified), the instruction may need to be modified to make it clear that plaintiff must prove that defendant acted based on the *prohibited* motivating reason and not the *permitted* motivating reason.

Sources and Authority

- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).
- Retaliation for Requesting Reasonable Accommodation for Religious Practice and Disability Prohibited. Government Code section 12940(l)(4), (m)(2).
- “Person” Defined Under Fair Employment and Housing Act. Government Code section 12925(d).
- Prohibited Retaliation. Title 2 California Code of Regulations section 11021.
- “[I]n order to establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a ‘protected activity,’ (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer’s action. Once an employee establishes a prima facie case, the employer is required to offer a legitimate, nonretaliatory reason for the adverse employment action. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation ‘ ‘ ‘drops out of the picture,’ ’ ’ and the burden shifts back to the employee to prove intentional retaliation.” (*Yanowitz, supra*, 36 Cal.4th at p. 1042, internal citations omitted.)
- “Actions for retaliation are ‘inherently fact-driven’; it is the jury, not the court, that is charged with determining the facts.” (*McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 299 [156 Cal.Rptr.3d 851].)
- “It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision.” (*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492 [102 Cal.Rptr.3d 431].)
- “Retaliation claims are inherently fact-specific, and the impact of an employer’s action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.” (*Yanowitz, supra*, 36 Cal.4th at p. 1052.)
- “Contrary to [defendant]’s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer’s retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute.” (*Yanowitz, supra*, 36 Cal.4th at pp. 1055–1056, internal citations omitted.)

- “[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination.” (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446, 473–474 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- “Clearly, section 12940, subdivision (h) encompasses a broad range of protected activity. An employee need not use specific legal terms or buzzwords in opposing discrimination. Nor is it necessary for an employee to file a formal charge. The protected activity element may be established by evidence that the plaintiff threatened to file a discrimination charge, by a showing that the plaintiff mistakenly, but reasonably and sincerely believed he was opposing discrimination, or by evidence an employer believed the plaintiff was a potential witness in another employee’s FEHA action.” (*Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 652 [163 Cal.Rptr.3d 392], internal citations and footnote omitted.)
- “ ‘Standing alone, an employee’s unarticulated belief that an employer is engaging in discrimination will not suffice to establish protected conduct for the purposes of establishing a prima facie case of retaliation, where there is no evidence the employer knew that the employee’s opposition was based upon a reasonable belief that the employer was engaging in discrimination.’ ‘[C]omplaints about personal grievances or vague or conclusory remarks that fail to put an employer on notice as to what conduct it should investigate will not suffice to establish protected conduct.’ ‘[¶] But employees need not explicitly and directly inform their employer that they believe the employer’s conduct was discriminatory or otherwise forbidden by FEHA.’” (*Castro-Ramirez v. Dependable Highway Express, Inc.* (2016) 2 Cal.App.5th 1028, 1046 [207 Cal.Rptr.3d 120], internal citation omitted.)
- “The relevant question ... is not whether a formal accusation of discrimination is made but whether the employee’s communications to the employer sufficiently convey the employee’s reasonable concerns that the employer has acted or is acting in an unlawful discriminatory manner.” (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1193 [220 Cal.Rptr.3d 42].)
- “Notifying one’s employer of one’s medical status, even if such medical status constitutes a ‘disability’ under FEHA, does not fall within the protected activity identified in subdivision (h) of section 12940—i.e., it does not constitute engaging in opposition to any practices forbidden under FEHA or the filing of a complaint, testifying, or assisting in any proceeding under FEHA.” (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 247 [206 Cal.Rptr.3d 841].)
- “[Plaintiff]’s advocacy for the disabled community and opposition to elimination of programs that might benefit that community do not fall within the definition of protected activity. [Plaintiff] has not shown the [defendant]’s actions amounted to discrimination against disabled citizens, but even if they could be so construed, discrimination by an employer against members of the general public is not a prohibited *employment* practice under the FEHA.” (*Dinslage v. City and County of San Francisco* (2016) 5 Cal.App.5th 368, 383 [209 Cal.Rptr.3d 809], original italics.)

- “Moreover, [defendant]’s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm.” (*Wysinger, supra*, 157 Cal.App.4th at p. 424, internal citations omitted.)
- “A long period between an employer’s adverse employment action and the employee’s earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection.” (*Wysinger, supra*, 157 Cal.App.4th at p. 421, internal citation omitted.)
- “Both direct and circumstantial evidence can be used to show an employer’s intent to retaliate. ‘Direct evidence of retaliation may consist of remarks made by decisionmakers displaying a retaliatory motive.’ Circumstantial evidence typically relates to such factors as the plaintiff’s job performance, the timing of events, and how the plaintiff was treated in comparison to other workers.” (*Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1153 [119 Cal.Rptr.2d 131], internal citations omitted.)
- “The retaliatory motive is ‘proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.’ ‘The causal link may be established by an inference derived from circumstantial evidence, “such as the employer’s knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision.” ’ ” (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)
- “[A]n employer generally can be held liable for the retaliatory actions of its supervisors.” (*Wysinger, supra*, 157 Cal.App.4th at p. 420.)
- “Plaintiff, although a partner, is a person whom section 12940, subdivision (h) protects from retaliation for opposing the partnership-employer’s harassment against those employees.” (*Fitzsimons v. California Emergency Physicians Medical Group* (2012) 205 Cal.App.4th 1423, 1429 [141 Cal.Rptr.3d 265].)
- “[A]n employer may be found to have engaged in an adverse employment action, and thus liable for retaliation under section 12940(h), ‘by permitting ... fellow employees to punish [him] for invoking [his] rights.’ We therefore hold that an employer may be held liable for coworker retaliatory conduct if the employer knew or should have known of coworker retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct.” (*Kelley v. The Conco Cos.* (2011) 196 Cal.App.4th 191, 213 [126 Cal.Rptr.3d 651], internal citation omitted.)
- “[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation.” (*Jones v. The Lodge at Torrey*

Pines Partnership (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)

- “The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints’ Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone ‘an absurd result’ that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer.” (*Steele, supra*, 162 Cal.App.4th at p. 1255, internal citations omitted.)
- “The plaintiff's burden is to prove, by competent evidence, that the employer's proffered justification is mere pretext; i.e., that the presumptively valid reason for the employer's action was in fact a coverup. ... In responding to the employer's showing of a legitimate reason for the complained-of action, the plaintiff cannot “ ‘simply show the employer's decision was wrong, mistaken, or unwise. Rather, the employee ‘ ‘must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them “unworthy of credence,” ... and hence infer “that the employer did not act for the [asserted] non-discriminatory reasons.” ’ ’ ’ ’ ” (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1409 [194 Cal.Rptr.3d 689].)
- “The showing of pretext, while it may indicate retaliatory intent or animus, is not the sole means of rebutting the employer's evidence of nonretaliatory intent. ‘ ‘While ‘pretext’ is certainly a relevant issue in a case of this kind, making it a central or necessary issue is not sound. The central issue is and should remain whether the evidence as a whole supports a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus. The employer's mere articulation of a legitimate reason for the action cannot answer this question; it can only dispel the presumption of improper motive that would otherwise entitle the employee to a judgment in his favor.” ’ ’ ’ ’ ” (*Light v. , Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 94 [221 Cal.Rptr.3d 668], original italics.)
- “Government Code section 12940, subdivision (h), does not shield an employee against termination or lesser discipline for either lying or withholding information during an employer's internal investigation of a discrimination claim. In other words, public policy does not protect deceptive activity during an internal investigation. Such conduct is a legitimate reason to terminate an at-will employee.” (*McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1528 [152 Cal.Rptr.3d 154], footnotes omitted.)
- “Although appellant does not argue she was constructively discharged, such a claim is not necessary to find unlawful retaliation.” (*McCoy, supra*, 216 Cal.App.4th at p. 301.)
- “The phrase ‘because of’ [in Gov. Code, § 12940(a)] is ambiguous as to the type or level of intent (i.e., motivation) and the connection between that motivation and the decision to treat the disabled person differently. This ambiguity is closely related to [defendant]’s argument that it is liable only if motivated by discriminatory animus. [¶] The statutory ambiguity in the phrase ‘because of’ was resolved by our Supreme Court about six months after the first jury trial [in *Harris, supra*, 56 Cal.4th at p. 203].” (*Wallace, supra*, 245 Cal.App.4th at p. 127.)

Secondary Sources

8 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Constitutional Law, §§ ~~922~~~~1028~~, ~~940~~~~1052~~, ~~941~~~~1054~~

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ ~~7:680~~~~121~~–~~7:841~~~~205~~ (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.83–2.88

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.131 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.37, 115.94 (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 2:74–2:75 (Thomson Reuters)

2512. Limitation on Remedies—Same Decision

[*Name of plaintiff*] claims that [he/she] was [discharged/[*other adverse employment action*]] because of [his/her] [*protected status or action, e.g., race, gender, or age*], which is an unlawful [discriminatory/retaliatory] reason. [*Name of defendant*] claims that [*name of plaintiff*] [was discharged/[*other adverse employment action*]] because of [*specify reason, e.g., plaintiff's poor job performance*], which is a lawful reason.

If you find that [discrimination/retaliation] was a substantial motivating reason for [*name of plaintiff*]'s [discharge/[*other adverse employment action*]], you must then consider [*name of defendant*]'s stated reason for the [discharge/[*other adverse employment action*]].

If you find that [*e.g., plaintiff's poor job performance*] was also a substantial motivating reason, then you must determine whether the defendant has proven that [he/she/it] would have [discharged/[*other adverse employment action*]] [*name of plaintiff*] anyway at that time based on [*e.g., plaintiff's poor job performance*] even if [he/she/it] had not also been substantially motivated by [discrimination/retaliation].

In determining whether [*e.g., plaintiff's poor job performance*] was a substantial motivating reason, determine what actually motivated [*name of defendant*], not what [he/she/it] might have been justified in doing.

If you find that [*name of defendant*] [discharged/[*other adverse employment action*]] [*name of plaintiff*] for a [discriminatory/retaliatory] reason, you will be asked to determine the amount of damages that [he/she] is entitled to recover. If, however, you find that [*name of defendant*] would have [discharged/[*other adverse employment action*]] [*name of plaintiff*] anyway at that time for [*specify defendant's nondiscriminatory/nonretaliatory reason*], then [*name of plaintiff*] will not be entitled to reinstatement, back pay, or damages.

New December 2013; Revised June 2015, June 2016

Directions for Use

Give this instruction along with CACI No. 2507, “*Substantial Motivating Reason*” Explained, if the employee has presented sufficient evidence for the jury to find that the employer took adverse action against him or her for a prohibited reason, but the employer has presented sufficient evidence for the jury to find that it had a legitimate reason for the action. In such a “mixed-motive” case, the employer is relieved from an award of damages, but may still be liable for attorney fees and costs and injunctive relief. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 211 [152 Cal.Rptr.3d 392, 294 P.3d 49].)

Mixed-motive must be distinguished from pretext though both require evaluation of the same evidence, i.e., the employer’s purported legitimate reason for the adverse action. In a pretext case, the only actual motive is the discriminatory one and the purported legitimate reasons are fabricated in order to disguise

the true motive. (See *City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716].) The employee has the burden of proving pretext. (*Harris, supra*, 56 Cal.4th at pp. 214–215.) If the employee proves discrimination or retaliation and also pretext, the employer is liable for all potential remedies including damages. But if the employee proves discrimination or retaliation but fails to prove pretext, then a mixed-motive case is presented. To avoid an award of damages, the employer then has the burden of proving that it would have made the same decision anyway solely for the legitimate reason, even though it may have also discriminated or retaliated.

Sources and Authority

- “[U]nder the FEHA, when a jury finds that unlawful discrimination was a substantial factor motivating a termination of employment, and when the employer proves it would have made the same decision absent such discrimination, a court may not award damages, backpay, or an order of reinstatement. But the employer does not escape liability. In light of the FEHA’s express purpose of not only redressing but also preventing and deterring unlawful discrimination in the workplace, the plaintiff in this circumstance could still be awarded, where appropriate, declaratory relief or injunctive relief to stop discriminatory practices. In addition, the plaintiff may be eligible for reasonable attorney’s fees and costs.” (*Harris, supra*, 56 Cal.4th at p. 211.)
- “Because employment discrimination litigation does not resemble the kind of cases in which we have applied the clear and convincing standard, we hold that preponderance of the evidence is the standard of proof applicable to an employer’s same-decision showing” (*Harris, supra*, 53 Cal.4th at p. 239.)
- “[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision.*” (*Harris, supra*, 56 Cal.4th at p. 224, original italics.)
- “In light of today’s decision, a jury in a mixed-motive case alleging unlawful termination should be instructed that it must find the employer’s action was substantially motivated by discrimination before the burden shifts to the employer to make a same-decision showing, and that a same-decision showing precludes an award of reinstatement, backpay, or damages.” (*Harris, supra*, 56 Cal.4th at p. 241.)
- “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.)
- “[A] plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of

discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff.” (*Harris, supra*, 56 Cal.4th at pp. 214–215.)

- “In some cases there is no single reason for an employer's adverse action, and a discriminatory motive may have influenced otherwise legitimate reasons for the employment decision. In *Harris v. City of Santa Monica (Harris)* the California Supreme Court recognized the traditional *McDonnell Douglas* burden-shifting test was intended for use in cases presenting a single motive for the adverse action, that is, in ‘cases that do not involve mixed motives.’ As the Court explained, this ‘framework ... presupposes that the employer has a single reason for taking an adverse action against the employee and that the reason is either discriminatory or legitimate. By hinging liability on whether the employer's proffered reason for taking the action is genuine or pretextual, the *McDonnell Douglas* inquiry aims to ferret out the “true” reason for the employer's action. In a mixed-motives case, however, there is no single “true” reason for the employer's action.’ ” (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1182 [220 Cal.Rptr.3d 42], internal citations omitted.)
- “Following the California Supreme Court's decision in *Harris*, ... the Judicial Council added CACI No. 2512, to be given when the employer presents evidence of a legitimate reason for the adverse employment action, informing the jurors that even if they find that discrimination was a substantial motivating reason for the adverse action, if the employer establishes that the adverse action nonetheless would have been taken for legitimate reasons, ‘then [the plaintiff] will not be entitled to reinstatement, back pay, or damages.’ ” (*Davis v. Farmers Ins. Exchange* (2016) 245 Cal.App.4th 1302, 1320–1321 [200 Cal.Rptr.3d 315].)
- “ ‘[Plaintiff] further argues that for equitable reasons, an employer that wishes to make a same-decision showing must concede that it had mixed motives for taking the adverse employment action instead of denying a discriminatory motive altogether. But there is no inconsistency when an employer argues that its motive for discharging an employee was legitimate, while also arguing, contingently, that if the trier of fact finds a mixture of lawful and unlawful motives, then its lawful motive alone would have led to the discharge.’ ” (*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th 169, 199 [167 Cal.Rptr.3d 24] [quoting *Harris, supra*, 56 Cal.App.4th at p. 240].)
- “As a preliminary matter, we reject [defendant]’s claim that the jury could have found no liability on the part of [defendant] had it been properly instructed on the mixed-motive defense at trial. As discussed, the Supreme Court in *Harris* held that the mixed-motive defense is available under the FEHA, but only as a limitation on remedies and not as a complete defense to liability. Consequently, when the plaintiff proves by a preponderance of the evidence that discrimination was a substantial motivating factor in the adverse employment decision, the employer is liable under the FEHA. When the employer proves by a preponderance of the evidence that it would have made the same decision even in the absence of such discrimination, the employer is still liable under the FEHA, but the plaintiff's remedies are then limited to declaratory or injunctive relief, and where appropriate, attorney's fees and costs. As presently drafted, BAJI No. 12.26 does not accurately set forth the parameters of the defense as articulated by the Supreme Court, but

rather states that, in a mixed-motive case, ‘the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision.’ By providing that the mixed-motive defense, if proven, is a complete defense to liability, [defendant]’s requested instruction directly conflicts with the holding in *Harris*. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 481 [161 Cal.Rptr.3d 758], internal citations omitted.)

- “Pretext may ... be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination.” (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 272 [100 Cal.Rptr.3d 296].)

Secondary Sources

8 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Constitutional Law, §§ ~~928~~~~1037~~, ~~950~~~~1067~~

7 Witkin, California Procedure (5th ed. 2008), Judgment § 217

3 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.11 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23 (Matthew Bender)

2513. Business Judgment

In California, employment is presumed to be “at will.” That means that an employer may [discharge/[other adverse action]] an employee for no reason, or for a good, bad, mistaken, unwise, or even unfair reason, as long as its action is not for a [discriminatory/retaliatory] reason.

New December 2013

Directions for Use

Give this instruction to advise the jury that the employer’s adverse action is not illegal just because it is ill-advised. It has been held to be error not to give this instruction. (See *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 20–24 [151 Cal.Rptr.3d 41].)

Sources and Authority

- At-Will Employment. Labor Code section 2922.
- “[A] plaintiff in a discrimination case must show discrimination, not just that the employer's decision was wrong, mistaken, or unwise. ... ‘“The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. ... ‘While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is ... whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason ... does not have to be a reason that the judge or jurors would act on or approve.’ ” ’ ” (*Veronese, supra*, 212 Cal.App.4th at p. 21, internal citation omitted.)
- “[I]f nondiscriminatory, [defendant]’s true reasons need not necessarily have been wise or correct. While the objective soundness of an employer's proffered reasons supports their credibility ... , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, ‘legitimate’ reasons in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding of *discrimination*.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358 [100 Cal.Rptr.2d 352, 8 P.3d 1089], original italics, internal citations omitted.)
- “[U]nder the law [defendant] was entitled to exercise her business judgment, without second guessing. But [the court] refused to tell the jury that. That was error.” (*Veronese, supra*, 212 Cal.App.4th at p. 24.)
- “An employment decision based on political concerns, even if otherwise unfair, is not actionable under section 12940 so long as the employee's race or other protected status is not a substantial factor in the decision.” (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 355 [223 Cal.Rptr.3d 173].)
- “What constitutes satisfactory performance is of course a question ordinarily vested in the

employer's sole discretion. An employer is free to set standards that might appear unreasonable to outside observers, and to discipline employees who fail to meet those standards, so long as the standards are applied evenhandedly. But that does not mean that an employer conclusively establishes the governing standard of competence in an employment discrimination action merely by asserting that the plaintiff's performance was less than satisfactory. Evidence of the employer's policies and practices, including its treatment of other employees, may support a contention, and an eventual finding, that the plaintiff's job performance did in fact satisfy the employer's own norms.” (*Cheal v. El Camino Hospital* (2014) 223 Cal.App.4th 736, 742–743 [167 Cal.Rptr.3d 485].)

- “The central issue is and should remain whether the evidence as a whole supports a reasoned inference that the challenged action was the product of discriminatory or retaliatory animus. The employer's mere articulation of a legitimate reason for the action cannot answer this question; it can only dispel the presumption of improper motive that would otherwise entitle the employee to a judgment in his favor.” (*Cheal, supra*, 223 Cal.App.4th at p. 755.)

Secondary Sources

3 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Agency and Employment, § ~~231-244~~ et seq.

8 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Constitutional Law, §§ ~~915~~~~1017-1021~~, ~~916~~, ~~918~~

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶ 4:25 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392, 7:530, 7:531, 7:535 (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.01 et seq. (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.11 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.23 (Matthew Bender)

2701. Nonpayment of Minimum Wage—Essential Factual Elements (Lab. Code, § 1194)

[Name of plaintiff] claims that [name of defendant] owes [him/her] the difference between the wages paid by [name of defendant] and the wages [name of plaintiff] should have been paid according to the minimum wage rate required by state law. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] performed work for [name of defendant];
2. That [name of plaintiff] was paid less than the minimum wage by [name of defendant] for some or all hours worked; and
3. The amount of wages owed.

The minimum wage for labor performed from [beginning date] to [ending date] was [minimum wage rate] per hour.

An employee is entitled to be paid the legal minimum wage rate even if he or she agrees to work for a lower wage.

New September 2003; Revised June 2005, June 2014, June 2015

Directions for Use

The court must determine the prevailing minimum wage rate from applicable state or federal law. (See, e.g., Cal. Code Regs., tit. 8, § 11000.) The jury must be instructed accordingly.

Both liquidated damages (See Lab. Code, § 1194.2) and civil penalties (See Lab. Code, § 1197.1) may be awarded on a claim for nonpayment of minimum wage.

Wage and hour claims are governed by two sources of authority: the provisions of the Labor Code and a series of 18 wage orders, adopted by the Industrial Welfare Commission. (See *Mendiola v. CPS Security Solutions, Inc.* (2015) 60 Cal.4th 833, 838 [182 Cal.Rptr.3d 124, 340 P.3d 355].) The California Labor Code and the IWC's wage orders provide that certain employees are exempt from minimum wage requirements (for example, outside salespersons; see Lab. Code, § 1171), and that under certain circumstances employers may claim credits for meals and lodging against minimum wage pay (see Cal. Code Regs., tit. 8, § 11000, subd. 3, § 11010, subd. 10, and § 11150, subd. 10(B)). The assertion of an exemption from wage and hour laws is an affirmative defense. (See generally *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 794 [85 Cal.Rptr.2d 844, 978 P.2d 2].) The advisory committee has chosen not to write model instructions for the numerous fact-specific affirmative defenses to minimum wage claims. (Cf. CACI No. 2720, *Affirmative Defense—Nonpayment of Overtime—Executive Exemption*, and CACI No. 2721, *Affirmative Defense—Nonpayment of Overtime—Administrative Exemption*.)

Sources and Authority

- Employee Right to Recover Minimum Wage or Overtime Compensation. Labor Code section 1194(a).
- Recovery of Liquidated Damages. Labor Code section 1194.2.
- Civil Penalties, Restitution and Liquidated Damages. Labor Code section 1197.1(a).
- “Wages” Defined. Labor Code section 200.
- Payment of Uncontested Wages Required. Labor Code section 206(a).
- Action by Department to Recover Unpaid Minimum Wage or Overtime Compensation. Labor Code section 1193.6(a).
- Duties of Industrial Welfare Commission. Labor Code section 1173.
- “Labor Code section 1194 accords an employee a statutory right to recover unpaid wages from an employer who fails to pay the minimum wage.” (*Flowers v. Los Angeles County Metropolitan Transportation Authority* (2015) 243 Cal.App.4th 66, 74 [196 Cal.Rptr.3d 352].)
- “Labor Code section 1194 does not define the employment relationship nor does it specify who may be liable for unpaid wages. Specific employers and employees become subject to the minimum wage requirements only through and under the terms of wage orders promulgated by the IWC, the agency formerly authorized to regulate working conditions in California.” (*Flowers, supra*, 243 Cal.App.4th at p. 74.)
- “The provision of board, lodging or other facilities *may* sometimes be considered in determining whether an employer has met minimum wage requirements for nonexempt employees.” (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 958 [219 Cal.Rptr.3d 580], original italics.)

Secondary Sources

3 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Agency and Employment, §§ ~~382417–384421~~, ~~398437–439~~, ~~399~~

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions-In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Payment of Wages*, ¶¶ 11:456, 11:499, 11:513, 11:545, 11:547 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-F, *Payment of Overtime Compensation*, ¶ 11:~~955-2730~~ et seq. (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1342, 11:1478.5 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 2, *Minimum Wages*, §§ 2.02[1], 2.03[1], 2.04[1], 2.05[1]; Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.72 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, §§ 250.13[1][a], 250.14[d] (Matthew Bender)

California Civil Practice: Employment Litigation §§ 4:67, 4:76 (Thomson Reuters)

2704. Damages—Waiting-Time Penalty for Nonpayment of Wages (Lab. Code, §§ 203, 218)

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant] for [unpaid wages/[insert other claim]], then [name of plaintiff] may be entitled to receive an award of a civil penalty based on the number of days [name of defendant] failed to pay [his/her] [wages/other] when due.

To recover the civil penalty, [name of plaintiff] must prove all of the following:

- 1. The date on which [name of plaintiff]’s employment ended;**
- 2. [That [name of defendant] failed to pay all wages due by [insert date];]**

[or]

[The date on which [name of defendant] paid [name of plaintiff] all wages due;]
- 3. [Name of plaintiff]’s daily wage rate at the time [his/her] employment with [name of defendant] ended; and**
- 4. That [name of defendant] willfully failed to pay these wages.**

The term “wages” includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

The term “willfully” means that the employer intentionally failed or refused to pay the wages.

New September 2003; Revised June 2005

Directions for Use

This instruction is intended to instruct the jury on factual determinations required to assist the court in calculating waiting time penalties under Labor Code section 203. The court must determine when final wages are due based on the circumstances of the case and applicable law—see Labor Code sections 201 and 202. If there is a factual dispute, for example, whether plaintiff gave advance notice of his or her intention to quit, or whether payment of final wages by mail was authorized by plaintiff, the court may be required to give further instruction to the jury. Final wages generally are due on the day an employee is discharged by the employer, but are not due for 72 hours if an employee quits without notice (see Lab. Code, §§ 201, 201.5, 201.7, 202, 205.5).

The definition of “wages” may be deleted as redundant if it is redundant with other instructions.

Sources and Authority

- Wages of Discharged Employee Due Immediately. Labor Code section 201.
- Willful Failure to Pay Wages of Discharged Employee. Labor Code section 203.
- Right of Action for Unpaid Wages. Labor Code section 218.
- Wages of Contract Employee on Quitting. Labor Code section 202.
- “Wages” Defined. Labor Code section 200.
- Payment for Accrued Vacation of Terminated Employee. Labor Code section 227.3.
- Wages Partially in Dispute. Labor Code section 206(a).
- Exemption for Certain Governmental Employers. Labor Code section 220(b).
- “ ‘[T]he public policy in favor of full and prompt payment of an employee’s earned wages is fundamental and well established ...’ and the failure to timely pay wages injures not only the employee, but the public at large as well. We have also recognized that sections 201, 202, and 203 play an important role in vindicating this public policy. To that end, the Legislature adopted the penalty provision as a disincentive for employers to pay final wages late. It goes without saying that a longer statute of limitations for section 203 penalties provides additional incentive to encourage employers to pay final wages in a prompt manner, thus furthering the public policy.” (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1400 [117 Cal.Rptr.3d 377, 241 P.3d 870], internal citations omitted.)
- “ ‘The plain purpose of [Labor Code] sections 201 and 203 is to compel the immediate payment of earned wages upon a discharge.’ The prompt payment of an employee’s earned wages is a fundamental public policy of this state.” (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 962 [219 Cal.Rptr.3d 580]The purpose of section 203 is to compel the prompt payment of earned wages; the section is to be given a reasonable but strict interpretation.” (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 7 [177 Cal.Rptr. 803], internal citation omitted.)
- “The statutory policy favoring prompt payment of wages applies to employees who retire, as well as those who quit for other reasons.” (*McLean v. State* (2016) 1 Cal.5th 615, 626 [206 Cal.Rptr.3d 545, 377 P.3d 796].)
- “[A]n employer may not delay payment for several days until the next regular pay period. Unpaid wages are due *immediately* upon discharge. This requirement is strictly applied and may not be ‘undercut’ by company payroll practices or ‘any industry habit or custom to the contrary.’ ” (*Kao, supra*, 12 Cal.App.5th at p. 962, original italics, internal citation omitted.)
- “ ‘ “[T]o be at fault within the meaning of [section 203], the employer’s refusal to pay need not be based on a deliberate evil purpose to defraud workmen of wages which the employer knows to be due. As used in section 203, ‘willful’ merely means that the employer intentionally failed or refused to perform an act which was required to be done.” ...’ ” (*Gonzalez v. Downtown LA Motors, LP*

(2013) 215 Cal.App.4th 36, 54 [155 Cal.Rptr.3d 18].)

- “[A]n employer’s reasonable, good faith belief that wages are not owed may negate a finding of willfulness.” (*Choate v. Celite Corp.* (2013) 215 Cal.App.4th 1460, 1468 [155 Cal.Rptr.3d 915].)
- “A ‘good faith dispute’ that any wages are due occurs when an employer presents a defense, based in law or fact which, if successful, would preclude any recover[y] on the part of the employee. The fact that a defense is ultimately unsuccessful will not preclude a finding that a good faith dispute did exist.” (*Kao, supra*, 12 Cal.App.5th at p. 963.)
- “A proper reading of section 203 mandates a penalty equivalent to the employee’s daily wages for each day he or she remained unpaid up to a total of 30 days. ... [¶] [T]he critical computation required by section 203 is the calculation of a daily wage rate, which can then be multiplied by the number of days of nonpayment, up to 30 days.” (*Mamika v. Barca* (1998) 68 Cal.App.4th 487, 493 [80 Cal.Rptr.2d 175].)
- “ ‘A tender of the wages due at the time of the discharge, if properly made and in the proper amount, terminates the further accumulation of penalty, but it does not preclude the employee from recovering the penalty already accrued.’ ” (*Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [315 P.2d 116], citation omitted.)
- “In light of the unambiguous statutory language, as well as the practical difficulties that would arise under defendant’s interpretation, we conclude there is but one reasonable construction: section 203(b) contains a single, three-year limitations period governing all actions for section 203 penalties irrespective of whether an employee’s claim for penalties is accompanied by a claim for unpaid final wages.” (*Pineda, supra*, 50 Cal.4th at p. 1398.)

Secondary Sources

3 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Agency and Employment, §§ ~~398437–439, 399~~

Chin et al., California Practice Guide: Employment Litigation, Ch. 1-A, *Introduction—Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Compensation—Coverage and Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-D, *Compensation—Payment of Wages*, ¶¶ 11:456, 11:470.1, 11:510, 11:513–11:515 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-J, *Compensation—Enforcing California Laws Regulating Employee Compensation*, ¶¶ 11:1458–11:1459, 11:1461–11:1461.1 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-B, *Remedies—Contract Damages*,

| ¶ 17:148 (The Rutter Group)

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws*, § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes*, § 250.16[2][d] (Matthew Bender)

California Civil Practice: Employment Litigation, §§ 4:67, 4:74 (Thomson Reuters)

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].)
- “[T]he costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption” (*Kao v.*

Holiday (2017) 12 Cal.App.5th 947, 958 [219 Cal.Rptr.3d 580].)

- “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) Agency and Employment, § 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]dential 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].)
- “[T]he costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption” (*Kao v. Holiday* (2017) 12 Cal.App.5th 947, 958 [219 Cal.Rptr.3d 580].)
- “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) Agency [and Employment](#), § 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)

4002. “Gravely Disabled” Explained

The term “gravely disabled” means that a person is presently unable to provide for his or her basic needs for food, clothing, or shelter because of [a mental health disorder/impairment by chronic alcoholism]. [The term “gravely disabled” does not include ~~mentally-retarded~~ persons with intellectual disabilities by reason of ~~being-mentally-retarded~~the disability alone.]

[[Insert one or more of the following:] [psychosis/bizarre or eccentric behavior/delusions/hallucinations/[insert other]] [is/are] not enough, by [itself/themselves], to find that [name of respondent] is gravely disabled. [He/She] must be unable to provide for the basic needs of food, clothing, or shelter because of [a mental disorder/impairment by chronic alcoholism].]

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

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

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

New June 2005; Revised January 2018

Directions for Use

This instruction provides the definition of “gravely disabled” from Welfare and Institutions Code section 5008(h)(1)(A), which will be the applicable standard in most cases. Read the bracketed sentence at the end of the first paragraph if appropriate to the facts of the case. There is a second standard in Welfare and Institutions Code section 5008(h)(1)(B) involving a finding of mental incompetence under Penal Code section 1370. A different instruction will be required if this standard is alleged.

The last paragraph principle regarding the likelihood of future deterioration may not apply ~~in cases whereif~~ the respondent has no insight into his or her mental disorder. (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1576–1577 [254 Cal.Rptr. 552].)

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

Sources and Authority

- “Gravely Disabled” Defined. Welfare and Institutions Code section 5008(h).

- “The enactment of the LPS and with it the substitution of ‘gravely disabled’ for ‘in need of treatment’ as the basis for commitment of individuals not dangerous to themselves or others reflects a legislative determination to meet the constitutional requirements of precision. The term ‘gravely disabled’ is sufficiently precise to exclude unusual or nonconformist lifestyles. It connotes an inability or refusal on the part of the proposed conservatee to care for basic personal needs of food, clothing and shelter.” (*Conservatorship of Chambers* (1977) 71 Cal.App.3d 277, 284 [139 Cal.Rptr. 357], footnotes omitted.)
- “[T]he public guardian must prove beyond a reasonable doubt that the proposed conservatee is gravely disabled.” (*Conservatorship of Jesse G.* (2016) 248 Cal.App.4th 453, 461 [203 Cal.Rptr.3d 667].)
- “The stricter criminal standard is used because the threat to the conservatee’s individual liberty and personal reputation is no different than the burdens associated with criminal prosecutions.” (*Conservatorship of Smith* (1986) 187 Cal.App.3d 903, 909 [232 Cal.Rptr. 277] internal citations omitted.)
- “Bizarre or eccentric behavior, even if it interferes with a person’s normal intercourse with society, does not rise to a level warranting conservatorship except where such behavior renders the individual helpless to fend for herself or destroys her ability to meet those basic needs for survival.” (*Conservatorship of Smith, supra*, 187 Cal.App.3d at p. 909.)
- “Under [Welfare and Institutions Code] section 5350, subdivision (e)(1), ‘a person is not “gravely disabled” if that person can survive safely without involuntary detention with the help of responsible family, friends, or others who are both willing and able to help provide for the person’s basic personal needs for food, clothing, or shelter.’ ” (*Conservatorship of Jesse G., supra*, 248 Cal.App.4th at p. 460.)
- “While [third person] may not have shown that he could manage appellant’s mental health symptoms as adeptly as would a person professionally trained to care for someone with a mental disorder, that is not the standard. As appellant states, ‘[t]he question in a LPS conservatorship case where the proposed conservatee asserts a third party assistance claim is not whether the third party will be able to manage the person’s mental health symptoms completely. Rather, the dispositive question is whether the person is able to provide the proposed conservatee with food, clothing, and shelter on a regular basis.’ ” (*Conservatorship of Jesse G., supra*, 248 Cal.App.4th at p. 463 fn. 4.)
- “We ... hold that a person sought to be made an LPS conservatee subject to involuntary confinement in a mental institution, is entitled to have a unanimous jury determination of all of the questions involved in the imposition of such a conservatorship, and not just on the issue of grave disability in the narrow sense of whether he or she can safely survive in freedom and provide food, clothing or shelter unaided by willing, responsible relatives, friends or appropriate third persons.” (*Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369].)
- “[A]n individual who will not voluntarily accept mental health treatment is not for that reason alone gravely disabled.” (*Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1468 [257 Cal.Rptr.

860].)

- “[T]he pivotal issue is whether [respondent] was ‘presently’ gravely disabled and the evidence demonstrates that he was not. Accordingly, the order granting the petition must be overturned.” (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1034 [226 Cal.Rptr. 33], fn. omitted, citing to *Conservatorship of Murphy* (1982) 134 Cal.App.3d 15, 18 [184 Cal.Rptr. 363].)
- “[A] conservatorship cannot be established because of a perceived likelihood of future relapse. To do so could deprive the liberty of persons who will not suffer such a relapse solely because of the pessimistic statistical odds. Because of the promptness with which a conservatorship proceeding can be invoked the cost in economic and liberty terms is unwarranted.” (*Conservatorship of Neal* (1987) 190 Cal.App.3d 685, 689 [235 Cal.Rptr. 577].)
- “A perceived likelihood of future relapse, without more, is not enough to justify establishing a conservatorship. Neither can such a likelihood justify keeping a conservatorship in place if its subject is not presently gravely disabled, in light of the statutory provisions allowing rehearings to evaluate a conservatee’s current status.” (*Conservatorship of Jones* (1989) 208 Cal.App.3d 292, 302 [256 Cal.Rptr. 415], internal citation omitted.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 97

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

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

4321. Affirmative Defense—Retaliatory Eviction—Tenant’s Complaint (Civ. Code, § 1942.5)

[Name of defendant] claims that [name of plaintiff] is not entitled to evict [him/her/it] because [name of plaintiff] filed this lawsuit in retaliation for [name of defendant]’s having exercised [his/her/its] rights as a tenant. To succeed on this defense, [name of defendant] must prove all of the following:

- 1. That [name of defendant] was not in default in the payment of [his/her/its] rent;**
- 2. That [name of plaintiff] filed this lawsuit in retaliation because [name of defendant] had complained about the condition of the property to [[name of plaintiff]/[name of appropriate agency]]; and**
- 3. That [name of plaintiff] filed this lawsuit within 180 days after**

[Select the applicable date(s) or event(s):]

[the date on which [name of defendant], in good faith, gave notice to [name of plaintiff] or made an oral complaint to [name of plaintiff] regarding the conditions of the property][./; or]

[the date on which [name of defendant], in good faith, filed a written complaint, or an oral complaint that was registered or otherwise recorded in writing, with [name of appropriate agency], of which [name of plaintiff] had notice, for the purpose of obtaining correction of a condition of the property][./; or]

[the date of an inspection or a citation, resulting from a complaint to [name of appropriate agency] of which [name of plaintiff] did not have notice][./; or]

[the filing of appropriate documents to begin a judicial or an arbitration proceeding involving the conditions of the property][./; or]

[entry of judgment or the signing of an arbitration award that determined the issue of the conditions of the property against [name of plaintiff]].

[Even if [name of defendant] has proved that [name of plaintiff] filed this lawsuit with a retaliatory motive, [name of plaintiff] is still entitled to possession of the premises if [he/she/it] proves that [he/she/it] also filed the lawsuit in good faith for a reason stated in the [3/30/60]-day notice.]

New August 2007; Revised June 2010

Directions for Use

This instruction is based solely on Civil Code section 1942.5(a), which has the 180-day limitation. The remedies provided by this statute are in addition to any other remedies provided by statutory or decisional law. (Civ. Code, § 1942.5(hj).) Thus, there are two parallel and independent sources for the doctrine of retaliatory eviction: the statute and the common law. (*Barela v. Superior Court* (1981) 30 Cal.3d 244, 251 [178 Cal.Rptr. 618, 636 P.2d 582].) Whether the common law provides additional protection against retaliation beyond the 180-day period has not been decided. (See *Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776 [187 Cal.Rptr. 242] [statute not a limit in tort action for wrongful eviction; availability of the common law retaliatory eviction defense, unlike that authorized by section 1942.5, is apparently not subject to time limitations].)

Include element 1 only if the landlord's asserted ground for eviction is something other than nonpayment of rent. If nonpayment is the ground, the landlord has the burden to prove that the tenant is in default. (See CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*.)

If element 1 is included, there may be additional issues of fact that the jury must resolve in order to decide whether the tenant is in default in the payment of rent. If necessary, instruct that the tenant is not in default if he or she has exercised any legally protected right not to pay the contractual amount of rent, such as a habitability defense, a “repair and deduct” remedy, or a rent increase that is alleged to be retaliatory.

For element 3, select the appropriate date or event that triggered the 180-day period within which a landlord may not file an unlawful detainer. (Civ. Code, § 1942.5(a).)

Include the last paragraph if the landlord alleges that there was also a lawful cause for the eviction (see Civ. Code, § 1942.5(df) [landlord may proceed “for any lawful cause”]), and that this cause was both asserted in good faith and set forth in the notice terminating the tenancy. (See Civ. Code, § 1942.5(eg); *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 595-596 [3 Cal.Rptr.3d 205, 73 P.3d 1185] [landlord asserting lawful cause under 1942.5(df) must also establish good faith under 1942.5(eg), but need not establish total absence of retaliatory motive].)

Sources and Authority

- Retaliatory Eviction: Tenant Complaints. Civil Code section 1942.5(a).
- Lawful Acts Permitted; No Tenant Waiver. Civil Code section 1942.5(df).
- Landlord's Good Faith Acts. Civil Code section 1942.5(eg).
- “The defense of ‘retaliatory eviction’ has been firmly ensconced in this state’s statutory law and judicial decisions for many years. ‘It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding.’ The retaliatory

eviction doctrine is founded on the premise that ‘[a] landlord may normally evict a tenant for any reason or for no reason at all, but he may not evict for an improper reason’ ” (*Barela, supra*, 30 Cal.3d at p. 249, internal citations omitted.)

- “Thus, California has two parallel and independent sources for the doctrine of retaliatory eviction. This court must decide whether petitioner raised a legally cognizable defense of retaliatory eviction under the statutory scheme and/or the common law doctrine.” (*Barela, supra*, 30 Cal.3d at p. 251.)
- “Retaliatory eviction occurs, as Witkin observes, ‘[When] a landlord exercises his legal right to terminate a residential tenancy in an authorized manner, but with the motive of retaliating against a tenant who is not in default but has exercised his legal right to obtain compliance with requirements of habitability.’ It is recognized as an affirmative defense in California; and as appellant correctly argues, it extends beyond warranties of habitability into the area of First Amendment rights.” (*Four Seas Inv. Corp. v. International Hotel Tenants’ Assn.* (1978) 81 Cal.App.3d 604, 610 [146 Cal.Rptr. 531], internal citations omitted.)
- “If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. ... ‘If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all.’ ” (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97], internal citations omitted.)
- “The existence or nonexistence of a landlord’s retaliatory motive is ordinarily a question of fact.” (*W. Land Office v. Cervantes* (1985) 175 Cal.App.3d 724, 731 [220 Cal.Rptr. 784].)
- “[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith--i.e., a bona fide--intent to withdraw the property from the rental market. If the tenant controverts the landlord’s good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence.” (*Drouet supra*, 31 Cal.4th at p. 596.)
- “[T]he cause of action for retaliation recognized by section 1942.5 applies to tenants of a mobilehome park. ... ‘By their terms, subdivisions (c) and (f) of section 1942.5 give a right of action to any lessee who has been subjected to an act of unlawful retaliation. Thus, on its face the statute provides protection to mobilehome park tenants who own their own dwellings and merely rent space from their landlord.’ ” (*Banuelos v. LA Investment, LLC* (2013) 219 Cal.App.4th 323, 330 [161 Cal.Rptr.3d 772].)

Secondary Sources

12 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Real Property, §§ ~~706739, 709742, 712745~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.113–8.117

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.65, 12.38

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 16

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

| Miller & Starr, California Real Estate, *Landlord-Tenant*, § [19:22534.206](#) (Thomson Reuters)

**4322. Affirmative Defense—Retaliatory Eviction—Engaging in Legally Protected Activity
(Civ. Code, § 1942.5(ed))**

[Name of defendant] **claims that [name of plaintiff] is not entitled to evict [him/her/it] because [name of plaintiff] filed this lawsuit in retaliation for [name of defendant]’s having engaged in legally protected activities. To succeed on this defense, [name of defendant] must prove both of the following:**

1. [Insert one or both of the following options:]

[That [name of defendant] lawfully organized or participated in [a tenants’ association/an organization advocating tenants’ rights];] [or]

[That [name of defendant] lawfully and peaceably [insert description of lawful activity];]

AND

2. That [name of plaintiff] filed this lawsuit because [name of defendant] engaged in [this activity/these activities].

[Even if [name of defendant] has proved that [name of plaintiff] filed this lawsuit with a retaliatory motive, [name of plaintiff] is still entitled to possession of the premises if [he/she/it] proves that [he/she/it] also filed the lawsuit in good faith for a reason stated in the [3/30/60]-day notice.]

New August 2007

Directions for Use

In element 1, select the tenant’s conduct that is alleged to be the reason for the landlord’s retaliation. (Civ. Code, § 1942.5(ed).)

Include the last paragraph if the landlord alleges that there was also a lawful cause for the eviction (see Civ. Code, § 1942.5(df)), and that this cause was both asserted in good faith and set forth in the notice terminating the tenancy. (See Civ. Code, § 1942.5(eg); *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 595-596 [3 Cal.Rptr.3d 205, 73 P.3d 1185] [landlord asserting lawful cause under 1942.5(df) must also establish good faith under 1942.5(eg), but need not establish total absence of retaliatory motive].)

Sources and Authority

- Retaliatory Eviction: Exercise of Tenant Rights. Civil Code section 1942.5(ed).

- Lawful Acts Permitted; No Tenant Waiver. Civil Code section 1942.5(~~df~~).
- Landlord’s Good-Faith Acts. Civil Code section 1942.5(~~eg~~).
- “If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. . . . ‘If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all. The question of permissible or impermissible purpose is one of fact for the court or jury.’ ” (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97], internal citations omitted.)
- “In an unlawful detainer action, where the defense of retaliatory eviction is asserted pursuant to Civil Code section 1942.5, the tenant has the overall burden of proving his landlord’s retaliatory motive by a preponderance of the evidence. If the landlord takes action for a valid reason not listed in the unlawful detainer statutes, he must give notice to the tenant of the ground upon which he proceeds; and if the tenant controverts that ground, the landlord has the burden of proving its existence by a preponderance of the evidence.” (*Western Land Office, Inc. v. Cervantes* (1985) 175 Cal.App.3d 724, 741 [220 Cal.Rptr. 784].)
- “[T]he burden was on the tenants to establish retaliatory motive by a preponderance of the evidence.” (*Western Land Office, Inc., supra*, 175 Cal.App.3d at p. 744.)
- “[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith--i.e., a bona fide--intent to withdraw the property from the rental market. If the tenant controverts the landlord’s good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence.” (*Drouet, supra*, 31 Cal.4th at p. 596.)
- “[T]he cause of action for retaliation recognized by section 1942.5 applies to tenants of a mobilehome park. . . . ‘By their terms, subdivisions (c) and (f) of section 1942.5 give a right of action to any lessee who has been subjected to an act of unlawful retaliation. Thus, on its face the statute provides protection to mobilehome park tenants who own their own dwellings and merely rent space from their landlord.’ ” (*Banuelos v. LA Investment, LLC* (2013) 219 Cal.App.4th 323, 330 [161 Cal.Rptr.3d 772].)

Secondary Sources

12 Witkin, Summary of California Law (~~11th ed. 2017~~~~10th ed. 2005~~) Real Property, §§ ~~706739, 709742, 712745~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.113–8.117

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.65, 12.38

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 16

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

| Miller & Starr, California Real Estate, *Landlord-Tenant*, § ~~1934:225-206~~ (Thomson Reuters)

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) 14 Cal.App.5th 870, 880–881 [222 Cal.Rptr.3d 397], internal citation omitted.)
- “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

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].)
- “A special verdict is ‘fatally defective’ if it does not allow the jury to resolve every controverted issue.” (*Trejo v. Johnson & Johnson* (2017) 13 Cal.App.5th 110, 136 [220 Cal.Rptr.3d 127].)
- “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.)
- “[T]hat the jury instruction ... defined [the element] did not obviate the necessity of including that required element in the special verdict. ‘A jury instruction alone does not constitute a finding. Nor does the fact that the evidence might support such a finding constitute a finding.’ ” (*Trejo, supra*, 13 Cal.App.5th at p. 138.)
- “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)

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: January 30, 2018

Title of proposal (*include amend/revise/adopt/approve + form/rule numbers*):

Jury Instructions: Additions and Revisions to Criminal Jury Instructions

Committee or other entity submitting the proposal:

Judicial Council Advisory Committee on Criminal Jury Instructions

Staff contact (name, phone and e-mail): Robin Seeley, 415-865-7710, robin.seeley@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: Compliance with Rule of Court 10.59

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

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on March 1–2, 2018

Title	Agenda Item Type
Jury Instructions: Additions and Revisions to Criminal Jury Instructions	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
<i>Judicial Council of California Criminal Jury Instructions (CALCRIM)</i>	March 2, 2018
Recommended by	Date of Report
Advisory Committee on Criminal Jury Instructions	January 5, 2018
Hon. René Auguste Chouteau, Chair	Contact
	Robin Seeley, 415-865-7710
	robin.seeley@jud.ca.gov

Executive Summary

The Advisory Committee on Criminal Jury Instructions recommends approval of the proposed revisions and additions to the *Judicial Council of California Criminal Jury Instructions (CALCRIM)*. These changes will keep *CALCRIM* current with statutory and case authority.

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective March 2, 2018, approve for publication under rule 2.1050 of the California Rules of Court the criminal jury instructions prepared by the committee. Once approved, the revised instructions will be published in the next official edition of the *Judicial Council of California Criminal Jury Instructions*.

A table of contents and the proposed revisions to the criminal jury instructions are attached at pages 9–100.

Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.59 of the California Rules of Court, which established the advisory committee and its charge.¹ In August 2005, the council voted to approve the *CALCRIM* 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 *CALCRIM*. The council approved the last *CALCRIM* release at its September 2017 meeting.

Rationale for Recommendation

The committee recommends proposed revisions to the following instructions: *CALCRIM* Nos. 332, 359, 360, 840, 1002, 1032, 1300, 1850, 2100, 2101, 2110, 2111, 2112, 2125, 2126, 2521, and 3100. It also recommends adoption of the following new instructions: *CALCRIM* Nos. 377, 2102, 2114, 2765, 3001, and 3002.

The committee revised the instructions based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law.

Below is an overview of some of the proposed changes, focusing on the new instructions.

Proposed New *CALCRIM* No. 377, Presence of Support Person/Dog

In *People v. Chenault* (2014) 227 Cal.App.4th 1503, 1517–1518, the court suggested in dicta that instructing on the presence of a witness support dog at trial was a “preferred practice” to minimize potential prejudice. See Penal Code section 868.4. Penal Code section 868.5 provides that “supporting persons” may assist prosecution witnesses. Although the committee had previously received feedback that a pattern jury instruction on this subject was not necessary, the tide has turned and it now proposes this draft.

Proposed New *CALCRIM* Nos. 2102 and 2114, with revisions to related *CALCRIM* Nos. 2100, 2101, 2110, 2111, 2112, 2125, and 2126

The state legislature amended Vehicle Code sections 23152 and 23153 to include new violations for driving with .04 percent or more blood alcohol content with a passenger for hire. These code sections go into effect on July 1, 2018. The committee drafted new instructions to cover these new violations. It also made necessary revisions to other related instructions with cross-references in the bench notes: *CALCRIM* Nos. 2100, 2101, 2110, 2111, 2112, 2125, and 2126.

¹ Rule 10.59(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 criminal jury instructions.”

Proposed New CALCRIM No. 2765, Misappropriation of Public Money

A recent case, *People v. Spaccia* (2017) 12 Cal.App.5th 1278, 1291, found fault with CALJIC No. 7.26.1 on misappropriation of public money because it omitted an element of the offense. The committee drafted a correct, more inclusive instruction that encompasses all the provisions of Penal Code sections 424(a)(1–7) to assist courts in instructing on these crimes.

Proposed New CALCRIM Nos. 3001 and 3002, Failure to Appear While on Bail, Failure to Appear While on Own Recognizance Release

Deputy District Attorney Craig Fisher of San Diego County proposed instructions on these offenses. The committee agreed these could be helpful to judges and practitioners.

CALCRIM Nos. 1850, 2125, and 3100, instructions with potential issues regarding bifurcated trials

A trial judge commented that the bench notes in these instructions could be more clear. In particular, she mentioned that attorneys had been uncertain about the distinction between elements and sentencing enhancements. In response to these concerns, the committee carefully reviewed and edited the language in the “Instructional Duty” section of the bench notes and added two new paragraphs in the “Related Issues” section of the bench notes (i.e., “Defense Stipulation to Prior Convictions” and “Motion for Bifurcated Trial.”)

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CALCRIM* circulated for public comment from November 21 through December 31, 2017. The committee received input from two different commentators. The text of all comments received and committee responses is included in a comment chart attached at pages 5–8.

Rule 2.1050 of the California Rules of Court requires the committee to regularly update, amend, and add topics to *CALCRIM* and to submit its recommendations to the council for approval. The proposed revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee considered no alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new edition and pay royalties to the Judicial Council. The council’s contract with West Publishing provides additional royalty revenue.

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 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 council provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Chart of comments, at pages 5–8
2. Full text of revised *CALCRIM* instructions, including table of contents, at pages 9–100

CALCRIM 2017, Summer Invitation to Comment

Revised CALCRIM Instructions

The longer comments have been lightly edited.

Instruction	Commentator	Comment	Response
	<p>Judge Kent Hamlin, Superior Court of Fresno County</p>	<p>Position: Comment on Behalf of Org.:</p> <p>I have comments regarding proposed changes to the Bench Notes for four instructions:</p> <ol style="list-style-type: none"> 1) <u>Bench notes to CALCRIM 224 should read:</u> If intent or mental state is the only element proved by circumstantial evidence, do not give this instruction. Give CALCRIM No. 225, Circumstantial Evidence: Intent or Mental State. 2) <u>Bench notes to CALCRIM 225 should read:</u> Give this instruction when the defendant’s intent or mental state is the only element of the offense that rests substantially or entirely on circumstantial evidence. If other elements of the offense also rest substantially or entirely on circumstantial evidence, do not give this instruction. Give CALCRIM No. 224, Circumstantial Evidence: Sufficiency of Evidence. <p>I do not understand the rationale for the proposed changes that eliminate the words, “do not give this instruction.” Either it is a case where circumstantial evidence is only pointed to as evidence of mental state or intent, in which case the judge must give 225, or it is a case where circumstantial evidence may prove some other element of the crime, in which case the judge must give 224. If there is any question which instruction applies, 224 should be given. A judge should <i>never</i> give both instructions, as 225 is entirely subsumed within 224.</p> <ol style="list-style-type: none"> 3) <u>Bench notes to CALCRIM 359 should read:</u> The court has a sua sponte duty to instruct on corpus delicti whenever an accused’s extrajudicial confession or 	<p>The committee agrees with the first two comments and will retract the proposed changes.</p> <p>Comments 3 & 4 raise issues outside the scope of the current invitation to comment. The committee will consider them at its next meeting.</p>

CALCRIM 2017, Summer Invitation to Comment

Revised CALCRIM Instructions

The longer comments have been lightly edited.

Instruction	Commentator	Comment	Response
		<p>admissions form part of the prosecution’s evidence. (People v. Howk (1961) 56 Cal.2d 687, 707 [16 Cal.Rptr. 370, 365 P.2d 426]). However, if the defendant’s extrajudicial statements are a part of the crime itself, as with criminal threats, robbery or conspiracy, for example, this instruction should not be given, even upon request.</p> <p>This more accurately frames the issue for the trial judge. It is a misstatement of the law to instruct the jurors that, “That other evidence need only be slight and need only be enough to support a reasonable inference that the crime is committed,” when the only statements of the defendant in evidence are “verbal acts,” such as a criminal threat or other statement in the course of the commission of the crime. The <i>corpus delicti</i> rule is not implicated at all in that setting. This instruction is designed to prevent a defendant from being convicted of a crime he did not commit, based only on his admission or confession. I appreciate the committee wanted to get away from the use of the terms “confession” and “admission,” but this instruction without further guidance has been a dangerous pitfall ever since the Supreme Court ruled in <i>People v. Diaz</i> (2015) 60 Cal. 4th 1176, that CALCRIM 358 must still be given, even in cases where the defendant’s statements are an element of the crime.</p> <p>4) Accordingly, the <u>Bench Note to CALCRIM 358</u> should also be <u>modified</u>, under the paragraph entitled, “Related Instructions”: If the out-of-court oral statement made by the defendant in evidence is a confession or admission, then <u>CALCRIM No. 359</u>, Corpus Delicti: Independent Evidence of a Charged Crime, may also be given, together with the bracketed cautionary instruction. If the extrajudicial statement of</p>	

CALCRIM 2017, Summer Invitation to Comment

Revised CALCRIM Instructions

The longer comments have been lightly edited.

Instruction	Commentator	Comment	Response
		<p>the defendant in evidence is part of the crime itself, as with criminal threats, robbery or conspiracy, for example, that instruction should not be given, even upon request.</p> <p>Thank you for considering these important modifications.</p>	
<p>2102, 2110, 2114, 2125, 2126, 2765, 3001, 3002, 224, 225, 332, 360, 359, 840, 1002, 1032, 1300, 1850, 2100, 2101, 2110, 2111, 2112, 3100, 2521</p>	<p>Orange County Bar Association</p>	<p>We agree with the proposed modifications for these instructions.</p>	<p>No response necessary</p>
<p>377</p>	<p>Orange County Bar Association</p>	<p>We propose additional language in bold as follows: purpose . . . , nor let it influence your decision in any way. Or, alternatively, reword this entirely and pattern it after the more extensive language of CALJIC No. 1.09 in bold as follows: The fact that [during the trial,] a [support] (person/dog) (was/is) present in the courtroom must not be considered by you for any purpose. You must disregard the (person’s/dog’s) presence and decide the case solely on the evidence presented. You must not consider the testimony of any witness to be more or less believable because of the (person/s/dog/s) presence. You must not speculate as to why the (person/dog) (was/is) present. In determining the issues in the case, disregard the matter entirely.</p> <p>As to the BENCH NOTES section, we propose adding the additional word “exclusively” for clarification as follows:</p>	<p>The committee respectfully disagrees with the first suggestion.</p> <p>First, it would never copy a CALJIC instruction, if only to avoid committing copyright infringement.</p> <p>Second, the committee believes that “less is more.” The suggestion to add more examples would undercut the blanket admonition to not let the presence of the support person or dog influence the jury’s decision in any way.</p> <p>The committee respectfully disagrees with the proposed paraphrasing of the bench note. The distinction between support dogs and support</p>

CALCRIM 2017, Summer Invitation to Comment

Revised CALCRIM Instructions

The longer comments have been lightly edited.

Instruction	Commentator	Comment	Response
		The court may give this instruction on request. If exclusively instructing on support person, this instruction only applies to prosecution witnesses.	persons and the witnesses they may support is clear. Even in the unlikely event that a trial featured both support persons and support dogs, the instruction would still only apply to prosecution witnesses when assisted by support persons.

Table of Contents

Winter 2018 CALCRIM Proposed Revisions

Instruction Number	Instruction Title
NEW 377	Presence of Support Person/Dog
NEW 2102, 2114, REVISED 2110, 2125, 2126	New DUI Crimes When Driving With “Passengers for Hire” as well as necessary cross-referenced instructions
NEW 2765	Misappropriation of Public Money
NEW 3001, 3002	Failure to Appear While on Bail, Failure to Appear While on Own Recognizance Release
332, 360	Expert Witness Testimony, Statements to an Expert
359	Corpus Delicti
840	Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition
1002, 1032	Rape of Intoxicated Woman or Spouse, Sodomy of Intoxicated Person
1300	Criminal Threat
1850, 2100, 2101, 2111, 2112, 3100	Instructions With Potential Issues Regarding Bifurcated Trials
2521	Carrying Concealed Firearm Within Vehicle

377. Presence of Support Person/Dog (Pen. Code, §§ 868.4, 868.5)

_____ <insert name of witness> **(will have/has/had) a (person/dog) present during (his/her) testimony. Do not consider the support (person's/dog's) presence for any purpose.**

New March 2018

BENCH NOTES

Instructional Duty

The court may give this instruction on request. If instructing on support persons, this instruction only applies to prosecution witnesses.

AUTHORITY

- Elements ▶ Pen. Code, §§ 868.4, 868.5.

2102. Driving With 0.04 Percent Blood Alcohol Causing Injury With a Passenger for Hire (Veh. Code, § 23153(e))

The defendant is charged [in Count __] with causing injury to another person while driving with a blood-alcohol level of 0.04 percent or more [in violation of Vehicle Code section 23153(e)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant drove a vehicle;
2. When (he/she) drove, the defendant's blood-alcohol level was 0.04 percent or more by weight;
3. When (he/she) drove with that blood-alcohol level, (he/she) also (committed an illegal act/ [or] neglected to perform a legal duty);
4. When (he/she) drove, there was a passenger for hire in the vehicle;

AND

5. The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.

A person is a *passenger for hire* when the person or someone else pays, or is expected to pay, for the ride, the payment is or will be with money or something else of value, and the payment is made to, or expected to be made to, the owner, operator, agent or any other person with an interest in the vehicle.

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood-alcohol level of 0.04 percent or more, you may, but are not required to, conclude that the defendant's blood-alcohol level was 0.04 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

[The People allege that the defendant committed the following illegal act[s]: _____ <list name[s] of offense[s]>.

To decide whether the defendant committed _____ <list name[s] of offense[s]>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty to exercise ordinary care at all times and to maintain proper control of the vehicle/ _____ <insert other duty or duties alleged>).]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra*, 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of “ordinary care.”

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of injury, the court should give the first bracketed paragraph on causation, which includes the “direct, natural, and probable” language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the “substantial factor” definition. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, failure to give harmless error if was required].) If the court concludes that a unanimity

instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” explains a rebuttable presumption created by statute. (See Veh. Code, § 23153(e); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” if there is evidence that the defendant’s blood-alcohol level was below 0.04 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with “In evaluating any test results in this case.” (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Do **not** give this instruction if the court has bifurcated the trial. Instead, give CALCRIM No. 2126, Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial. See the Bench Notes to CALCRIM No. 3100, Prior Conviction: Nonbifurcated Trial, for an extensive discussion of bifurcation. If the court does not grant a bifurcated trial, give CALCRIM No. 2110, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the “imminent peril/sudden emergency” doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2100, *Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements ▶ Veh. Code, § 23153(e); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Partition Ratio ▶ Veh. Code, § 23152; *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions ▶ Veh. Code, § 23153(e); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Must Instruct on Elements of Predicate Offense ▶ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care ▶ Pen. Code, § 7(2); Restatement Second of Torts, § 282.
- Causation ▶ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Unanimity Instruction ▶ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Statute Constitutional ▶ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

LESSER INCLUDED OFFENSES

- Driving With 0.04 Percent Blood Alcohol With a Passenger for Hire ▶ Veh. Code, § 23152(e).

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol* and CALCRIM No. 2100, *Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury*.

2103–2109. Reserved for Future Use

2110. Driving Under the Influence (Veh. Code, § 23152(a))

The defendant is charged [in Count ___] with driving under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug] [in violation of Vehicle Code section 23152(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant drove a vehicle;

AND

2. When (he/she) drove, the defendant was under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug].

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.

The manner in which a person drives is not enough by itself to establish whether the person is or is not under the influence of (an alcoholic beverage/ [or] a drug) [or under the combined influence of an alcoholic beverage and a drug]. However, it is a factor to be considered, in light of all the surrounding circumstances, in deciding whether the person was under the influence.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes _____ <insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer>.]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant’s blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

[It is not a defense that the defendant was legally entitled to use the drug.]

[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to drive.]

New January 2006; Revised June 2007, April 2008, August 2015, March 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal. Rptr. 2d 690].)

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that the defendant’s blood alcohol level was 0.08 percent”

explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that the defendant’s blood alcohol level was 0.08 percent” if there is no substantial evidence that the defendant’s blood alcohol level was at or above 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11 262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution’s theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with “In evaluating any test results in this case.” (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed sentence stating that “it is not a defense that something else also impaired (his/her) ability to drive” if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Related Instructions

CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements ▶ Veh. Code, § 23152(a).
- Alcoholic Beverage Defined ▶ Veh. Code, § 109; Bus. & Prof. Code, § 23004.
- Drug Defined ▶ Veh. Code, § 312.
- Driving ▶ *Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].
- Presumptions ▶ Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Mandatory Presumption Unconstitutional Unless Instructed as Permissive Inference ▶ *People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].
- Under the Influence Defined ▶ *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.rptr.2d 710].
- Manner of Driving ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 84 [282 Cal.Rptr. 170]; *People v. McGrath* (1928) 94 Cal.App. 520, 524 [271 P. 549].
- Legal Entitlement to Use Drug Not a Defense ▶ Veh. Code, § 23630.
- Prior Convictions ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 272-277.

2 Witkin, California Evidence (5th ed. 2012), Demonstrative, Experimental, and Scientific Evidence § 56.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with felony driving under the influence based on prior convictions, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have been proved. If the jury finds that the prior convictions have not been proved, then the offense should be set at a misdemeanor.

- Attempted Driving Under the Influence ▶ Pen. Code, § 664; Veh. Code, § 23152(a); *People v. Garcia* (1989) 214 Cal.App.3d Supp.1, 3–4 [262 Cal.Rptr. 915].

RELATED ISSUES

Driving

“[S]ection 23152 requires proof of volitional movement of a vehicle.” (*Mercer v. Dept. of Motor Vehicles* (1991) 53 Cal.3d 753, 768 [280 Cal.Rptr. 745, 809 P.2d 404].) However, the movement may be slight. (*Padilla v. Meese* (1986) 184 Cal.App.3d 1022, 1029 [229 Cal.Rptr. 310]; *Henslee v. Dept. of Motor Vehicles* (1985) 168 Cal.App.3d 445, 450–453 [214 Cal.Rptr. 249].) Further, driving may be established through circumstantial evidence. (*Mercer, supra*, 53 Cal.3d at p. 770; *People v. Wilson* (1985) 176 Cal.App.3d Supp. 1, 9 [222 Cal.Rptr. 540] [sufficient evidence of driving where the vehicle was parked on the freeway, over a mile from the on-ramp, and the defendant, the sole occupant of the vehicle, was found in the driver’s seat with the vehicle’s engine running].) See CALCRIM No. 2241, *Driver and Driving Defined*.

PAS Test Results

The results of a preliminary alcohol screening (PAS) test “are admissible upon a showing of either compliance with title 17 or the foundational elements of (1) properly functioning equipment, (2) a properly administered test, and (3) a qualified operator” (*People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203].)

Presumption Arising From Test Results—Timing

Unlike the statute on driving with a blood alcohol level of 0.08 percent or more, the statute permitting the jury to presume that the defendant was under the

influence if he or she had a blood alcohol level of 0.08 percent or more does not contain a time limit for administering the test. (Veh. Code, § 23610; *People v. Schrieber* (1975) 45 Cal.App.3d 917, 922 [119 Cal.Rptr. 812].) However, the court in *Schrieber, supra*, noted that the mandatory testing statute provides that “the test must be incidental to both the offense and to the arrest and . . . no substantial time [should] elapse . . . between the offense and the arrest.” (*Id.* at p. 921.)

2114. Driving With 0.04 Percent Blood Alcohol With a Passenger for Hire (Veh. Code, § 23152(e))

The defendant is charged [in Count ___] with driving with a blood-alcohol level of 0.04 percent or more with a passenger for hire [in violation of Vehicle Code section 23152(e)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant drove a vehicle;
2. When (he/she) drove, the defendant's blood-alcohol level was 0.04 percent or more by weight;

AND

3. When (he/she) drove, there was a passenger for hire in the vehicle.

A person is a *passenger for hire* when the person or someone else pays, or is expected to pay, for the ride, the payment is or will be with money or something else of value, and the payment is made to, or expected to be made to, the owner, operator, agent or any other person with an interest in the vehicle.

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.04 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.04 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

New March 2018, effective July 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

Do **not** give this instruction if the court has bifurcated the trial. Instead, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. See the Bench Notes to CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, for an extensive discussion of bifurcation.

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(e); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” if there is no substantial evidence that the defendant’s blood alcohol level was at or above 0.4 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with “In evaluating any test results in this case.” (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Related Instructions

CALCRIM No. 2110, *Driving Under the Influence*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements ▶ Veh. Code, § 23152(e).
- Partition Ratio ▶ Veh. Code, § 23152; *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions ▶ Veh. Code, §§ 23152(e), 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Prior Convictions ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 272-277

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RELATED ISSUES

Defense Stipulation to Prior Convictions

The defendant may stipulate to the truth of the prior convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) If the defendant stipulates, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

Motion for Bifurcated Trial

Either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.)

2125. Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions (Veh. Code, §§ 23550, 23550.5 & 23566)

If you find the defendant guilty of ([causing injury while] driving under the influence/ [or] [causing injury while] driving with a blood alcohol level of (0.08/0.04) percent or more), [or the lesser offense of driving under the influence [or driving with a blood alcohol level of (0.08/0.04) percent or more]], you must then determine whether the People have proved the additional allegation that the defendant has been convicted of (another/other) driving under the influence offense[s] before. It has already been determined that the defendant is the person named in exhibits _____ *<insert numbers or descriptions of exhibits>*. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

The People allege that the defendant has been convicted of:

[1.] A violation of _____ *<insert Veh. Code section violated>*, on _____ *<insert date of conviction>*, in the _____ *<insert name of court>*, in Case Number _____ *<insert docket or case number>*(;/.)

[AND *<Repeat for each prior conviction alleged>*.]

[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of _____ *<insert other permitted purpose, e.g., assessing credibility of the defendant>*]. Do not consider this evidence for any other purpose.]

[You must consider each alleged conviction separately.] The People have the burden of proving (the/each) alleged conviction beyond a reasonable doubt. If the People have not met this burden [for any alleged conviction], you must find that the alleged conviction has not been proved.

New January 2006, Revised March 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on proof of the alleged prior convictions. ~~Give this instruction if the defendant does not admit the prior conviction and the court has not granted a bifurcated trial on the prior conviction.~~

~~Any prior convictions are a sentencing factor for the trial court and not an element of the offense. (*People v. Burris* (2005) 34 Cal.4th 1012, 1016, fn. 3 [22 Cal.Rptr.3d 876, 103 P.3d 276].) The defendant may stipulate to the truth of the prior convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) If the defendant stipulates, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)~~

~~In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) Do not give this instruction if the court has bifurcated the trial. Instead, if the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With .08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. See the Bench Notes to CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*, for an extensive discussion of bifurcation.~~

This instruction **must** be given with the appropriate instruction defining the elements of the driving under the influence offense charged, CALCRIM Nos. 2100, 2101, 2110, 2111.

On request, the court should give the bracketed limiting instruction regarding the evidence of the prior convictions. (See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction and the defense may prefer that no limiting instruction be given. (See *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have or have not been proved.

AUTHORITY

- Enhancements. ▶ Veh. Code, §§ 23550, 23550.5 & 23566.

- Prior Convictions ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].
- Judge Determines if Defendant Person Named in Documents ▶ Pen. Code, § 1025(b); *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].
- Limiting Instruction on Prior Conviction ▶ *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 222–225.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[3][d] (Matthew Bender).

RELATED ISSUES

Ten-Year “Washout” Period

Effective January 1, 2005, prior convictions for driving under the influence within ten years of the current offense may be used for enhancement purposes. (See Veh. Code, §§ 23550, 23550.5 & 23566.)

Order of Convictions, Not Offenses Relevant

In order for the sentencing enhancements for multiple driving under the influence offenses to apply, the conviction for the other offense or offenses must predate the current offense. (*People v. Snook* (1997) 16 Cal.4th 1210, 1216 [69 Cal.Rptr.2d 615, 947 P.2d 808].) The date on which the other offenses occurred is not relevant. (*Ibid.*)

All Offenses Must Occur Within Time Period

“[F]or a fourth DUI offense to be charged as a felony, the offense must be committed within [. . . ten] years of three or more separate DUI violations resulting in convictions, and all four must occur within a period of [. . . ten] years.” (*People v. Munoz* (2002) 102 Cal.App.4th 12, 20 [125 Cal.Rptr.2d 182].)

Prior Felony Reduced to Misdemeanor

In *People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1389 [101 Cal.Rptr.2d 618], the defendant had been previously convicted of a felony driving under the influence offense. After successful completion of probation, that felony was

reduced to a misdemeanor under Penal Code section 17(b). (*Ibid.*) The court held that that conviction could not later be used as a prior *felony* conviction to enhance the defendant's sentence. (*Ibid.*)

Defense Stipulation to Prior Convictions

The defendant may stipulate to the truth of the prior convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) If the defendant stipulates, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

Motion for Bifurcated Trial

Either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.)

See also the Related Issues section and Bench Notes to CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

2126. Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial (Veh. Code, §§ 23550, 23550.5 & 23566)

The People have alleged that the defendant was previously convicted of (another/other) driving under the influence offense[s]. It has already been determined that the defendant is the person named in exhibits _____ <insert numbers or descriptions of exhibits>. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

The People allege that the defendant has been convicted of:

[1.] A violation of _____ <insert Veh. Code section violated>, on _____ <insert date of conviction>, in the _____ <insert name of court>, in Case Number _____ <insert docket or case number>(;/.)

[AND <Repeat for each prior conviction alleged>.]

[In deciding whether the People have proved the allegation[s], consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial.]

You may not return a finding that (the/any) alleged conviction has or has not been proved unless all 12 of you agree on that finding.

New January 2006, Revised March 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on proof of the alleged prior convictions. Give this instruction if the court has granted a bifurcated trial. The court **must also give** CALCRIM No. 221, *Reasonable Doubt: Bifurcated Trial*.

Give the bracketed paragraph that begins with “In deciding whether the People have proved” on request.

The court must provide the jury with a verdict form on which the jury will indicate if the prior conviction has been proved. (Pen. Code, § 1158.)

AUTHORITY

- Enhancements ▶ Veh. Code, §§ 23550, 23550.5 & 23566.
- Prior Convictions ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].
- Bifurcation ▶ *People v. Calderon* (1994) 9 Cal.4th 69, 77–79 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41].
- Judge Determines if Defendant Person Named in Documents ▶ Pen. Code, § 1025(b); *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 222–225.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[3][d] (Matthew Bender).

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*, and CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*.

2127–2129. Reserved for Future Use

2765. Misappropriation of Public Money (Pen. Code § 424(a)(1-7))

The defendant is charged [in Count __] with misappropriating public money [in violation of Penal Code section 424(a)(_)<insert correct paragraph>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was responsible for receiving, safekeeping, transferring, or distributing public money;

[AND]

2. The defendant, while responsible for receiving, safekeeping, transferring, or distributing public money:

<select the element that corresponds to the paragraph of Pen. Code § 424(a) with which defendant is charged>

<(a)(1)> [took some of that money for (his/her) own or someone else's use without legal authority;]

<(a)(2)> [loaned, made a profit from, or used some of that money without legal authority;]

<(a)(3)> [knowingly kept a false account or made a false entry or erasure in any account of the money.]

<(a)(4)> [fraudulently changed, falsified, hid, destroyed, or obliterated an accounting of that money.]

<(a)(5)> [willfully refused or failed to disburse, on demand, any public money in (his/her) control in response to a draft, order, or warrant drawn upon that money by competent authority;]

<(a)(6)> [willfully failed to transfer any public money when the transfer was required by law;]

<(a)(7)> [willfully failed or refused to disburse any money that (he/she) had received to a person legally authorized to receive that money, despite having a legal duty to do so;]

<give element 3 when instructing on Pen. Code § 424(a)(1), (a)(2), (a)(5), (a)(6), (a)(7)>

[AND]

3. When the defendant did so, (he/she) (knew that (he/she) was not following the law on receiving, safekeeping, transferring, or distributing public money or was acting without legal authority/ [or]

was criminally negligent in failing to know the legal requirements for or restrictions on (his/her) conduct.)]

A person who is *responsible for public money* only needs to have some control over the money. That control does not need to be a major part of that person's job.

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for the consequences of that act.]

[A person acts *fraudulently* when he or she makes a false statement, misrepresents information, hides the truth, or otherwise does something with the intent to deceive.]

[The term *public money* includes all funds, bonds, and evidence of indebtedness received or held by state, county, district, city, town, or public agency officers in their official capacity. It also includes money received from selling bonds or other evidence of indebtedness authorized by the legislative body of any city, county, district, or public agency.]

[A person commits an act *willfully* when he or she does it willingly or on purpose.]

New March 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** to give this instruction defining the elements of the crime.

AUTHORITY

- Definition of Public Funds/Moneys ▶ Pen. Code, §§ 424(b), 426.
- Definition of Responsible for/Charged With ▶ *People v. Groat* (1993) 19 Cal.App.4th 1228, 1232 [24 Cal.Rptr.2d 15]
- Definition of Fraudulent Behavior ▶ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770].

- Criminal Negligence Requirement ▶ *Stark v. Superior Court* (2011) 52 Cal.4th 368, 399 [128 Cal.Rptr.3d 611, 257 P.3d 41].

2767–2799. Reserved for Future Use

negligent in failing to know the legal requirements for or restrictions on (his/her) conduct.)]

A person who is *responsible for public money* only needs to have some control over the money. That control does not need to be a major part of that person's job.

[*Criminal negligence* involves more than ordinary carelessness, inattention, or mistake in judgment. A person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for the consequences of that act.]

[A person acts *fraudulently* when he or she makes a false statement, misrepresents information, hides the truth, or otherwise does something with the intent to deceive.]

[The term *public money* includes all funds, bonds, and evidence of indebtedness received or held by state, county, district, city, town, or public agency officers in their official capacity. It also includes money received from selling bonds or other evidence of indebtedness authorized by the legislative body of any city, county, district, or public agency.]

[A person commits an act *willfully* when he or she does it willingly or on purpose.]

New March 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** to give this instruction defining the elements of the crime.

AUTHORITY

- Definition of Public Funds/Moneys ▶ Pen. Code, §§ 424(b), 426.
- Definition of Responsible for/Charged With ▶ *People v. Groat* (1993) 19 Cal.App.4th 1228, 1232 [24 Cal.Rptr.2d 15]
- Definition of Fraudulent Behavior ▶ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770].

- Criminal Negligence Requirement ▶ *Stark v. Superior Court* (2011) 52 Cal.4th 368, 399 [128 Cal.Rptr.3d 611, 257 P.3d 41].

2767–2799. Reserved for Future Use

3001. Failure to Appear While on Bail (Pen. Code, § 1320.5)

The defendant is charged [in Count ____] with failing to appear while out of custody on bail [in violation of Penal Code section 1320.5].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was (charged with/convicted of) the commission of a felony in (this case/case number ____);
2. The defendant was released from custody on bail in (this/that) case;
3. The defendant was required to appear in court at a specific date, time and place in (this/that) case;
4. The defendant willfully failed to appear in court as required;

AND

5. When the defendant willfully failed to appear in court as required, (he/she) did so in order to evade the process of the court.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

[If you find the defendant willfully failed to appear within 14 days of the date assigned for appearance you may, but are not required to, infer that the failure to appear was for the purpose of evading the process of the court.]

New March 2018

BENCH NOTES

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements. Pen. Code, § 1320.5.

Willfully defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Specific intent. *People v. Sutton* (1993) 19 Cal.App.4th 795, 799-800; *People v. Wesley* (1988) 198 Cal.App.3d 519.

Mandatory presumption unconstitutional unless instructed as permissive inference. *People v. Forrester* (1994) 30 Cal.App.4th 1697, 1703.

Secondary Sources

4 Witkin & Epstein, Cal. Criminal Law (4th Ed. 2012), Pretrial Proceedings, § 116.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.48 (Matthew Bender).

3002. Failure to Appear While on Own Recognizance Release (Pen. Code, § 1320)

The defendant is charged [in Count ____] with failing to appear while released from custody on (his/her) own recognizance [in violation of Penal Code section 1320((a)/(b))].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant was (charged with/convicted of) the commission of a (felony/misdemeanor) in (this case/case number ____);
2. The defendant was released from custody on (his/her) own recognizance pursuant to a signed written release;
3. The defendant willfully failed to appear in court as required;

AND

4. When the defendant willfully failed to appear in court as required, (he/she) did so in order to evade the process of the court.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

A *signed written release* must contain the following:

1. Defendant's promise to appear as ordered by a judge or magistrate;
2. Defendant's promise to obey all reasonable conditions imposed by a judge or magistrate;
3. Defendant's promise not to leave the state without permission from the court;
4. Defendant's agreement to waive extradition if he or she fails to appear as required and is arrested outside the State of California;

AND

5. Defendant's acknowledgement that he or she has been informed of the consequences and penalties for violations of the conditions of release.

[If you find the defendant willfully failed to appear within 14 days of the date assigned for appearance you may, but are not required to, infer that the failure to appear was for the purpose of evading the process of the court.]

New March 2018

BENCH NOTES

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

AUTHORITY

Elements. Pen. Code, § 1320.

Requirement of written agreement conforming to Pen. Code, § 1318: *People v. Hernandez* (2009) 177 Cal.App.4th 1182; *People v. Jenkins* (1983) 146 Cal.App.3d 22.

Split of authority over whether substantial compliance with Penal Code section 1318 is sufficient: *People v. Carroll* (2014) 222 Cal.App.4th 1406 [Yes]; *People v. Mohammed* (2008) 162 Cal.App.4th 920 [No].

Willfully defined. Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107.

Specific intent. *People v. Sutton* (1993) 19 Cal.App.4th 795, 799-800; *People v. Wesley* (1988) 198 Cal.App.3d 519.

Mandatory presumption unconstitutional unless instructed as permissive inference. *People v. Forrester* (1994) 30 Cal.App.4th 1697, 1703.

Secondary Sources

4 Witkin & Epstein, Cal. Criminal Law (4th Ed. 2012), Pretrial Proceedings, §§ 135-139.

3003-3099. Reserved for Future Use

332. Expert Witness Testimony

(A witness was/Witnesses were) allowed to testify as [an] expert[s] and to give [an] opinion[s]. You must consider the opinion[s], but you are not required to accept (it/them) as true or correct. The meaning and importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witnesses generally. In addition, consider the expert’s knowledge, skill, experience, training, and education, the reasons the expert gave for any opinion, and the facts or information on which the expert relied in reaching that opinion. You must decide whether information on which the expert relied was true and accurate.

You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.

[An expert witness may be asked a hypothetical question. A *hypothetical question* asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If you conclude that an assumed fact is not true, consider the effect of the expert’s reliance on that fact in evaluating the expert’s opinion.]

[If the expert witnesses disagreed with one another, you should weigh each opinion against the others. You should examine the reasons given for each opinion and the facts or other matters on which each witness relied. You may also compare the experts’ qualifications.]

New January 2006 ~~insert date of council approval~~; March 2018

BENCH NOTES

Instructional Duty

When expert testimony is received at trial, the court must **sua sponte** instruct the jury on evaluating the expert’s testimony. (Pen. Code, § 1127b.)

Give the bracketed paragraph beginning, “An expert witness may be asked a hypothetical question,” if an expert witness responded to a hypothetical question.

Give the bracketed paragraph beginning, “If the expert witnesses disagreed with one another,” if there is conflicting expert testimony.

AUTHORITY

- Instructional Requirements ▶ Pen. Code, § 1127b.
- Inadmissible Case-Specific Hearsay Not Basis for Expert Testimony ▶ *People v. Sanchez* (2016) 63 Cal.4th 665, 684-686 [204 Cal.Rptr.3d 102, 374 P.3d 320] *People v. Vega-Robles* (2017) 9 Cal. App. 5th 382, 416 [215 Cal.Rptr 3d 284].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 642.

1 Witkin, California Evidence (4th ed. 2000) Opinion Evidence, § 85.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][a][ii], 85.03[2][b], Ch. 86, *Insanity Trial*, § 86.04[3][a] (Matthew Bender).

360. Statements to an Expert

_____ <Insert name> testified that in reaching (his/her) conclusions as an expert witness, (he/she) considered [a] statement[s] made by _____ <insert name>. [I am referring only to the statement[s] _____ <insert or describe statements admitted for this limited purpose>.] You may consider (that/those) statement[s] only to evaluate the expert's opinion. Do not consider (that/those) statement[s] as proof that the information contained in the statement[s] is true.

New January 2006; March 2018

BENCH NOTES

Instructional Duty

Although the court has no sua sponte duty to give this instruction, it should be given if appropriate under the circumstances. (*People v. Cantrell* (1973) 8 Cal.3d 672, 683 [105 Cal.Rptr. 792, 504 P.2d 1256], disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 324 [149 Cal.Rptr. 265, 583 P.2d 1308] and *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1].)

This instruction should not be given if all of the statements relied on by the expert were admitted under applicable hearsay exceptions. If some but not all of the defendant's statements were admitted for the limited purpose of evaluating the expert's testimony, specify those statements in the bracketed sentence.

AUTHORITY

- Instructional Requirements ▶ *In re Spencer* (1965) 63 Cal.2d 400, 412 [46 Cal.Rptr. 753, 406 P.2d 33].
- [Inadmissible Case-Specific Hearsay Not Basis for Expert Testimony](#) ▶ *People v. Sanchez* (2016) 63 Cal.4th 665, 684-686 [204 Cal.Rptr.3d 102, 374 P.3d 320]; *People v. Vega-Robles* (2017) 9 Cal. App. 5th 382, 416 [215 Cal.Rptr 3d 284].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 113.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 71, *Scientific and Expert Evidence*, § 71.04 (Matthew Bender).

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.02[2][b] (Matthew Bender).

359. Corpus Delicti: Independent Evidence of a Charged Crime

The defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone. You may rely on the defendant's out-of-court statements to convict (him/her) only if you first conclude that other evidence shows that the charged crime [or a lesser included offense] was committed.

That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.

This requirement of other evidence does not apply to proving the identity of the person who committed the crime [and the degree of the crime]. If other evidence shows that the charged crime [or a lesser included offense] was committed, the identity of the person who committed it [and the degree of the crime] may be proved by the defendant's statement[s] alone.

You may not convict the defendant unless the People have proved (his/her) guilt beyond a reasonable doubt.

New January 2006; Revised August 2006, February 2014, February 2015, September 2017, March 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on corpus delicti whenever an accused's extrajudicial statements form part of the prosecution's evidence. [\(People v. Howk \(1961\) 56 Cal.2d 687, 707 \[16 Cal.Rptr. 370, 365 P.2d 426\]](#), [unless the statement was made during the commission of the crime. \(People v. Carpenter \(1997\) 15 Cal.4th 312, 394 \[63 Cal.Rptr.2d 1, 935 P.2d 708. \(People v. Howk \(1961\) 56 Cal.2d 687, 707 \[16 Cal.Rptr. 370, 365 P.2d 426\]](#), [instruction required for defense admissions].) ~~If the defendant's extrajudicial statements constitute the crime, as with criminal threats, the rationale in Howk may not apply, however.~~

~~The corpus be proved by statements made before or after the crime, but can be proved by statements made during the crime. (People v. Carpenter (1997) 15 Cal.4th 312, 394 [63 Cal.Rptr.2d 1, 935 P.2d 708].)~~

Give the bracketed language in the first paragraph if the court will be instructing on lesser included offenses.

An earlier version of this instruction was upheld in *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1496 [60 Cal.Rptr.3d 777]. A later case, *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1427-1429 [155 Cal.Rptr.3d 403], found fault with the same earlier version of the instruction without referring to *Reyes*. The instruction has been modified in light of the discussion in *Rivas*.

AUTHORITY

- Instructional Requirements ▶ *People v. Ray* (1996) 13 Cal.4th 313, 342 [52 Cal.Rptr.2d 296, 914 P.2d 846]; *People v. Jennings* (1991) 53 Cal.3d 334, 368 [279 Cal.Rptr. 780, 807 P.2d 1009]; *People v. Howk* (1961) 56 Cal.2d 687, 707 [16 Cal.Rptr. 370, 365 P.2d 426].
- Burden of Proof ▶ *People v. Lara* (1994) 30 Cal.App.4th 658, 676 [35 Cal. Rptr.2d 886].
- Earlier Version of This Instruction Correctly States the Law ▶ *People v. Rosales* (2014) 222 Cal.App.4th 1254, 1260-1261 [166 Cal.Rptr.3d 620]; *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1496 [60 Cal.Rptr.3d 777].
- Proof of Identity Independent of “Elements” ▶ *People v. Rivas* (2013) 214 Cal.App.4th 1410, 1427-1429 [155 Cal.Rptr.3d 403].
- Corpus Delicti Rule Does Not Apply Generally to All Uncharged Acts ▶ *People v. Davis* (2008) 168 Cal.App.4th 617, 636 [86 Cal.Rptr.3d 55].

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Elements, §§ 47–54.

2 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 30, *Confessions and Admissions*, §§ 30.04[2], 30.57 (Matthew Bender).

4 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 85, *Submission to Jury and Verdict*, § 85.04[2][c]; Ch. 87, *Death Penalty*, § 87.13[17][e] (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 140, *Challenges to Crimes*, § 140.01 (Matthew Bender).

COMMENTARY

Harm Caused by Criminal Conduct

The instruction states that the other evidence need only “be enough to support a reasonable inference that someone’s criminal conduct caused an injury, loss, or harm.” This is based in part on *People v. Alvarez* (2002) 27 Cal.4th 1161, 1171 [119 Cal.Rptr.2d 903, 46 P.3d 372], in which the court stated that “[t]here is no requirement of independent evidence ‘of every physical act constituting an element of an offense,’ so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency.” (Citing *People v. Jones* (1998) 17 Cal.4th 279, 303 [70 Cal.Rptr.2d 793, 949 P.2d 890].)

Scope of Corpus Delicti

The following are not elements of a crime and need not be proved by independent evidence: the degree of the crime charged (*People v. Cooper* (1960) 53 Cal.2d 755, 765 [3 Cal.Rptr. 148, 349 P.2d 964]), the identity of the perpetrator (*People v. Westfall* (1961) 198 Cal.App.2d 598, 601 [18 Cal.Rptr. 356]), elements of the underlying felony when the defendant is charged with felony murder (*People v. Cantrell* (1973) 8 Cal.3d 672, 680–681 [105 Cal.Rptr. 792, 504 P.2d 1256], disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 324 [149 Cal.Rptr. 265, 583 P.2d 1308] and *People v. Flannel* (1979) 25 Cal.3d 668, 684–685, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]), special circumstances when the defendant is charged with a felony-based special circumstance murder as listed in Penal Code section 190.2(a)(17) (Pen. Code, § 190.41; see *People v. Ray* (1996) 13 Cal.4th 313, 341, fn. 13 [52 Cal.Rptr.2d 296, 914 P.2d 846]), the knowledge and intent required for aider-abettor liability (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1128–1129 [124 Cal.Rptr.2d 373, 52 P.3d 572]; *People v. Ott* (1978) 84 Cal.App.3d 118, 131 [148 Cal.Rptr. 479]), or facts necessary for a sentencing enhancement (see *People v. Shoemaker* (1993) 16 Cal.App.4th 243, 252–256 [20 Cal.Rptr.2d 36]).

RELATED ISSUES

Truth-in-Evidence Initiative

The “truth-in-evidence” provision of the California Constitution abrogates the corpus delicti rule insofar as it restricts the admissibility of incriminatory extrajudicial statements by an accused. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1173–1174 [119 Cal.Rptr.2d 903, 46 P.3d 372]; see Cal. Const., art. I, § 28(d) [Proposition 8 of the June 8, 1982 General Election].) The constitutional provision, however, does not eliminate the rule insofar as it prohibits *conviction* when the only evidence that the crime was committed is the defendant’s own statements outside of court. Thus, the provision does not affect the rule to the extent it requires a jury instruction that no person may be convicted absent evidence of the crime independent of his or her out-of-court statements. (*People v. Alvarez, supra*, 27 Cal.4th at p. 1180.)

840. Inflicting Injury on Spouse, Cohabitant, or Fellow Parent Resulting in Traumatic Condition (Pen. Code, § 273.5(a))

The defendant is charged [in Count __] with inflicting an injury on [his/her] ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child/someone with whom (he/she) had, or previously had, an engagement or dating relationship that resulted in a traumatic condition [in violation of Penal Code section 273.5(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully [and unlawfully] inflicted a physical injury on (his/her) ([former] spouse/[former] cohabitant/the (mother/father) of (his/her) child)/someone with whom (he/she) had, or previously had, an engagement or dating relationship);

[AND]

2. The injury inflicted by the defendant resulted in a traumatic condition.

<Give element 3 when instructing on self-defense or defense of another>

[AND]

3. The defendant did not act (in self-defense/ [or] in defense of someone else).]

Someone commits an act *willfully* when he or she does it willingly or on purpose.

A *traumatic condition* is a wound or other bodily injury, whether minor or serious, caused by the direct application of physical force.

[The term *cohabitants* means two unrelated persons living together for a substantial period of time, resulting in some permanency of the relationship. Factors that may determine whether people are cohabiting include, but are not limited to, (1) sexual relations between the parties while sharing the same residence, (2) sharing of income or expenses, (3) joint use or ownership of

property, (4) the parties' holding themselves out as (spouses/domestic partners), (5) the continuity of the relationship, and (6) the length of the relationship.]

[The term *dating relationship* means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations].

[A person may cohabit simultaneously with two or more people at different locations, during the same time frame, if he or she maintains substantial ongoing relationships with each person and lives with each person for significant periods.]

[A person is considered to be the (mother/father) of another person's child if the alleged male parent is presumed under law to be the natural father. _____ <insert name of presumed father> is presumed under law to be the natural father of _____ <insert name of child>.]

[A traumatic condition is the *result of* an injury if:

1. The traumatic condition was the natural and probable consequence of the injury;
2. The injury was a direct and substantial factor in causing the condition;

AND

3. The condition would not have happened without the injury.

A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that resulted in the traumatic condition.]

New January 2006; Revised June 2007, August 2012, August 2014, February 2015, February 2016, March 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

If there is sufficient evidence of self-defense or defense of another, the court has a **sua sponte** duty to instruct on the defense. Give bracketed element 3 and any appropriate defense instructions. (See CALCRIM Nos. 3470–3477.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590-591 [35 Cal.Rptr. 401]; *People v. Cervantes* (2001) 26 Cal.4th 860, 865–874 [111 Cal.Rptr.2d 148, 29 P.3d 225].) Give the bracketed paragraph that begins, “A traumatic condition is the *result of* an injury if”

If there is sufficient evidence that an alleged victim’s injuries were caused by an accident, the court has a **sua sponte** duty to instruct on accident. (*People v. Gonzales* (1999) 74 Cal.App.4th 382, 390 [88 Cal.Rptr.2d 111].) Give CALCRIM No. 3404, *Accident*.

Give the bracketed language “[and unlawfully]” in element 1 if there is evidence that the defendant acted in self-defense.

Give the third bracketed sentence that begins “A person may cohabit simultaneously with two or more people,” on request if there is evidence that the defendant cohabited with two or more people. (See *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].)

Give on request the bracketed paragraph that begins “A person is considered to be the (mother/father)” if an alleged parental relationship is based on the statutory presumption that the male parent is the natural father. (See Pen. Code, § 273.5(d); see also *People v. Vega* (1995) 33 Cal.App.4th 706, 711 [39 Cal.Rptr.2d 479] [parentage can be established without resort to any presumption].)

If the defendant is charged with an enhancement for a prior conviction for a similar offense within seven years and has not stipulated to the prior conviction, give CALCRIM No. 3100, *Prior Conviction: Nonbifurcated Trial*. If the court has granted a bifurcated trial, see CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If there is evidence that the traumatic condition resulted from strangulation or suffocation, consider instructing according to the special definition provided in Pen. Code, § 273.5(c).

The amendment to Penal Code section 273.5(b) adding “someone with whom the offender has, or previously had, an engagement or dating relationship as defined in Penal Code section 243(f)(10)” to the list of potential victims became effective on January 1, 2014.

AUTHORITY

- Elements ▶ Pen. Code, § 273.5(a).
- Traumatic Condition Defined ▶ Pen. Code, § 273.5(c); *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- Willful Defined ▶ Pen. Code, § 7, subd. 1; see *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Cohabitant Defined ▶ *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000 [252 Cal.Rptr. 729]; *People v. Ballard* (1988) 203 Cal.App.3d 311, 318–319 [249 Cal.Rptr. 806].
- Direct Application of Force ▶ *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].
- Duty to Define Traumatic Condition ▶ *People v. Burns* (1948) 88 Cal.App.2d 867, 873–874 [200 P.2d 134].
- Strangulation and Suffocation ▶ Pen. Code, § 273.5(d).
- General Intent Crime ▶ See *People v. Thurston* (1999) 71 Cal.App.4th 1050, 1055 [84 Cal.Rptr.2d 221]; *People v. Campbell* (1999) 76 Cal.App.4th 305, 307–309 [90 Cal.Rptr.2d 315]; contra *People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1402 [7 Cal.Rptr.2d 495] [dictum].
- Simultaneous Cohabitation ▶ *People v. Moore* (1996) 44 Cal.App.4th 1323, 1335 [52 Cal.Rptr.2d 256].
- Dating Relationship Defined ▶ Pen. Code, § 243(f)(10).

Secondary Sources

1 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against the Person, §§ 64–67.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.13[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Infliction of Corporal Punishment on Spouse ▶ Pen. Code, §§ 664, 273.5(a); *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1627, 1628 [47 Cal.Rptr.2d 769] [attempt requires intent to cause traumatic condition, but does not require a resulting “traumatic condition”].
- Misdemeanor Battery ▶ Pen. Code, §§ 242, 243(a); see *People v. Gutierrez* (1985) 171 Cal.App.3d 944, 952 [217 Cal.Rptr. 616].
- Battery Against Spouse, Cohabitant, or Fellow Parent ▶ Pen. Code, § 243(e)(1); see *People v. Jackson* (2000) 77 Cal.App.4th 574, 580 [91 Cal.Rptr.2d 805].
- Simple Assault ▶ Pen. Code, §§ 240, 241(a); *People v. Van Os* (1950) 96 Cal.App.2d 204, 206 [214 P.2d 554].

RELATED ISSUES

Continuous Course of Conduct

Penal Code section 273.5 is aimed at a continuous course of conduct. The prosecutor is not required to choose a particular act and the jury is not required to unanimously agree on the same act or acts before a guilty verdict can be returned. (*People v. Thompson* (1984) 160 Cal.App.3d 220, 224–225 [206 Cal.Rptr. 516].)

Multiple Acts of Abuse

A defendant can be charged with multiple violations of Penal Code section 273.5 when each battery satisfies the elements of section 273.5. (*People v. Healy* (1993) 14 Cal.App.4th 1137, 1140 [18 Cal.Rptr.2d 274].)

Prospective Parents of Unborn Children

Penal Code section 273.5(a) does not apply to a man who inflicts an injury upon a woman who is pregnant with his unborn child. “A pregnant woman is not a ‘mother’ and a fetus is not a ‘child’ as those terms are used in that section.” (*People v. Ward* (1998) 62 Cal.App.4th 122, 126, 129 [72 Cal.Rptr.2d 531].)

Termination of Parental Rights

Penal Code section 273.5 “applies to a man who batters the mother of his child even after parental rights to that child have been terminated.” (*People v. Mora* (1996) 51 Cal.App.4th 1349, 1356 [59 Cal.Rptr.2d 801].)

1002. Rape of Intoxicated Woman or Spouse (Pen. Code, §§ 261(a)(3), 262(a)(2))

The defendant is charged [in Count ___] with raping (a woman/his wife) while she was intoxicated [in violation of _____ <insert appropriate code section[s]>].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant had sexual intercourse with a woman;
2. He and the woman were (not married/married) to each other at the time of the intercourse;
3. The effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the woman from resisting;

AND

4. The defendant knew or reasonably should have known that the effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the woman from resisting.

Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis. [Ejaculation is not required.]

A person is *prevented from resisting* if he or she is so intoxicated that he or she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved.

[_____ <If appropriate, insert controlled substance> (is/are) [a] controlled substance[s].]

<Defense: Reasonable Belief Capable of Consent>

[The defendant is not guilty of this crime if he actually and reasonably believed that the woman was capable of consenting to sexual intercourse, even if that belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the woman was capable of consenting. If the People have not met this burden, you must find the defendant not guilty.]

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A space is provided to identify controlled substances, if the parties agree.

Defenses—Instructional Duty

~~The court has~~ There is an sua sponte duty to instruct on the defense of reasonable belief that the person was capable of consent if there is sufficient evidence to support the defense. (See *People v. Giardino-Lujano* (2017) 15 Cal.App.5th 187, (2000) 82 Cal.App.4th 454, 472 [98 Cal.Rptr.2d 315].)

Related Instructions

CALCRIM No. 1001, *Rape or Spousal Rape in Concert*, may be given in conjunction with this instruction, if appropriate.

AUTHORITY

- Elements ▶ Pen. Code, §§ 261(a)(3), 262(a)(2).
- Consent Defined ▶ Pen. Code, § 261.6.
- Controlled Substances ▶ Health & Safety Code, §§ 11054–11058; see *People v. Avila* (2000) 80 Cal.App.4th 791, 798, fn. 7 [95 Cal.Rptr.2d 651].
- Penetration Defined ▶ Pen. Code, § 263; *People v. Karsai* (1982) 131 Cal.App.3d 224, 233–234 [182 Cal.Rptr. 406], disapproved on other grounds by *People v. Jones* (1988) 46 Cal.3d 585, 600 [250 Cal.Rptr. 635, 758 P.2d 1165].
- Anesthetic Effect ▶ See *People v. Avila* (2000) 80 Cal.App.4th 791, 798–799 [95 Cal.Rptr.2d 651] [in context of sodomy].
- General Intent and Knowledge Requirements ▶ *People v. Linwood* (2003) 105 Cal.App.4th 59, 67–72 [129 Cal.Rptr.2d 73] [statute is not impermissibly vague and uses appropriate criminal negligence standard].
- “Prevented From Resisting” Defined ▶ *People v. Lujano* (2017) 15 Cal.App.5th 187, 192-193 [223 Cal.Rptr.3d 105][CALCRIM 1032 has correct definition]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 465–466 [98 Cal.Rptr.2d 315].

- [Reasonable Belief in Capacity to Consent](#) ▶ *People v. Lujano* (2017) 15 Cal.App.5th 187, 191-192 [223 Cal.Rptr.3d 105]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 471-472 [98 Cal.Rptr.2d 315].
- This Instruction Upheld ▶ *People v. Smith* (2010) 191 Cal.App.4th 199, 204-205 [120 Cal.Rptr.3d 52].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 1–8, 16, 18.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.20[1][a], [5], 142.23[1][e] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

COMMENTARY

Gender-specific language is used because rape usually occurs between a man and a woman. In keeping with plain English principles, the committee used those terms to make the instruction clear and concrete.

LESSER INCLUDED OFFENSES

- Attempted Rape ▶ Pen. Code, §§ 663, 261(a)(3).
- Attempted Rape of Intoxicated Spouse ▶ Pen. Code, §§ 663, 262(a)(2).
- Assault ▶ Pen. Code, § 240.
- Battery ▶ Pen. Code, § 242; *People v. Guitierrez* (1991) 232 Cal.App.3d 1624, 1636 [284 Cal.Rptr. 230], disapproved on other grounds in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 [103 Cal.Rptr.2d 23, 15 P.3d 243]; but see *People v. Marshall* (1997) 15 Cal.4th 1, 38-39 [61 Cal.Rptr.2d 84, 931 P.2d 262] [battery not a lesser included offense of attempted rape].

RELATED ISSUES

Administering Drugs to Assist Commission of Felony

A person who administers to someone else any chloroform, ether, laudanum, or any controlled substance, anesthetic, or intoxicating agent, with the intent to

enable or assist himself or herself or any other person to commit a felony is guilty of a felony. (Pen. Code, § 222.)

See the Related Issues section to CALCRIM No. 1000, *Rape or Spousal Rape by Force, Fear, or Threats*.

1032. Sodomy of an Intoxicated Person (Pen. Code, § 286(i))

The defendant is charged [in Count __] with sodomy of a person while that person was intoxicated [in violation of Penal Code section 286(i)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant committed an act of sodomy with another person. ;
2. The effect of (a/an) (intoxicating/anesthetic/controlled) substance prevented the other person from resisting;

AND

3. The defendant knew or reasonably should have known that the effect of that substance prevented the other person from resisting.

Sodomy is any penetration, no matter how slight, of the anus of one person by the penis of another person. [Ejaculation is not required.]

A person is *prevented from resisting* if he or she is so intoxicated that he or she cannot give legal consent. In order to give legal consent, a person must be able to exercise reasonable judgment. In other words, the person must be able to understand and weigh the physical nature of the act, its moral character, and probable consequences. Legal consent is consent given freely and voluntarily by someone who knows the nature of the act involved.

[_____ <If appropriate, insert controlled substance[s]> (is/are) [a] controlled substance[s].]

<Defense: Reasonable Belief Capable of Consent>

[The defendant is not guilty of this crime if (he/she) actually and reasonably believed that the other person was capable of consenting to the act, even if that belief was wrong. The People have the burden of proving beyond a reasonable doubt that the defendant did not actually and reasonably believe that the other person was capable of consenting. If the People have not met this burden, you must find the defendant not guilty.]

New January 2006; March 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A space is provided to identify controlled substances if the parties agree that there is no issue of fact.

Defenses—Instructional Duty

~~The court has a **sua sponte** duty to instruct on the defense of reasonable belief the person was capable of consent if there is sufficient evidence to support the defense. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 472 [98 Cal.Rptr.2d 315].)~~

Related Instructions

CALCRIM No. 1031, *Sodomy in Concert*, may be given in conjunction with this instruction if appropriate.

AUTHORITY

- Elements ▶ Pen. Code, § 286(i); *People v. Avila* (2000) 80 Cal.App.4th 791, 802–803 [95 Cal.Rptr.2d 651].
- Anesthetic Effect Defined ▶ *People v. Avila* (2000) 80 Cal.App.4th 791, 798–799 [95 Cal.Rptr.2d 651].
- Consent Defined ▶ Pen. Code, § 261.6.
- Controlled Substances Defined ▶ Health & Safety Code, §§ 11054–11058; see *People v. Avila* (2000) 80 Cal.App.4th 791, 798, fn. 7 [95 Cal.Rptr.2d 651].
- Prevented From Resisting Defined ▶ *People v. Lujano* (2017) 15 Cal.App.5th 187, 192-193 [223 Cal.Rptr.3d 105][CALCRIM 1032 has correct definition]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 465–466 [98 Cal.Rptr.2d 315][in context of rape].
- Reasonable Belief in Capacity to Consent ▶ *People v. Lujano* (2017) 15 Cal.App.5th 187, 191-192 [223 Cal.Rptr.3d 105]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 471-472 [98 Cal.Rptr.2d 315].
- Sodomy Defined ▶ Pen. Code, § 286(a); see *People v. Singh* (1923) 62 Cal.App. 450, 452 [217 P. 121] [ejaculation is not required].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Sex Offenses and Crimes Against Decency, §§ 26, 29.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.20[1][b], [5] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure §§ 12:16, 12:17 (The Rutter Group).

LESSER INCLUDED OFFENSES

- Assault ▶ Pen. Code, § 240.
- Attempted Sodomy of Intoxicated Person ▶ Pen. Code, §§ 664, 286(i).
- Battery ▶ Pen. Code, § 242.

RELATED ISSUES

See the Related Issues section under CALCRIM No. 1030, *Sodomy by Force, Fear, or Threats*.

1300. Criminal Threat (Pen. Code, § 422)

The defendant is charged [in Count ___] with having made a criminal threat [in violation of Penal Code section 422].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to _____ <insert name of complaining witness or member[s] of complaining witness's immediate family>;
2. The defendant made the threat (orally/in writing/by electronic communication device);
3. The defendant intended that (his/her) statement be understood as a threat [and intended that it be communicated to _____ <insert name of complaining witness>];
4. The threat was so clear, immediate, unconditional, and specific that it communicated to _____ <insert name of complaining witness> a serious intention and the immediate prospect that the threat would be carried out;
5. The threat actually caused _____ <insert name of complaining witness> to be in sustained fear for (his/her) own safety [or for the safety of (his/her) immediate family];

AND

6. _____'s <insert name of complaining witness> fear was reasonable under the circumstances.

Someone commits an act *willfully* when he or she does it willingly or on purpose.

In deciding whether a threat was sufficiently clear, immediate, unconditional, and specific, consider the words themselves, as well as the surrounding circumstances.

Someone who intends that a statement be understood as a threat does not have to actually intend to carry out the threatened act [or intend to have someone else do so].

Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm.

Sustained fear means fear for a period of time that is more than momentary, fleeting, or transitory.

[An immediate ability to carry out the threat is not required.]

[An *electronic communication device* includes, but is not limited to: a telephone, cellular telephone, pager, computer, video recorder, or fax machine.]

[*Immediate family* means (a) any spouse, parents, and children; (b) any grandchildren, grandparents, brothers and sisters related by blood or marriage; or (c) any person who regularly lives in the other person's household [or who regularly lived there within the prior six months].]

New January 2006; Revised August 2006, June 2007, February 2015, February 2016, March 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction defining the elements of the crime.

A specific crime or the elements of any specific Penal Code violation that might be subsumed within the actual words of any threat need not be identified for the jury. (See *People v. Butler* (2000) 85 Cal.App.4th 745, 758 [102 Cal.Rptr.2d 269].) The threatened acts or crimes may be described on request depending on the nature of the threats or the need to explain the threats to the jury. (*Id.* at p. 760.)

When the threat is conveyed through a third party, give the appropriate bracketed language in element three. (*People v. Felix* (2001) 92 Cal.App.4th 905, 913 [112 Cal.Rptr.2d 311]; *In re Ryan D.* (2002) 100 Cal.App.4th 854, 861–862 [123 Cal.Rptr.2d 193] [insufficient evidence minor intended to convey threat to victim].)

Give the bracketed definition of “electronic communication” on request. (Pen. Code, § 422; 18 U.S.C., § 2510(12).)

If there is evidence that the threatened person feared for the safety of members of his or her immediate family, the bracketed phrase in element 5 and the final bracketed paragraph defining “immediate family” should be given on request. (See Pen. Code, § 422; Fam. Code, § 6205; Prob. Code, §§ 6401, 6402.)

If instructing on attempted criminal threat, give the third element in the bench notes of CALCRIM No. 460, *Attempt Other Than Attempted Murder*. (*People v. Chandler* (2014) 60 Cal.4th 508, 525 [176 Cal.Rptr.3d 548, 332 P.3d 538].)

AUTHORITY

- Elements ▶ Pen. Code, § 422; *In re George T.* (2004) 33 Cal.4th 620, 630 [16 Cal.Rptr.3d 61, 93 P.3d 1007]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1536 [70 Cal.Rptr.2d 878].
- Great Bodily Injury Defined ▶ Pen. Code, § 12022.7(f).
- Sufficiency of Threat Based on All Surrounding Circumstances ▶ *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340 [69 Cal.Rptr.2d 728]; *People v. Butler* (2000) 85 Cal.App.4th 745, 752–753 [102 Cal.Rptr.2d 269]; *People v. Martinez* (1997) 53 Cal.App.4th 1212, 1218–1221 [62 Cal.Rptr.2d 303]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137–1138 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1013–1014 [109 Cal.Rptr.2d 464]; see *People v. Garrett* (1994) 30 Cal.App.4th 962, 966–967 [36 Cal.Rptr.2d 33].
- Crime that Will Result in Great Bodily Injury Judged on Objective Standard ▶ *People v. Maciel* (2003) 113 Cal.App.4th 679, 685 [6 Cal.Rptr.3d 628].
- Threatening Hand Gestures Not Verbal Threats Under Penal Code Section 422 ▶ *People v. Gonzalez* (2017) 2 Cal.5th 1138, 1147 [218 Cal.Rptr.3d 150, 394 P.3d 1074].
- Threat Not Required to Be Unconditional ▶ *People v. Bolin* (1998) 18 Cal.4th 297, 339–340 [75 Cal.Rptr.2d 412, 956 P.2d 374], disapproving *People v. Brown* (1993) 20 Cal.App.4th 1251, 1256 [25 Cal.Rptr.2d 76]; *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1162 [38 Cal.Rptr.2d 328].
- Conditional Threat May Be True Threat, Depending on Context ▶ *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1540 [70 Cal.Rptr.2d 878].
- Immediate Ability to Carry Out Threat Not Required ▶ *People v. Lopez* (1999) 74 Cal.App.4th 675, 679 [88 Cal.Rptr.2d 252].

- Sustained Fear ▶ *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1139–1140 [105 Cal.Rptr.2d 165]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1024 [109 Cal.Rptr.2d 464]; *People v. Allen* (1995) 33 Cal.App.4th 1149, 1155–1156 [40 Cal.Rptr.2d 7].
- Verbal Statement, Not Mere Conduct, Is Required ▶ *People v. Franz* (2001) 88 Cal.App.4th 1426, 1441–1442 [106 Cal.Rptr.2d 773].
- Statute Not Unconstitutionally Vague ▶ *People v. Maciel* (2003) 113 Cal.App.4th 679, 684–686 [6 Cal.Rptr.3d 628].
- Attempted Criminal Threats ▶ *People v. Chandler* (2014) 60 Cal.4th 508, 525 [176 Cal.Rptr.3d 548, 332 P.3d 538].
- Statute Authorizes Only One Conviction and One Punishment Per Victim, Per Threatening Encounter ▶ *People v. Wilson* (2015) 234 Cal.App.4th 193, 202 [183 Cal.Rptr.3d 541].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 24–30.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 142, *Crimes Against the Person*, § 142.11A[1] (Matthew Bender).

COMMENTARY

This instruction uses the current nomenclature “criminal threat,” as recommended by the Supreme Court in *People v. Toledo* (2001) 26 Cal.4th 221, 224, fn. 1 [109 Cal.Rptr.2d 315, 26 P.3d 1051] [previously called “terrorist threat”]. (See also Stats. 2000, ch. 1001, § 4.)

LESSER INCLUDED OFFENSES

- Attempted Criminal Threat ▶ See Pen. Code, § 422; *People v. Toledo* (2001) 26 Cal.4th 221, 230–231 [109 Cal.Rptr.2d 315, 26 P.3d 1051].
- Threatening a public officer of an educational institution in violation of Penal Code section 71 may be a lesser included offense of a section 422 criminal threat under the accusatory pleadings test. (*In re Marcus T.* (2001) 89 Cal.App.4th 468, 472–473 [107 Cal.Rptr.2d 451].) But see *People v. Chaney* (2005) 131 Cal.App.4th 253, 257–258 [31 Cal.Rptr.3d 714], finding that a violation of section 71 is not a lesser included offense of section 422 under the accusatory pleading test when the pleading does not specifically allege the

intent to cause (or attempt to cause) a public officer to do (or refrain from doing) an act in the performance of official duty.

RELATED ISSUES

Ambiguous and Equivocal Poem Insufficient to Establish Criminal Threat

In *In re George T.* (2004) 33 Cal.4th 620, 628–629 [16 Cal.Rptr.3d 61, 93 P.3d 1007], a minor gave two classmates a poem containing language that referenced school shootings. The court held that “the text of the poem, understood in light of the surrounding circumstances, was not ‘as unequivocal, unconditional, immediate, and specific as to convey to [the two students] a gravity of purpose and an immediate prospect of execution of the threat.’ ” (*Id.* at p. 638.)

Related Statutes

Other statutes prohibit similar threatening conduct against specified individuals. (See, e.g., Pen. Code, §§ 76 [threatening elected public official, judge, etc., or staff or immediate family], 95.1 [threatening jurors after verdict], 139 [threatening witness or victim after conviction of violent offense], 140 [threatening witness, victim, or informant].)

Unanimity Instruction

If the evidence discloses a greater number of threats than those charged, the prosecutor must make an election of the events relied on in the charges. When no election is made, the jury must be given a unanimity instruction. (*People v. Butler* (2000) 85 Cal.App.4th 745, 755, fn. 4 [102 Cal.Rptr.2d 269]; *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534, 1539 [70 Cal.Rptr.2d 878].)

Whether Threat Actually Received

If a threat is intended to and does induce a sustained fear, the person making the threat need not know whether the threat was actually received. (*People v. Teal* (1998) 61 Cal.App.4th 277, 281 [71 Cal.Rptr.2d 644].)

1850. Petty Theft With Prior Conviction (Pen. Code, § 666)

If you find the defendant guilty of petty theft, you must then decide whether the People have proved the additional allegation that the defendant has been convicted of a theft offense before and served a term in a penal institution as a result of that conviction. It has already been determined that the defendant is the person named in exhibits _____ *<insert numbers or descriptions of exhibits>*. You must decide whether the evidence proves that the defendant was previously convicted of the alleged crime[s].

To prove this allegation, the People must prove that:

1. The defendant was previously convicted of a theft offense;

AND

2. The defendant served a term in a penal institution for that conviction.

The People allege that the defendant was previously convicted of:

[1.] A violation of _____ *<insert code section violated>*, on _____ *<insert date of conviction>*, in the _____ *<insert name of court>*, in Case Number _____ *<insert docket or case number>*(;/.)

[AND *<Repeat for each prior conviction alleged>*.]

[_____ *<insert name of penal institution>* is a *penal institution*.]

[A *penal institution* includes [a] (city jail/county jail/state prison/any facility, camp, hospital, or institution operated to confine, treat, employ, train, and discipline persons in the legal custody of the Department of Corrections/federal prison/_____ *<specify other institution>*).]

[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of _____ *<insert other permitted purpose, e.g., assessing credibility of the defendant>*]. Do not consider this evidence for any other purpose.]

[You must consider each alleged conviction separately.] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved.

New January 2006; Revised August 2015, ~~March 2018~~

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on proof of the alleged prior conviction. (See Pen. Code, § 1025 [on defendant's denial, jury must decide issue of prior convictions]; *People v. Barre* (1992) 11 Cal.App.4th 961, 965 [14 Cal.Rptr.2d 307].)

~~The prior conviction and incarceration requirement of Penal Code section 666 is a sentencing factor for the trial court and not an element of a section 666 offense. (*People v. Bouzas* (1991) 53 Cal.3d 467, 478–480 [279 Cal.Rptr. 847, 807 P.2d 1076]; *People v. Stevens* (1996) 48 Cal.App.4th 982, 987 [56 Cal.Rptr.2d 13].) Thus, the defendant may stipulate to the convictions. (*People v. Bouzas, supra*, 53 Cal.3d at pp. 478–480; *People v. Stevens, supra*, 48 Cal.App.4th at p. 987; *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41].)~~

~~Give this instruction only if the defendant does not stipulate and the court does not grant a bifurcated trial. Do not give this instruction if the court has bifurcated the trial.~~

~~If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (Pen. Code, §§ 1025, 1093; see *People v. Bouzas, supra*, 53 Cal.3d at pp. 471–472, 480.)~~

~~The enhancement allegation under To be convicted of a violation of Penal Code section 666 applies only if the defendant has must have been previously convicted of a crime listed in Penal Code sections 368(d) or (e) or 667(e)(2)(Ce)(iv), or previously convicted under Penal Code section 368(d) or (e); or be or is required to register under the Sex Offender Registration Act. If applicable, give CALCRIM No. 3100, *Prior Conviction: NonBifurcated Trial*.~~

If the court grants a bifurcated trial, on either of the offenses described in the paragraph above or a qualifying prior theft conviction, give CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Enhancement ▶ Pen. Code, § 666; *People v. Bruno* (1987) 191 Cal.App.3d 1102, 1105 [237 Cal.Rptr. 31]; *People v. Bean* (1989) 213 Cal.App.3d 639, 642 [261 Cal.Rptr. 784].
- Convictions From Other States ▶ Pen. Code, § 668; *People v. Perry* (1962) 204 Cal.App.2d 201, 204 [22 Cal.Rptr. 54].
- Prior Incarceration Requirement ▶ *People v. James* (1957) 155 Cal.App.2d 604, 612 [318 P.2d 175] [service of partial term is sufficient]; *People v. Valenzuela* (1981) 116 Cal.App.3d 798, 803 [172 Cal.Rptr. 284] [custody resulting from credit for time served is sufficient]; but see *People v. Cortez* (1994) 24 Cal.App.4th 510, 513–514 [29 Cal.Rptr.2d 445] [participation in work release program alone is insufficient].
- Penal Institution Defined ▶ *Ex parte Wolfson* (1947) 30 Cal.2d 20, 26 [180 P.2d 326] [includes county jail]; *People v. Valenzuela* (1981) 116 Cal.App.3d 798, 803, 804, 807–808 [172 Cal.Rptr. 284] [includes California Rehabilitation Center]; see Pen. Code, §§ 667.5(h) [defining state prison or federal penal institution for purposes of prior prison term enhancement], 969b [prima facie evidence of prior conviction and term served in any state or federal penitentiary, reformatory, or county or city jail], 6081, 6082 [prison defined]; Welf. & Inst. Code, § 851 [excludes juvenile hall].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Property, § 9.

3 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Punishment, § 417.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 143, *Crimes Against Property*, § 143.01[3] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with felony petty theft based on a prior conviction, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior conviction has been proved. If the jury finds that the prior conviction has not been proved, then the offense should be set at a misdemeanor.

There is no crime of attempted petty theft with a prior conviction. None of the elements of Penal Code section 666 may be attempted. (*People v. Bean* (1989) 213 Cal.App.3d 639, 642, fn. 4 [261 Cal.Rptr. 784].)

RELATED ISSUES

Jury Findings on Prior Convictions

The jury must determine the truth of the prior conviction unless jury trial is waived or the defendant admits to the prior conviction. If more than one prior conviction is charged, the jury must make a separate finding on each charged prior. (Pen. Code, § 1158; *People v. Barre* (1992) 11 Cal.App.4th 961, 965–966 [14 Cal.Rptr.2d 307].)

Judicial Notice of Prior Conviction

It is error for a trial court to take judicial notice of a defendant's alleged prior conviction when a reasonable juror could only understand the notice to mean that the court conclusively determined the prior-conviction allegation to be true. (*People v. Barre* (1992) 11 Cal.App.4th 961, 965–966 [14 Cal.Rptr.2d 307] .)

Defense Stipulation to Prior Convictions

The prior conviction and incarceration requirement of Penal Code section 666 is a sentencing factor for the trial court and not an element of a section 666 offense. (*People v. Bouzas* (1991) 53 Cal.3d 467, 478–480 [279 Cal.Rptr. 847, 807 P.2d 1076]; *People v. Stevens* (1996) 48 Cal.App.4th 982, 987 [56 Cal.Rptr.2d 13].) Thus, the defendant may stipulate to the convictions. (*People v. Bouzas, supra*, 53 Cal.3d at pp. 478–480; *People v. Stevens, supra*, 48 Cal.App.4th at p. 987; *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].)
The defendant may stipulate to the truth of the prior convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) If the defendant stipulates, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See Pen. Code, §§ 1025, 1093; *People v. Bouzas, supra*, 53 Cal.3d at pp. 471–472, 480; *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

Motion for Bifurcated Trial

Either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.)

1851–1859. Reserved for Future Use

**2100. Driving a Vehicle or Operating a Vessel Under the Influence
Causing Injury (Veh. Code, § 23153(a), (f), (g))**

The defendant is charged [in Count ___] with causing injury to another person while (driving a vehicle/operating a vessel) under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug) [in violation of Vehicle Code section 23153(a)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant (drove a vehicle/operated a vessel);
2. When (he/she) (drove a vehicle/operated a vessel), the defendant was under the [combined] influence of (an alcoholic beverage/ [or] a drug/ [or] an alcoholic beverage and a drug);
3. While (driving a vehicle/operating a vessel) under the influence, the defendant also (committed an illegal act/ [or] neglected to perform a legal duty);

AND

4. The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.

A person is *under the influence* if, as a result of (drinking [or consuming] an alcoholic beverage/ [and/or] taking a drug), his or her mental or physical abilities are so impaired that he or she is no longer able to (drive a vehicle/operate a vessel) with the caution of a sober person, using ordinary care, under similar circumstances.

[An *alcoholic beverage* is a liquid or solid material intended to be consumed that contains ethanol. Ethanol is also known as ethyl alcohol, drinking alcohol, or alcohol. [An *alcoholic beverage* includes _____ <insert type[s] of beverage[s] from Veh. Code, § 109 or Bus. & Prof. Code, § 23004, e.g., wine, beer>.]

[A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to (drive a vehicle/operate a vessel) as an ordinarily cautious person, in full possession of his or her faculties and using

reasonable care, would (drive a vehicle/operate a vessel) under similar circumstances.]

[If the People have proved beyond a reasonable doubt that the defendant's blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.

[The People allege that the defendant committed the following illegal act[s]: _____ <list name[s] of offense[s]>.

To decide whether the defendant committed _____ <list name[s] of offense[s]>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while (driving the vehicle/operating the vessel): (the duty to exercise ordinary care at all times and to maintain proper control of the (vehicle/vessel)/ _____ <insert other duty or duties alleged>).]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A *natural and probable consequence* is one that a

reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

[It is not a defense that the defendant was legally entitled to use the drug.]

[If the defendant was under the influence of (an alcoholic beverage/ [and/or] a drug), then it is not a defense that something else also impaired (his/her) ability to (drive a vehicle/operate a vessel).]

New January 2006; Revised June 2007, April 2008, December 2008, August 2015, September 2017, March 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra*, 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of “ordinary care.”

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of injury, the court should give the first bracketed paragraph on causation, which includes the “direct, natural, and probable” language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the “substantial factor” definition. (See *People v. Autry* (1995) 37

Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, failure to give harmless error if was required].) If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that the defendant’s blood alcohol level was 0.08 percent” explains a rebuttable presumption created by statute. (See Veh. Code, § 23610; Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that the defendant’s blood alcohol level was 0.08 percent” if there is no evidence that the defendant’s blood alcohol level was at or above 0.08 percent at the time of the test. In addition, if the test falls within the range in which no presumption applies, 0.05 percent to just below 0.08 percent, do not give this bracketed sentence. (*People v. Wood* (1989) 207 Cal.App.3d Supp. 11, 15 [255 Cal.Rptr. 537].) The court should also consider whether there is sufficient evidence to establish that the test result exceeds the margin of error before giving this instruction for test results of 0.08 percent. (Compare *People v. Campos* (1982) 138 Cal.App.3d Supp. 1, 4–5 [188 Cal.Rptr. 366], with *People v. Randolph* (1989) 213 Cal.App.3d Supp. 1, 11 [262 Cal.Rptr. 378].)

The statute also creates a rebuttable presumption that the defendant was not under the influence if his or her blood alcohol level was less than 0.05 percent. (*People v. Gallardo* (1994) 22 Cal.App.4th 489, 496 [27 Cal.Rptr.2d 502].) Depending on the facts of the case, the defendant may be entitled to a pinpoint instruction on this presumption. It is not error to refuse an instruction on this presumption if the prosecution’s theory is that the defendant was under the combined influence of drugs and alcohol. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1250 [32 Cal.Rptr.2d 442].)

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with “In evaluating any test results in this case.” (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

Give the bracketed sentence stating that “it is not a defense that something else also impaired (his/her) ability to drive” if there is evidence of an additional source of impairment such as an epileptic seizure, inattention, or falling asleep.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the “imminent peril/sudden emergency” doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2101, *Driving With 0.08 Percent Blood Alcohol Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements ▶ Veh. Code, § 23153(a), (f), (g); *People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641].
- Alcoholic Beverage Defined ▶ Veh. Code, § 109, Bus. & Prof. Code, § 23004.
- Drug Defined ▶ Veh. Code, § 312.
- Presumptions ▶ Veh. Code, § 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Under the Influence Defined ▶ *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105–107 [85 Cal.Rptr. 69]; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665–666 [49 Cal.Rptr.2d 710].
- Must Instruct on Elements of Predicate Offense ▶ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care ▶ Pen. Code, § 7, subd. 2; Restatement Second of Torts, § 282; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243] [ordinary negligence standard applies to driving under the influence causing injury].
- Causation ▶ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Legal Entitlement to Use Drug Not a Defense ▶ Veh. Code, § 23630.
- Unanimity Instruction ▶ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].
- Prior Convictions ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 272-277.

2 Witkin, California Evidence (5th ed. 2012) Demonstrative, Experimental, and Scientific Evidence § 56.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent ▶ Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].
- Driving Under the Influence Causing Injury is not a lesser included offense of vehicular manslaughter without gross negligence ▶ *People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1148–1149 [66 Cal.Rptr.3d 675].
- Violations of Vehicle Code section 23153(a), are not lesser included offenses of Vehicle Code section 23153(f) [now 23153(g)] ▶ *People v. Cady* (2016) 7 Cal.App.5th 134, 145-146 [212 Cal.Rptr.3d 319].

RELATED ISSUES

DUI Cannot Serve as Predicate Unlawful Act

“[T]he evidence must show an unlawful act or neglect of duty *in addition* to driving under the influence.” (*People v. Minor* (1994) 28 Cal.App.4th 431, 438 [33 Cal.Rptr.2d 641] [italics in original]; *People v. Oyaas* (1985) 173 Cal.App.3d 663, 668 [219 Cal.Rptr. 243].)

Act Forbidden by Law

The term “ ‘any act forbidden by law’ . . . refers to acts forbidden by the Vehicle Code . . . ” (*People v. Clenney* (1958) 165 Cal.App.2d 241, 253 [331 P.2d 696].) The defendant must commit the act when driving the vehicle. (*People v. Capetillo* (1990) 220 Cal.App.3d 211, 217 [269 Cal.Rptr. 250] [violation of Veh. Code, § 10851 not sufficient because offense not committed “when” defendant was driving the vehicle but by mere fact that defendant was driving the vehicle].)

Neglect of Duty Imposed by Law

“In proving the person neglected any duty imposed by law in driving the vehicle, it is not necessary to prove that any specific section of [the Vehicle Code] was

violated.” (Veh. Code, § 23153(c); *People v. Oyaas* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243].) “[The] neglect of duty element . . . is satisfied by evidence which establishes that the defendant’s conduct amounts to no more than ordinary negligence.” (*People v. Oyaas, supra*, 173 Cal.App.3d at p. 669.) “[T]he law imposes on any driver [the duty] to exercise ordinary care at all times and to maintain a proper control of his or her vehicle.” (*Id.* at p. 670.)

Multiple Victims to One Drunk Driving Accident

“In *Wilkoff v. Superior Court* [(1985) 38 Cal.3d 345, 352 [211 Cal.Rptr. 742, 696 P.2d 134]] we held that a defendant cannot be charged with multiple counts of felony drunk driving under Vehicle Code section 23153, subdivision (a), where injuries to several people result from one act of drunk driving.” (*People v. McFarland* (1989) 47 Cal.3d 798, 802 [254 Cal.Rptr. 331, 765 P.2d 493].) However, when “a defendant commits vehicular manslaughter with gross negligence[,] . . . he may properly be punished for [both the vehicular manslaughter and] injury to a separate individual that results from the same incident.” (*Id.* at p. 804.) The prosecution may also charge an enhancement for multiple victims under Vehicle Code section 23558.

See also the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

2101. Driving With 0.08 Percent Blood Alcohol Causing Injury (Veh. Code, § 23153(b))

The defendant is charged [in Count __] with causing injury to another person while driving with a blood alcohol level of 0.08 percent or more [in violation of Vehicle Code section 23153(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant drove a vehicle;
2. When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight;
3. When the defendant was driving with that blood alcohol level, (he/she) also (committed an illegal act/ [or] neglected to perform a legal duty);

AND

4. The defendant's (illegal act/ [or] failure to perform a legal duty) caused bodily injury to another person.

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

[The People allege that the defendant committed the following illegal act[s]: _____ <list name[s] of offense[s]>.

To decide whether the defendant committed _____ <list name[s] of offense[s]>, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

[The People [also] allege that the defendant failed to perform the following legal (duty/duties) while driving the vehicle: (the duty to exercise ordinary care at all times and to maintain proper control of the vehicle/ _____ <insert other duty or duties alleged>).]

[You may not find the defendant guilty unless all of you agree that the People have proved that the defendant (committed [at least] one illegal act/[or] failed to perform [at least] one duty).

<Alternative A—unanimity required; see Bench Notes>

[You must all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

<Alternative B—unanimity not required; see Bench Notes>

[But you do not have to all agree on which (act the defendant committed/ [or] duty the defendant failed to perform).]

[Using *ordinary care* means using reasonable care to prevent reasonably foreseeable harm to someone else. A person fails to exercise ordinary care if he or she (does something that a reasonably careful person would not do in the same situation/ [or] fails to do something that a reasonably careful person would do in the same situation).]

[An act causes bodily injury to another person if the injury is the direct, natural, and probable consequence of the act and the injury would not have happened without the act. A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.]

[There may be more than one cause of injury. An act causes bodily injury to another person only if it is a substantial factor in causing the injury. A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the injury.]

New January 2006; Revised August 2006, April 2008, August 2015, March 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime.

If the prosecution alleges under element 3 that the defendant committed an act forbidden by law, the court has a **sua sponte** duty to specify the predicate offense alleged and to instruct on the elements of that offense. (*People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].)

If the prosecution alleges under element 3 that the defendant neglected to perform a duty imposed by law, the court has a **sua sponte** duty to instruct on the duty allegedly neglected. (See *People v. Minor, supra*, 28 Cal.App.4th at pp. 438–439.) If the prosecution alleges that the defendant neglected the general duty of every driver to exercise ordinary care (see *People v. Oyass* (1985) 173 Cal.App.3d 663, 669 [219 Cal.Rptr. 243]), the court should give the bracketed definition of “ordinary care.”

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of injury, the court should give the first bracketed paragraph on causation, which includes the “direct, natural, and probable” language. If there is evidence of multiple causes of injury, the court should also give the second bracketed paragraph on causation, which includes the “substantial factor” definition. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].)

There is a split in authority over whether there is a **sua sponte** duty to give a unanimity instruction when multiple predicate offenses are alleged. (*People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30] [unanimity instruction required], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735] [unanimity instruction not required but preferable]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438] [unanimity instruction not required]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906] [unanimity instruction not required, failure to give harmless error if was required].) If the court concludes that a unanimity instruction is appropriate, give the unanimity alternative A. If the court concludes that unanimity is not required, give the unanimity alternative B.

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” if there is evidence that the defendant’s blood alcohol level was below 0.08 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with “In evaluating any test results in this case.” (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayan* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. ~~2110~~2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal. Rptr. 2d 690].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Defenses—Instructional Duty

On request, if supported by the evidence, the court must instruct on the “imminent peril/sudden emergency” doctrine. (*People v. Boulware* (1940) 41 Cal.App.2d 268, 269–270 [106 P.2d 436].) The court may use the bracketed instruction on sudden emergency in CALCRIM No. 590, *Gross Vehicular Manslaughter While Intoxicated*.

Related Instructions

CALCRIM No. 2100, *Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

CALCRIM No. 595, *Vehicular Manslaughter: Speeding Laws Defined*.

AUTHORITY

- Elements ▶ Veh. Code, § 23153(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Partition Ratio ▶ Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions ▶ Veh. Code, § 23153(b); Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Must Instruct on Elements of Predicate Offense ▶ *People v. Minor* (1994) 28 Cal.App.4th 431, 438–439 [33 Cal.Rptr.2d 641]; *People v. Ellis* (1999) 69 Cal.App.4th 1334, 1339 [82 Cal.Rptr.2d 409].
- Negligence—Ordinary Care ▶ Pen. Code, § 7(2); Restatement Second of Torts, § 282.
- Causation ▶ *People v. Rodriguez* (1960) 186 Cal.App.2d 433, 440 [8 Cal.Rptr. 863].
- Unanimity Instruction ▶ *People v. Gary* (1987) 189 Cal.App.3d 1212, 1218 [235 Cal.Rptr. 30], overruled on other grounds in *People v. Flood* (1998) 18 Cal.4th 470, 481 [76 Cal.Rptr.2d 180, 957 P.2d 869]; *People v. Durkin* (1988) 205 Cal.App.3d Supp. 9, 13 [252 Cal.Rptr. 735]; *People v. Mitchell* (1986) 188 Cal.App.3d 216, 222 [232 Cal.Rptr. 438]; *People v. Leffel* (1988) 203 Cal.App.3d 575, 586–587 [249 Cal.Rptr. 906].

- Statute Constitutional ▶ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 272-277.

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, § 91.36 (Matthew Bender).

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Misdemeanor Driving Under the Influence or With 0.08 Percent ▶ Veh. Code, § 23152(a) & (b); *People v. Capetillo* (1990) 220 Cal.App.3d 211, 220 [269 Cal.Rptr. 250].

RELATED ISSUES

See the Related Issues section in CALCRIM No. 2111, *Driving With 0.08 Percent Blood Alcohol* and CALCRIM No. 2100, *Driving a Vehicle or Operating a Vessel Under the Influence Causing Injury*.

2102–2109. Reserved for Future Use

2111. Driving With 0.08 Percent Blood Alcohol (Veh. Code, § 23152(b))

The defendant is charged [in Count __] with driving with a blood alcohol level of 0.08 percent or more [in violation of Vehicle Code section 23152(b)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant drove a vehicle;

AND

2. When (he/she) drove, the defendant's blood alcohol level was 0.08 percent or more by weight.

[If the People have proved beyond a reasonable doubt that a sample of the defendant's (blood/breath) was taken within three hours of the defendant's [alleged] driving and that a chemical analysis of the sample showed a blood alcohol level of 0.08 percent or more, you may, but are not required to, conclude that the defendant's blood alcohol level was 0.08 percent or more at the time of the alleged offense.]

[In evaluating any test results in this case, you may consider whether or not the person administering the test or the agency maintaining the testing device followed the regulations of the California Department of Public Health.]

New January 2006; Revised August 2006, June 2007, April 2008, August 2015, March 2018

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v.*

Calderon (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

The bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” explains a rebuttable presumption created by statute. (See Veh. Code, § 23152(b); Evid. Code, §§ 600–607.) The California Supreme Court has held that a jury instruction phrased as a rebuttable presumption in a criminal case creates an unconstitutional mandatory presumption. (*People v. Roder* (1983) 33 Cal.3d 491, 497–505 [189 Cal.Rptr. 501, 658 P.2d 1302].) In accordance with *Roder*, the instructions have been written as permissive inferences.

The court **must not** give the bracketed paragraph that begins with “If the People have proved beyond a reasonable doubt that a sample of” if there is no substantial evidence that the defendant’s blood alcohol level was at or above 0.08 percent at the time of the test.

If the evidence demonstrates that the person administering the test or agency maintaining the testing device failed to follow the title 17 regulations, give the bracketed sentence that begins with “In evaluating any test results in this case.” (*People v. Adams* (1976) 59 Cal.App.3d 559, 567 [131 Cal.Rptr. 190] [failure to follow regulations in administering breath test goes to weight, not admissibility, of the evidence]; *People v. Williams* (2002) 28 Cal.4th 408, 417 [121 Cal.Rptr.2d 854, 49 P.3d 203] [same]; *People v. Esayian* (2003) 112 Cal.App.4th 1031, 1039 [5 Cal.Rptr.3d 542] [results of blood test admissible even though phlebotomist who drew blood not authorized under title 17].)

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Related Instructions

CALCRIM No. 2110, *Driving Under the Influence*.

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements ▶ Veh. Code, § 23152(b); *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 265–266 [198 Cal.Rptr. 145, 673 P.2d 732].
- Partition Ratio ▶ Veh. Code, § 23152(b); *People v. Bransford* (1994) 8 Cal.4th 885, 890 [35 Cal.Rptr.2d 613, 884 P.2d 70].
- Presumptions ▶ Veh. Code, §§ 23152(b), 23610; Evid. Code, § 607; *People v. Milham* (1984) 159 Cal.App.3d 487, 503–505 [205 Cal.Rptr. 688].
- Statute Constitutional ▶ *Burg v. Municipal Court* (1983) 35 Cal.3d 257, 273 [198 Cal.Rptr. 145, 673 P.2d 732].
- Prior Convictions ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Crimes Against Public Peace and Welfare §§ 272-277

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with felony driving under the influence based on prior convictions, then the misdemeanor offense is a lesser included offense. The court must provide the jury with a verdict form on which the jury will indicate if the prior convictions have been proved. If the jury finds that the prior convictions have not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Partition Ratio

In 1990, the Legislature amended Vehicle Code section 23152(b) to state that the “percent, by weight, of alcohol in a person’s blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.”

Following this amendment, the Supreme Court held that evidence of variability of breath-alcohol partition ratios was not relevant and properly excluded. (*People v. Bransford* (1994) 8 Cal.4th 885, 890–893 [35 Cal.Rptr.2d 613, 884 P.2d 70].) See the Related Issues section in CALCRIM No. 2110, *Driving Under the Influence*.

2112. Driving While Addicted to a Drug (Veh. Code, § 23152(c))

The defendant is charged [in Count __] with driving while addicted to a drug [in violation of Vehicle Code section 23152(c)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant drove a vehicle;

AND

2. When (he/she) drove, the defendant was addicted to a drug.

A *drug* is a substance or combination of substances, other than alcohol, that could so affect the nervous system, brain, or muscles of a person that it would appreciably impair his or her ability to drive as an ordinarily cautious person, in full possession of his or her faculties and using reasonable care, would drive under similar circumstances.

A person is *addicted* to a drug if he or she:

1. Has become physically dependent on the drug, suffering withdrawal symptoms if he or she is deprived of it;
2. Has developed a tolerance to the drug's effects and therefore requires larger and more potent doses;

AND

3. Has become emotionally dependent on the drug, experiencing a compulsive need to continue its use.

[It is not a defense that the defendant was legally entitled to use the drug.]

New January 2006; *March 2018*

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the defendant is charged with a misdemeanor or a felony based on prior convictions.

If the defendant is charged with one or more prior convictions for driving under the influence, the defendant may stipulate to the convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) In addition, either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.) If the defendant does not stipulate and the court does not grant a bifurcated trial, give CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*. If the court grants a bifurcated trial, give CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*. If the defendant stipulates to the truth of the convictions, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

Vehicle Code section 23630 states that the fact that the defendant was legally entitled to use the drug is not a defense to a charge of driving under the influence. (Veh. Code, § 23630.) It is unclear whether this provision applies to the charge of driving while addicted. If the court concludes that the statute does apply, the court may add the bracketed sentence at the end of the instruction: “It is not a defense that the defendant was legally entitled to use the drug.”

In addition, Vehicle Code section 23152(c) states “[t]his subdivision shall not apply to a person who is participating in a narcotic treatment program approved pursuant to Article 3 (commencing with Section 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code.” If there is evidence that the defendant is participating in an approved treatment program, the court has a **sua sponte** duty to instruct on this defense.

On request, give CALCRIM No. 2241, *Driver and Driving Defined*.

Related Instructions

CALCRIM No. 2125, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions*.

CALCRIM No. 2126, *Driving Under the Influence or With 0.08 or 0.04 Percent Blood Alcohol: Prior Convictions—Bifurcated Trial*.

AUTHORITY

- Elements ▶ Veh. Code, § 23152(c).
- Drug Defined ▶ Veh. Code, § 312.
- Addict Defined ▶ *People v. O'Neil* (1965) 62 Cal.2d 748, 754 [44 Cal.Rptr. 320, 401 P.2d 928].
- Prior Convictions ▶ *People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 205–210.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[1][a] (Matthew Bender).

3100. Prior Conviction: Nonbifurcated Trial (Pen. Code, §§ 1025, 1158)

If you find the defendant guilty of a crime, you must also decide whether the People have proved the additional allegation that the defendant was previously convicted of (another/other) crime[s]. It has already been determined that the defendant is the person named in exhibit[s] _____ <insert number[s] or description[s] of exhibit[s]>. You must decide whether the evidence proves that the defendant was convicted of the alleged crime[s].

The People allege that the defendant has been convicted of:

[1.] A violation of _____ <insert code section alleged>, on _____ <insert date of conviction>, in the _____ <insert name of court>, in Case Number _____ <insert docket or case number>(;/.)

[AND <Repeat for each prior conviction alleged>.]

[Consider the evidence presented on this allegation only when deciding whether the defendant was previously convicted of the crime[s] alleged [or for the limited purpose of _____ <insert other permitted purpose, e.g., assessing credibility of the defendant>]. Do not consider this evidence as proof that the defendant committed any of the crimes with which he is currently charged or for any other purpose.]

[You must consider each alleged conviction separately.] The People have the burden of proving (the/each) alleged conviction beyond a reasonable doubt. If the People have not met this burden [for any alleged conviction], you must find that the alleged conviction has not been proved.

New January 2006; March 2018

BENCH NOTES

Instructional Duty

If the defendant is charged with a prior conviction, the court has a **sua sponte** duty to instruct on the allegation. ~~Give this instruction if the defendant does not admit the prior conviction and the court has not granted a bifurcated trial on the prior conviction.~~

If identity is an issue, the court must make the factual determination that the defendant is the person who has suffered the convictions in question before giving this instruction.

Do not give this instruction if the court has bifurcated the trial. Instead, if the court grants bifurcation, do not give this instruction. Give CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

If the defendant is charged with a prison prior, the court must determine whether the jury should decide if the defendant served a separate prison term for the conviction and whether the defendant remained free of prison custody for the “washout” period. (Pen. Code, § 667.5(a) & (b).) The Commentary below discusses these issues further. If the court chooses to submit these issues to the jury, give CALCRIM No. 3102, *Prior Conviction: Prison Prior*, with this instruction.

If the court determines that there is a factual issue regarding the prior conviction that must be submitted to the jury, give CALCRIM No. 3103, *Prior Conviction: Factual Issue for Jury*, with this instruction. The Commentary below discusses this issue further.

On request, the court should give the limiting instruction that begins with “Consider the evidence presented on this allegation only when deciding. . . .” (See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913].) There is no sua sponte duty to give the limiting instruction, and the defense may request that no limiting instruction be given. (See *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].)

The court must provide the jury with a verdict form on which the jury will indicate whether the prior conviction has been proved. (Pen. Code, § 1158.)

AUTHORITY

- Statutory Authority ▶ Pen. Code, §§ 1025, 1158.
- Bifurcation ▶ *People v. Calderon* (1994) 9 Cal.4th 69, 77–79 [36 Cal.Rptr.2d 333, 885 P.2d 83]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41].
- Judge Determines Whether Defendant Is Person Named in Documents ▶ Pen. Code, § 1025(c); *People v. Garcia* (2003) 107 Cal.App.4th 1159, 1165 [132 Cal.Rptr.2d 694].

- Limiting Instruction on Prior Conviction ▶ See *People v. Valentine* (1986) 42 Cal.3d 170, 182, fn. 7 [228 Cal.Rptr. 25, 720 P.2d 913]; *People v. Griggs* (2003) 110 Cal.App.4th 1137, 1139 [2 Cal.Rptr.3d 380].
- Disputed Factual Issues ▶ See *People v. Epps* (2001) 25 Cal.4th 19, 23 [104 Cal.Rptr.2d 572, 18 P.3d 2]; *People v. Kelii* (1999) 21 Cal.4th 452, 458–459 [87 Cal.Rptr.2d 674, 981 P.2d 518]; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541]; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *People v. McGee* (2006) 38 Cal.4th 682 [42 Cal.Rptr.3d 899, 133 P.3d 1054]; *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901].
- Three-Strikes Statutes ▶ Pen. Code, §§ 667(e), 1170.12.
- Five-Year Enhancement for Serious Felony ▶ Pen. Code, § 667(a)(1).
- Three-Year Enhancement for Prison Prior If Violent Felony ▶ Pen. Code, § 667.5(a).
- One-Year Enhancement for Prison Prior ▶ Pen. Code, § 667.5(b).
- Serious Felony Defined ▶ Pen. Code, § 1192(c).
- Violent Felony Defined ▶ Pen. Code, § 667.5(c).

Secondary Sources

5 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Criminal Trial, § 515.

2 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 42, *Arraignment, Pleas, and Plea Bargaining*, § 42.21[6][a] (Matthew Bender).

5 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 91, *Sentencing*, §§ 91.21[2], 91.60, 91.80 (Matthew Bender).

COMMENTARY

Factual Issues—Decided by Jury or Court?

A prior conviction may present an ancillary factual issue that must be decided before the conviction may be used under a particular enhancement or sentencing statute. For example, the prosecution might seek sentencing under the “three strikes” law, alleging that the defendant was previously convicted of two burglaries. These prior convictions would qualify as “strikes” only if the burglaries were residential. (See *People v. Kelii* (1999) 21 Cal.4th 452, 455 [87 Cal.Rptr.2d 674, 981 P.2d 518].) If the defendant had been specifically convicted of first

degree burglary of an inhabited dwelling, then there would be no issue over whether the prior convictions qualified. If, on the other hand, the defendant had been convicted simply of “burglary,” then whether the offenses were residential would be a factual issue. (*Ibid.*) The question then arises: who decides these ancillary factual issues, the jury or the court?

Penal Code sections 1025(b) and 1158 specifically state that the jury must decide whether the defendant “suffered the prior conviction.” The California Supreme Court has observed that “sections 1025 and 1158 are limited in nature. [Citation.] By their terms, [these sections] grant a defendant the right to have the jury determine only whether he or she ‘suffered’ the alleged prior conviction.” (*People v. Epps* (2001) 25 Cal.4th 19, 23 [104 Cal.Rptr.2d 572, 18 P.3d 2] [internal quotation marks and citation omitted].) Thus, the California Supreme Court has held that the court, not the jury, must decide ancillary facts necessary to establish that a prior conviction comes within a particular recidivist statute. (*People v. Kelii, supra*, 21 Cal.4th at pp. 458–459; *People v. Wiley* (1995) 9 Cal.4th 580, 592 [38 Cal.Rptr.2d 347, 889 P.2d 541]; *People v. McGee* (2006) 38 Cal.4th 682 [42 Cal.Rptr.3d 899, 133 P.3d 1054].) Specifically, the court must determine whether the facts of a prior conviction make the conviction a “serious” felony (*People v. Kelii, supra*, 21 Cal.4th at p. 457); and whether prior convictions charged as serious felonies were “brought and tried separately.” (*People v. Wiley, supra*, 9 Cal.4th at p. 592.)

Penal Code section 1025 was amended in 1997 to further provide that the court, not the jury, must determine whether the defendant is the person named in the documents submitted to prove the prior conviction. (Pen. Code, § 1025(c); see also *People v. Epps, supra*, 25 Cal.4th at pp. 24–25.) The California Supreme Court has held that the defendant still has a statutory right to a jury trial on whether he or she “suffered” the prior conviction, which “may include the question whether the alleged prior conviction *ever even occurred*. For example, in a rare case, the records of the prior conviction may have been fabricated, or they may be in error, or they may otherwise be insufficient to establish the existence of the prior conviction.” (*People v. Epps, supra*, 25 Cal.4th at p. 25 [italics in original].) At the same time, the court also observed that “[t]his procedure would appear to leave the jury little to do except to determine whether those documents are authentic and, if so, are sufficient to establish that the convictions the defendant suffered are indeed the ones alleged.” (*Id.* at p. 27 [italics omitted] [quoting *People v. Kelii, supra*, 21 Cal.4th at p. 459].)

However, in 2000, the United States Supreme Court held that the federal due process clause requires that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (*Apprendi v.*

New Jersey (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435]; see also *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403].) In *People v. Epps*, *supra*, 25 Cal.4th at p. 28, the California Supreme Court noted that *Apprendi* might have overruled the holdings of *Kelii* and *Wiley*. In *People v. McGee* (2006) 38 Cal.4th 682 [42 Cal.Rptr.3d 899, 133 P.3d 1054], however, the California Supreme Court determined that it was not error for the trial court to examine the record of a prior conviction to determine whether it constitutes a qualifying prior conviction for purposes of a recidivist sentencing statute, because there is a “significant difference” between a “hate crime” enhancement and a traditional sentencing determination.

Prior Prison Term and “Washout” Period

A similar issue arises over whether the jury or the court must decide if the defendant served a prison term as a result of a particular conviction and if the defendant has been free of custody for sufficient time to satisfy the “washout” period. (See Pen. Code, § 667.5(a) & (b).) In *People v. Winslow* (1995) 40 Cal.App.4th 680, 687 [46 Cal.Rptr.2d 901], the Court of Appeal held that the jury must determine whether the defendant served a prior prison term for a felony conviction. The other holdings in *Winslow* were rejected by the California Supreme Court. (*People v. Kelii*, *supra*, 21 Cal.4th at pp. 458–459; *People v. Wiley*, *supra*, 9 Cal.4th at p. 592.) However, the *Winslow* holding that the jury must determine if the defendant served a prison term for a felony conviction remains controlling authority.

But, in *People v. Epps*, *supra*, 25 Cal.4th at pp. 25–26, the Court expressed doubt, in dicta, about whether the fact of having served a prison term is properly submitted to the jury. Discussing the 1997 amendment to Penal Code section 1025, the Court noted that

[t]he analysis lists the following questions that the jury would still decide if Senate Bill 1146 became law: . . . ‘Was the defendant sentenced to prison based on that conviction? How long has the defendant been out of custody since he or she suffered the prior conviction?’ . . .

[T]hough we do not have a case before us raising the issue, it appears that many of the listed questions are the sort of legal questions that are for the court under [*Wiley*]. For example, determining . . . whether the defendant was sentenced to prison is “largely legal” (*Kelii*, *supra*, 21 Cal. 4th at p. 455, quoting *Wiley*, *supra*, 9 Cal. 4th at p. 590), and though these questions require resolution of some facts, “a factual inquiry, limited to examining court documents, is . . . ‘the type of inquiry traditionally performed

by judges as part of the sentencing function.” (*Kelii*, at p. 457, quoting *Wiley*, at p. 590.) . . . Therefore, the list of questions in the committee analysis should not be read as creating new jury trial rights that did not exist under *Wiley*.
(*Ibid.*)

On the other hand, *Apprendi*, discussed above, could be interpreted as requiring the jury to make these factual findings. (But see *People v. Thomas* (2001) 91 Cal.App.4th 212, 223 [110 Cal.Rptr.2d 571] [even under *Apprendi*, no federal due process right to have jury determine whether defendant served a prior prison term].)

Until the California Supreme Court resolves this question, the court should consider submitting to the jury the issues of whether the defendant served a prison term and whether the defendant has remained free of custody for sufficient time to satisfy the “washout” period. The court may use CALCRIM No. 3102, *Prior Conviction: Prison Prior*.

RELATED ISSUES

Review Limited to Record of Conviction

When determining if a prior conviction comes under a particular recidivist statute, “the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction” but may not consider facts outside the record of conviction. (*People v. Myers* (1993) 5 Cal.4th 1193, 1195 [22 Cal.Rptr.2d 911, 858 P.2d 301]; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1204–1205 [96 Cal.Rptr.2d 1, 998 P.2d 969]; *People v. Henley* (1999) 72 Cal.App.4th 555, 564 [85 Cal.Rptr.2d 123].) The prosecution bears the burden of proving that the prior conviction meets the requirements of the enhancement statute. (*People v. Henley, supra*, 72 Cal.App.4th at pp. 564–565.)

Constitutionality of Prior

The prosecution is not required to prove the constitutional validity of a prior conviction as an “element” of the enhancement. (*People v. Walker* (2001) 89 Cal.App.4th 380, 386 [107 Cal.Rptr.2d 264].) Rather, following the procedures established in *People v. Sumstine* (1984) 36 Cal.3d 909, 922–924 [206 Cal.Rptr. 707, 687 P.2d 904], and *People v. Allen* (1999) 21 Cal.4th 424, 435–436 [87 Cal.Rptr.2d 682, 981 P.2d 525], the defense may bring a motion challenging the constitutional validity of the prior. These questions are matters of law to be determined by the trial court.

Defense Stipulation to Prior Convictions

The defendant may stipulate to the truth of the prior convictions. (*People v. Weathington* (1991) 231 Cal.App.3d 69, 90 [282 Cal.Rptr. 170].) If the defendant stipulates, the prior convictions should not be disclosed to the jury unless the court admits them as otherwise relevant. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [78 Cal.Rptr.2d 809].)

Motion for Bifurcated Trial

Either the defendant or the prosecution may move for a bifurcated trial. (*People v. Calderon* (1994) 9 Cal.4th 69, 77–78 [36 Cal.Rptr.2d 333]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1334–1336 [71 Cal.Rptr.2d 41]; *People v. Weathington, supra*, 231 Cal.App.3d at p. 90.)

2521. Carrying Concealed Firearm Within Vehicle (Pen. Code, § 25400(a)(1))

The defendant is charged [in Count __] with unlawfully carrying a concealed firearm within a vehicle [in violation of Penal Code section 25400].

To prove that the defendant is guilty of this crime, the People must prove that:

- 1. The defendant carried within a vehicle a firearm capable of being concealed on the person;**
- 2. The defendant knew the firearm was in the vehicle;**
- 3. The firearm was substantially concealed within the vehicle;**

AND

- 4. The vehicle was under the defendant's control or direction.**

[A *firearm capable of being concealed on the person* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of an explosion or other form of combustion and that has a barrel less than 16 inches in length. [A *firearm capable of being concealed on the person* also includes any device that has a barrel 16 inches or more in length that is designed to be interchanged with a barrel less than 16 inches in length.] [A *firearm* also includes any rocket, rocket-propelled projectile launcher, or similar device containing any explosive or incendiary material, whether or not the device is designed for emergency or distress signaling purposes.]]

[The term *firearm capable of being concealed on the person* is defined in another instruction.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[Firearms carried openly in belt holsters are not concealed.]

<Defense: Statutory Exemption>

[The defendant did not unlawfully carry a concealed firearm with-in a vehicle if _____ <insert defense from Pen. Code, §§ [25450](#), [25510](#), [25525](#), [25600](#), [25605](#), [25610](#), [25525](#), [25510](#), or [25450](#)>. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully carried a concealed firearm within a vehicle. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New January 2006; Revised February 2012; [March 2018](#)

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If the defendant is charged with any of the sentencing factors in Penal Code section 25400(c), the court must also give the appropriate instruction from CALCRIM Nos. 2540–2546. (*People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

The court should give the bracketed definition of “firearm capable of being concealed on the person” unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Penal Code section 25400(a) prohibits carrying a concealed “pistol, revolver, or other firearm capable of being concealed upon the person.” Penal Code section 16530 provides a single definition for this class of weapons. Thus, the committee has chosen to use solely the all-inclusive phrase “firearm capable of being concealed on the person.”

Defenses—Instructional Duty

Exemptions and a justification for carrying a concealed firearm are stated in Penal Code sections [25450](#), [25525](#), [25510](#), [25600](#), [25605](#), [25525](#), [25510](#), and [25450](#), [25610](#). If sufficient evidence has been presented to raise a reasonable doubt about the existence of a legal basis for the defendant’s actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, “The defendant did not unlawfully”

Related Instructions

CALCRIM No. 2540, *Carrying Firearm: Specified Convictions*.

CALCRIM No. 2541, *Carrying Firearm: Stolen Firearm*.

CALCRIM No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang*.

CALCRIM No. 2543, *Carrying Firearm: Not in Lawful Possession*.

CALCRIM No. 2544, *Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness*.

CALCRIM No. 2545, *Carrying Firearm: Not Registered Owner*.

CALCRIM No. 2546, *Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded*.

AUTHORITY

- Elements ▶ Pen. Code, § 25400(a)(1) .
- Firearm Defined ▶ Pen. Code, § 16520.
- Knowledge Required ▶ *People v. Jurado* (1972) 25 Cal.App.3d 1027, 1030–1031 [102 Cal.Rptr. 498]; *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].
- Concealment Required ▶ *People v. Nelson* (1960) 185 Cal.App.2d 578, 580–581 [8 Cal.Rptr. 288].
- Factors in Pen. Code, § 25400(c) Sentencing Factors, Not Elements ▶ *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].
- Justifications and Exemptions ▶ Pen. Code, §§ 25600, 25605, 25525, 25510, 25450.
- Need Not Be Operable ▶ *People v. Marroquin* (1989) 210 Cal.App.3d 77, 82 [258 Cal.Rptr. 290].
- Substantial Concealment ▶ *People v. Wharton* (1992) 5 Cal.App.4th 72, 75 [6 Cal.Rptr.2d 673] [interpreting now-repealed Pen. Code, § 12020(a)(4)]; *People v. Fuentes* (1976) 64 Cal.App.3d 953, 955 [134 Cal.Rptr. 885] [same].
- Statute Is Not Unconstitutionally Vague ▶ *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355 [83 Cal.Rptr.2d 619].

Secondary Sources

2 Witkin & Epstein, *California Criminal Law* (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 154–159.

6 Millman, Sevilla & Tarlow, *California Criminal Defense Practice*, Ch. 144, *Crimes Against Order*, § 144.01[1][d] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with one of the sentencing factors that makes this offense a felony, then the misdemeanor offense is a lesser included offense. The statute defines as a misdemeanor all violations of the statute not covered by the specified sentencing factors. (Pen. Code, § 25400(c)(7).) The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved. If the jury finds that the sentencing factor has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Gun in Unlocked Carrying Case Is Concealed

“If a firearm is transported in a vehicle in such a manner as to be invisible unless its carrying case is opened, it is concealed in the ordinary and usual meaning of the term.” (*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355 [83 Cal.Rptr.2d 619].) Thus, carrying a firearm in an unlocked case in a vehicle violates Penal Code section 25400(a)(1). (*Ibid.*) However, Penal Code section 25525 makes it lawful to transport a firearm in a vehicle if it is in a *locked* case.

Not Necessary for Defendant to Possess or Control the Firearm

“The statute does not require that the defendant have the exclusive possession and control of the firearm.” (*People v. Davis* (1958) 157 Cal.App.2d 33, 36 [320 P.2d 88].) The court in *People v. Davis, supra*, upheld the conviction where the defendant owned and controlled the vehicle and knew of the presence of the firearm below the seat, even though the weapon was placed there by someone else and belonged to someone else. (*Ibid.*)

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: January 30, 2018

Title of proposal (*include amend/revise/adopt/approve + form/rule numbers*):
Judicial Council Forms: Technical Changes to Reflect Federal Poverty Guidelines

Committee or other entity submitting the proposal:

Staff, on behalf of Civil and Small Claims Advisory Committee, Probate and Mental Health Advisory Committee, and Appellate Advisory Committee

Staff contact (name, phone and e-mail): Anne M. Ronan, 415-865-8933, anne.ronan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:

Approved by RUPRO: Technical change

Project description from annual agenda:

If requesting July 1 or out of cycle, explain:

The government revises the Federal Poverty Guidelines most years, in late January. Fee waiver and other needs-based determinations are based in part on the dollar amounts of these guidelines, and have to be changed as soon as possible to reflect this revision.

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

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: March 2, 2018

Title	Agenda Item Type
Judicial Council Forms: Technical Changes to Reflect Federal Poverty Guidelines	Action required
Rules, Forms, Standards, or Statutes Affected	Effective Date
Revise forms FW-001, FW-001-GC, APP-015/FW-015-INFO, and JV-132	March 1, 2018
Recommended by	Date of Report
Judicial Council staff	January 25, 2018
Susan R. McMullan, Attorney, Legal Services	Contact
	Anne Ronan, 415-865-8933 anne.ronan@jud.ca.gov
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Executive Summary

Four Judicial Council forms containing figures based on the federal poverty guidelines need to be revised to reflect the changes in those guidelines recently published by the federal government.

Recommendation

Staff of the Judicial Council recommends that the Judicial Council, effective March 1, 2018, revise the following documents to reflect 2018 increases in the federal poverty guidelines:

- *Request to Waive Court Fees* (form FW-001);
- *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC);

- *Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)* (form APP-015/FW-015-INFO); and
- *Financial Declaration—Juvenile Dependency* (form JV-132).

The revised forms are attached at pages 5–15.

Previous Council Action

The council last revised these four forms on March 1, 2017, to reflect the last change in the federal poverty guidelines.

Rationale for Recommendation

Judicial Council forms containing figures based on the federal poverty guidelines need to be revised to reflect the changes in those guidelines recently published by the federal government.

Fee waiver forms

The eligibility of indigent litigants to proceed without paying filing fees or other court costs is determined by California Government Code section 68632. Among other things, section 68632(b) provides that a fee waiver shall be granted to litigants whose household monthly income is 125 percent or less of the current poverty guidelines established by the United States Department of Health and Human Services (HHS).

The Judicial Council has adopted rules of court and forms for litigants to obtain fee waivers. Three of the forms, *Request to Waive Court Fees* (form FW-001), *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC), and *Information Sheet on Waiver of Appellate Court Fees (Supreme Court, Court of Appeal, Appellate Division)* (form APP-015/FW-015-INFO), contain figures based on the monthly poverty guidelines. The tables in item 5b on the general fee waiver application form, in item 8(b) for the probate fee waiver form, and on page 1 of the appellate court information sheet provide monthly income figures on which a court may base a decision to grant a fee waiver in accordance with Government Code section 68632.

Juvenile form

The Judicial Council administers a program under Welfare and Institutions Code section 903.47 to collect reimbursement of the cost of court-appointed counsel in dependency proceedings from liable persons found able to pay. Under the statewide standard adopted by the council, an otherwise liable person is presumed to be unable to pay reimbursement if that person's monthly household income is 125 percent or less of the current federal poverty guidelines established by the HHS.

Financial Declaration—Juvenile Dependency (form JV-132) contains figures based on the poverty guidelines. The table in item 3 provides monthly income levels below which an

individual is presumed to be unable to pay reimbursement for the cost of court-appointed counsel.

Revisions required

The monthly income figures currently on the four forms reflect 125 percent of the 2016 poverty guidelines established by the HHS. The HHS released revised federal poverty guidelines on January 18, 2018.¹ As a result, these items on the Judicial Council forms must be revised to reflect the 2018 federal poverty guideline revisions.

To determine the new monthly income figures for the forms, the federal poverty guidelines must be multiplied by 125 percent and divided by 12.² The new figures are reflected in the revised tables on the forms attached here.

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).)

Staff monitors revisions to the poverty guidelines and ensures that the forms are revised as necessary and submitted to the council. Revised forms FW-001, FW-001-GC, APP-015/FW-015-INFO, and JV-132 should take effect immediately to ensure that litigants are provided with accurate monthly income guidelines on which a court may base a decision regarding fee waivers or financial liability. This rapid change to the forms is necessary because the revised poverty guidelines take effect immediately upon release. Once adopted by the Judicial Council, the revised forms will be distributed to the courts and forms publishers and posted to the California Courts website.

Implementation Requirements, Costs, and Operational Impacts

If a court provides free copies of these forms to parties, it will incur costs to print or duplicate the revised forms. However, the revisions are required to make the forms consistent with current law.

Attachments

1. Form FW-001, at pages 5–6
2. Form FW-001-GC, at pages 7–10
3. Form APP-015/FW-015-INFO, at pages 11–12

¹ See Annual Update of the HHS Poverty Guidelines, 83 FR 2642 (Jan. 18, 2018), attached at pp. 16–18 of this report.

² The Computation Sheet is attached at page 19. The monthly income figures in the tables on the forms have always slightly exceeded 125% of the poverty guidelines because they were rounded up to the nearest cent. Therefore, the language on the form reflects this slight excess, in stating that the item should be checked if the household income is “less than” the amount in the chart.

4. Form JV-132, at pages 13–15
5. Excerpt from *Federal Register*, at pages 16–18
6. Computation Sheet, at page 19

DRAFT

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council
2018-01-25

Fill in court name and street address:

Superior Court of California, County of

Fill in case number and name:

Case Number:

Case Name:

If you are getting public benefits, are a low-income person, or do not have enough income to pay for your household's basic needs and your court fees, you may use this form to ask the court to waive your court fees.

- You cannot give the court proof of your eligibility,
Your financial situation improves during this case, or
You settle your civil case for \$10,000 or more.

1 Your Information (person asking the court to waive the fees):

Name:
Street or mailing address:
City: State: Zip:
Phone:

2 Your Job, if you have one (job title):

Name of employer:
Employer's address:

3 Your Lawyer, if you have one (name, firm or affiliation, address, phone number, and State Bar number):

a. The lawyer has agreed to advance all or a portion of your fees or costs (check one): Yes No

b. (If yes, your lawyer must sign here) Lawyer's signature:
If your lawyer is not providing legal-aid type services based on your low income, you may have to go to a hearing to explain why you are asking the court to waive the fees.

4 What court's fees or costs are you asking to be waived?

- Superior Court (See Information Sheet on Waiver of Superior Court Fees and Costs (form FW-001-INFO).)
Supreme Court, Court of Appeal, or Appellate Division of Superior Court (See Information Sheet on Waiver of Appellate Court Fees (form APP-015/FW-015-INFO).)

5 Why are you asking the court to waive your court fees?

- I receive (check all that apply; see form FW-001-INFO for definitions): Food Stamps Supp. Sec. Inc. SSP Medi-Cal County Relief/Gen. Assist. IHSS CalWORKS or Tribal TANF CAPI
My gross monthly household income (before deductions for taxes) is less than the amount listed below. (If you check 5b, you must fill out 7, 8, and 9 on page 2 of this form.)

Table with 6 columns: Family Size, Family Income, Family Size, Family Income, Family Size, Family Income. Includes a note: If more than 6 people at home, add \$450.00 for each extra person.

- I do not have enough income to pay for my household's basic needs and the court fees. I ask the court to: (check one and you must fill out page 2):
waive all court fees and costs
waive some of the court fees
let me make payments over time

6 Check here if you asked the court to waive your court fees for this case in the last six months. (If your previous request is reasonably available, please attach it to this form and check here:)

I declare under penalty of perjury under the laws of the State of California that the information I have provided on this form and all attachments is true and correct.

Date:

Print your name here

Sign here

Case Number: _____

Your name: _____

If you checked 5a on page 1, do not fill out below. If you checked 5b, fill out questions 7, 8, and 9 only. If you checked 5c, you **must** fill out this entire page. If you need more space, attach form MC-025 or attach a sheet of paper and write Financial Information and your name and case number at the top.

7 Check here if your income changes a lot from month to month. If it does, complete the form based on your average income for the past 12 months.

8 Your Gross Monthly Income

a. List the source and amount of any income you get each month, including: wages or other income from work before deductions, spousal/child support, retirement, social security, disability, unemployment, military basic allowance for quarters (BAQ), veterans payments, dividends, interest, trust income, annuities, net business or rental income, reimbursement for job-related expenses, gambling or lottery winnings, etc.

- (1) _____ \$ _____
(2) _____ \$ _____
(3) _____ \$ _____
(4) _____ \$ _____

b. Your total monthly income: \$ _____

9 Household Income

a. List the income of all other persons living in your home who depend in whole or in part on you for support, or on whom you depend in whole or in part for support.

Table with columns: Name, Age, Relationship, Gross Monthly Income. Rows (1) through (4) with blank lines for entry.

b. Total monthly income of persons above: \$ _____

Total monthly income and household income (8b plus 9b): \$ _____

10 Your Money and Property

a. Cash \$ _____

b. All financial accounts (List bank name and amount):

- (1) _____ \$ _____
(2) _____ \$ _____
(3) _____ \$ _____

c. Cars, boats, and other vehicles

Table with columns: Make / Year, Fair Market Value, How Much You Still Owe. Rows (1) through (3) with blank lines for entry.

d. Real estate

Table with columns: Address, Fair Market Value, How Much You Still Owe. Rows (1) through (2) with blank lines for entry.

e. Other personal property (jewelry, furniture, furs, stocks, bonds, etc.):

Table with columns: Describe, Fair Market Value, How Much You Still Owe. Rows (1) through (2) with blank lines for entry.

11 Your Monthly Deductions and Expenses

a. List any payroll deductions and the monthly amount below:

- (1) _____ \$ _____
(2) _____ \$ _____
(3) _____ \$ _____
(4) _____ \$ _____

b. Rent or house payment & maintenance \$ _____

c. Food and household supplies \$ _____

d. Utilities and telephone \$ _____

e. Clothing \$ _____

f. Laundry and cleaning \$ _____

g. Medical and dental expenses \$ _____

h. Insurance (life, health, accident, etc.) \$ _____

i. School, child care \$ _____

j. Child, spousal support (another marriage) \$ _____

k. Transportation, gas, auto repair and insurance \$ _____

l. Installment payments (list each below):

Table with columns: Paid to, How Much? Rows (1) through (3) with blank lines for entry.

m. Wages/earnings withheld by court order \$ _____

n. Any other monthly expenses (list each below):

Table with columns: Paid to, How Much? Rows (1) through (3) with blank lines for entry.

Total monthly expenses (add 11a - 11n above): \$ _____

To list any other facts you want the court to know, such as unusual medical expenses, etc., attach form MC-025 or attach a sheet of paper and write Financial Information and your name and case number at the top.

Check here if you attach another page.

Important! If your financial situation or ability to pay court fees improves, you must notify the court within five days on form FW-010.

Clerk stamps date here when form is filed.

DRAFT

Not approved by the judicial
Council

2018-01-25

This form must be used by a guardian or conservator, or by a petitioner for the appointment of a guardian or conservator, to request a waiver of court fees in the guardianship or conservatorship court proceeding or in any other civil action in which the guardian or conservator represents the interests of the ward or conservatee as a plaintiff or defendant.

If the ward or conservatee (including a proposed ward or conservatee if a petition for appointment of a guardian or conservator has been filed but has not yet been decided by the court) directly receives public benefits or is supported by public benefits received by another for his or her support, is a low-income person, or does not have enough income to pay for his or her household's basic needs and the court fees, you may use this form to ask the court to waive the court fees. The court may order you to answer questions about the finances of the ward or conservatee. If the court waives the fees, the ward or conservatee, his or her estate, or someone with a duty to support the ward or conservatee, may still have to pay later if:

- You cannot give the court proof of the ward's or conservatee's eligibility,
- The ward's or conservatee's financial situation improves during this case, or
- You settle the civil case on behalf of the ward or conservatee for **\$10,000** or more. The trial court that waives fees will have a lien on any such settlement in the amount of the waived fees and costs. The court may also charge the ward or conservatee, or his or her estate, any collection costs.

Fill in court name and street address:

Superior Court of California, County of

Fill in case number and name:

Case Number:**Case Name:****1 Your Information** (guardian or conservator, or person asking the court to appoint a guardian or conservator):

Name: _____ Phone: () - _____

Street or mailing address: _____

City: _____ State: ____ Zip: _____

2 Your Lawyer (if you have one): Name: _____

Firm or Affiliation: _____ State Bar No.: _____

Address: _____ Phone: () - _____

City: _____ State: ____ Zip: _____ E-mail: _____

a. The lawyer has agreed to advance all or a portion of court fees or costs (check one): Yes No

b. (If yes, your lawyer must sign here.) Lawyer's signature: _____

If your lawyer is not providing legal-aid type services based on your or the ward's or conservatee's low income, you may have to go to a hearing to explain why you are asking the court to waive the fees.

3 Ward's or Conservatee's Information (file a separate Request for each ward in a multiward case):

Name: _____ Age and date of birth (ward only): _____

Street or mailing address: _____

City: _____ State: ____ Zip: _____

Phone: () - _____

4 Ward's or Conservatee's Lawyer, if any: Name: _____

Firm or Affiliation: _____ State Bar No.: _____

Address: _____ Phone: () - _____

City: _____ State: ____ Zip: _____ E-mail: _____

5 Ward or Conservatee's Job (job title; if not employed, so state): _____

Name of employer: _____

Employer's address: _____ State: ____ Zip: _____



Name of (Proposed) Ward or Conservatee: _____

Case Number: _____

6 What court's fees or costs are you asking to be waived?

- Superior Court (See *Information Sheet on Waiver of Superior Court Fees and Costs* (form FW-001-INFO).)
- Supreme Court, Court of Appeal, or Appellate Division of Superior Court (See *Information Sheet on Waiver of Appellate Court Fees* (form APP-015/FW-015-INFO).)

7 Check here if you asked the court to waive court fees for this case in the last six months. (If your previous request is reasonably available, please attach it to this form and check here):

8 Why are you asking the court to waive the ward's or conservatee's court fees?

- a. The ward or one or both of the ward's parents, or the conservatee or the conservatee's spouse or registered domestic partner, receive (check all that apply):
- Supplemental Security Income (SSI) State Supplemental Payment (SSP) SNAP (Food Stamps)
 - IHSS (In-Home Supportive Services) CalWORKS or Tribal TANF Medi-Cal
 - County Relief/General Assistance CAPI (Cash Assistance Program for Aged, Blind, and Disabled)
- (Names and relationships to ward or conservatee of persons who receive the public benefits listed above):
- _____
- _____

b. The gross monthly income of the ward's or conservatee's household (before deductions for taxes) is less than the amount listed below. (If you check 8b, you **must** fill out items 14, 15, and 16 on page 4 of this form.)*

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	If more than 6 people at home, add \$450.00 for each extra person.
1	\$1,264.59	3	\$2,164.59	5	\$3,064.59	
2	\$1,714.59	4	\$2,614.59	6	\$3,514.59	

- c. The ward's or conservatee's household does not have enough income to pay for its basic needs and the court fees. I ask the court to (check one, and you **must** fill out items 14, 15, 16, 17, and 18 on page 4):*
- (i) Waive all court fees and costs.
 - (ii) Waive some court fees and costs.
 - (iii) Let the (proposed) guardian or conservator, on behalf of the (proposed) ward or conservatee, make payments over time.

* (Do not include income of guardian or conservator living in the household in 8b or 8c or count him or her in family size in 8b, unless he or she is a parent of the ward or the spouse or registered domestic partner of the conservatee.)

Guardians or petitioners for their appointment must complete items 9 and 10.

9 Ward's Estate: Person only, no estate. Inventory or petition estimated value:

Source (e.g., gift, inheritance, settlement, judgment, insurance): _____ Est. collection date: _____

10 Ward's Parents' Information:

a. Name of ward's father: _____ Deceased (date of death): _____
 Street or mailing address: _____
 City: _____ State: ____ Zip: _____
 Phone: () - _____

b. Name of ward's mother: _____ Deceased (date of death): _____
 Street or mailing address: _____
 City: _____ State: ____ Zip: _____
 Phone: () - _____

c. Ward's parents are (check all that apply): married living together separated divorced
 Support order for ward? No Yes Payable to (name): _____
 Payor (name): _____
 Court: _____ Case Number: _____
 Date of order (if multiple, date of latest): _____ Monthly amount: _____



Name of (Proposed) Ward or Conservatee: _____

Case Number: _____

Conservators or petitioners for their appointment must complete items 11–13.

11 Conservatee’s Estate: Person only, no estate.

Inventory or petition estimated value: _____ Est. collection date: _____

12 Conservatee’s Spouse’s or Registered Domestic Partner’s Information:

Name of conservatee’s spouse or registered domestic partner: _____ Spouse Partner

Date of marriage or partnership: _____ Deceased (*date of death*): _____

Street or mailing address: _____ Phone: (____) ____ - _____

City: _____ State: ____ Zip: _____

Name of employer (*if none, so state*): _____

Employer’s address: _____ State: ____ Zip: _____

The conservatee’s spouse or partner is is not managing, or following appointment of a conservator is planning to manage, some or all of the couple’s community property outside the conservatorship estate.

If you selected “is” above: The income, money, and property shown on page 4 includes does not include the income and property managed, or expected to be managed, by the spouse/partner outside the estate.

Divorced (*date of final judgment or decree*): _____

Court: _____

Case Number: _____ Support order for conservatee? No Yes

Date of support order (*if multiple, date of latest*): _____ Monthly amount: _____

13 The Conservatee and Trusts:

The conservatee:

a. Is Is not a trustor or settlor of a trust.

b. Is Is not a beneficiary of a trust.

If you selected “Is” to complete any of the above statements, identify and provide, in an attachment to this *Request*, the current address and telephone number of the current trustee(s) of each trust, describe the general terms of and value of each trust and the nature and value of the conservatee’s interest in each trust, and the amount(s) and frequency of any distributions to or for the benefit of the conservatee prior to your appointment as conservator of which you are aware. (*You may use Judicial Council form MC-025 for this purpose.*)

All applicants who checked item 8b or item 8c on page 2 must continue to and follow the instructions for completion of items 14–16 or items 14–18 on page 4, before signing below.

The information I have provided on this form and all attachments about the (proposed) ward or conservatee is true and correct to the best of my information and belief. The information I have provided on this form and all attachments concerning myself is true and correct. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

Print your name here

Sign here



Name of (Proposed) Ward or Conservatee:

Case Number:

If you checked 8a on page 2, do not fill out below. If you checked 8b, you must answer questions 14–16. If you checked 8c, you must answer questions 14–18. If you need more space, attach form MC-025 or attach a sheet of paper, and write "Financial Information" and the ward's or conservatee's name and case number at the top.

14 [] Check here if the ward's or conservatee's income changes a lot from month to month. If it does, complete the form based on his or her average income for the past 12 months.

15 Ward's or Conservatee's Gross Monthly Income

a. List the source and amount of any income the ward or conservatee gets each month, including: wages or other income from work before deductions, spousal/child support, retirement, social security, disability, unemployment, military basic allowance for quarters (BAQ), veterans payments, dividends, interest, trust income, annuities, net business or rental income, reimbursement for job-related expenses, gambling or lottery winnings, etc.

- (1) \$
(2) \$
(3) \$
(4) \$
(5) \$

b. Total monthly income: \$

16 Ward's or Conservatee's Household's Income

a. List the income of all other persons living in the ward's or conservatee's home who depend in whole or in part on him or her for support, or on whom he or she depends in whole or in part for support.

Table with columns: Name, Age, Relationship, Gross Monthly Income. Rows 1-10.

b. Total monthly income of persons above: \$

Total monthly income and household income (15b plus 16b): \$

17 Ward's or Conservatee's Household's Money and Property

a. Cash \$

b. All financial accounts (list bank name and amount):

- (1) \$
(2) \$
(3) \$

c. Cars, boats, and other vehicles

Table with columns: Make / Year, Fair Market Value, How Much You Still Owe. Rows 1-3.

d. Real estate

Table with columns: Address, Fair Market Value, How Much You Still Owe. Rows 1-2.

e. Other personal property (jewelry, furniture, furs, stocks, bonds, etc.):

Table with columns: Describe, Fair Market Value, How Much You Still Owe. Rows 1-2.

18 Ward's or Conservatee's Household's Monthly Deductions and Expenses

a. List any payroll deductions and the monthly amount below:

- (1) \$
(2) \$
(3) \$
(4) \$

b. Rent or house payment and maintenance \$

c. Food and household supplies \$

d. Utilities and telephone \$

e. Clothing \$

f. Laundry and cleaning \$

g. Medical and dental expenses \$

h. Insurance (life, health, accident, etc.) \$

i. School, child care \$

j. Child, spousal support (another marriage) \$

k. Transportation, gas, auto repair and insurance \$

l. Installment payments (list each below):

Table with columns: Paid to, How Much? Rows 1-3.

m. Wages/earnings withheld by court order \$

n. Any other monthly expenses (list each below):

Table with columns: Paid to, How Much? Rows 1-3.

Total monthly expenses (add 18a – 18n above): \$

To list any other facts you want the court to know, such as the (proposed) ward's or conservatee's unusual medical expenses, etc, attach form MC-025 or attach a sheet of paper and write "Financial Information" and the (proposed) ward's or conservatee's name and case number at the top.

Check here if you attach another page. []

Important! If the ward's or conservatee's financial situation or ability to pay court fees improves, you must notify the court within five days on form FW-010-GC.

Do not include income of guardian or conservator living in the household in item 16, his or her money and property in item 17, or his or her deductions and expenses in item 18 unless he or she is a parent of the ward or the spouse or registered domestic partner of the conservatee.

INFORMATION SHEET ON WAIVER OF APPELLATE COURT FEES (SUPREME COURT, COURT OF APPEAL, APPELLATE DIVISION)

If you file an appeal, a petition for a writ, or a petition for review in a civil case, such as a family law case or a case in which you sued someone or someone sued you, you must generally pay a filing fee to the court. If you are a party other than the party who filed the appeal or the petition, you must also generally pay a fee when you file your first document in a case in the Court of Appeal or Supreme Court. You and the other parties in the case may also have to pay other court fees in these proceedings, such as fees to prepare or get a copy of a clerk's transcript in an appeal. However, if you cannot afford to pay these court fees and costs, you may ask the court to issue an order saying you do not have to pay these fees (this is called "waiving" these fees).

1. Who can get their court fees waived? The court will waive your court fees and costs if:

- **You are getting public assistance**, such as Medi-Cal, Food Stamps, Supplemental Security Income (not Social Security), State Supplemental Payment, County Relief/General Assistance, In-Home Supportive Services, CalWORKS, Tribal Temporary Assistance for Needy Families, or Cash Assistance Program for Aged, Blind, and Disabled.
- **You have a low income level.** Under the law you are considered a low-income person if the gross monthly income (before deductions for taxes) of your household is less than the amount listed below:

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income
1	\$1,264.59	3	\$2,164.59	5	\$3,064.59
2	\$1,714.59	4	\$2,614.59	6	\$3,514.59

If more than 6 people at home, add \$450.00 for each extra person.

- **You do not have enough income to pay for your household's basic needs *and* your court fees .**

2. What fees and costs will the court waive? If you qualify for a fee waiver, the Supreme Court, Court of Appeal, or Appellate Division will waive the filing fee for the notice of appeal, a petition for a writ, a petition for review, or the first document filed by a party other than the party who filed the appeal or petition, and any court fee for participating in oral argument by telephone. The trial court will also waive costs related to the clerk's transcript on appeal, the fee for the court to hold in trust the deposit for a reporter's transcript on appeal under rule 8.130(b) or rule 8.834(b) of the California Rules of Court, and the fees for making a transcript or copy of an official electronic recording under rule 8.835. If you are the appellant (the person who is appealing the trial court decision), the fees waived include the deposit required under Government Code section 68926.1 and the costs for preparing and certifying the clerk's transcript and sending the original to the reviewing court and one copy to you. If you are the respondent (a party other than the appellant in a case that is being appealed), the fees waived include the costs for sending you a copy of the clerk's transcript. You can also ask the trial court to waive other necessary court fees and costs.

The court **cannot** waive the fees for preparing a reporter's transcript in a civil case. A special fund, called the Transcript Reimbursement Fund, may help pay for the transcript. (See <http://www.courtreportersboard.ca.gov/consumers/index.shtml#trf> and Business and Professions Code sections 8030.2 and following for more information about this fund.) If you are unable to pay the cost of a reporter's transcript, a record of the oral proceedings can be prepared in other ways, by preparing an agreed statement or, in some circumstances, a statement on appeal or settled statement.

3. How do I ask the court to waive my fees?

- **Appeal in Limited Civil Case (civil case in which the amount of money claimed is \$25,000 or less).** In a limited civil case, if the trial court already issued an order waiving your court fees *and that fee waiver has not ended* (fee waivers automatically end 60 days after the judgment), the fees and costs identified in item 2 above are already waived; just give the court a copy of your current fee waiver. If you do not already have an order waiving your fees or you had a fee waiver but it has ended, you must complete and file a *Request to Waive Court Fees* (form FW-001). If you are the appellant (the party who is appealing), you should check both boxes in item 4 on FW-001 and file the completed form with your notice of appeal. If you are the respondent (a party other than the appellant in a case that is being appealed), the completed form should be filed in the court when the fees you are requesting to be waived, such as the fee for the clerk's transcript or telephonic oral argument, are due.

- **Writ Proceeding in Limited Civil Case (civil case in which the amount of money claimed is \$25,000 or less).** If you want the Superior Court to waive the fees in a writ proceeding in a limited civil case, you must complete a *Request to Waive Court Fees* (form FW-001). In item 4 on FW-001, check the second box. The completed form should be filed with your petition for a writ.
- **If You Are a Guardian or Conservator.** If you are a guardian or conservator or a petitioner for the appointment of a guardian or conservator, special rules apply to your request for a fee waiver on an appeal from an order in the guardianship or conservatorship proceeding or in a civil action in which you are a party acting on behalf of your ward or conservatee. Complete and submit a *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC) to request a fee waiver. See California Rules of Court, rule 7.5.
- **Appeal in Other Civil Cases.** If you want the court to waive fees and costs in an appeal in a civil case other than a limited civil case, such as a family law case or an unlimited civil case (a civil case in which the amount of money claimed is more than \$25,000), you must complete a *Request to Waive Court Fees* (form FW-001). In item 4 on FW-001, check the second box to ask the Court of Appeal to waive the fee for filing the notice of appeal or, if you are a respondent (a party other than the one who filed the appeal), the fee for the first document you file in the Court of Appeal. Check both boxes if you also want the trial court to waive your costs for the clerk's transcript (if the trial court already issued an order waiving your fees *and that fee waiver has not ended*, you do not need to check the first box; the fees and costs identified in item 2 above are already waived, just give the court a copy of your current fee waiver). If you are the appellant, the completed form should be submitted with your notice of appeal (if you check both boxes in item 4, the court may ask for two signed copies of this form). If you are the respondent, the completed form should be submitted at the time the fee you are asking the court to waive is due. For example, file the form in the trial court with your request for a copy of the clerk's transcript if you are asking the court to waive the transcript fee or file the form in the Court of Appeal with the first document you file in that court if you are asking the court to waive the fee for filing that document. To request waiver of a court fee for telephonic oral argument, you should file the completed form in the Court of Appeal when the fee for telephonic oral argument is due.
- **Writ Proceeding in Other Civil Cases.** If you want the Supreme Court or Court of Appeal to waive the fees and costs in a writ proceeding in a civil case other than a limited civil case, such as a family law case or an unlimited civil case (a civil case in which the amount of money claimed is more than \$25,000), you must complete a *Request to Waive Court Fees* (form FW-001). If you are the petitioner (the party filing the petition), the completed form should be submitted with your petition for a writ in the Supreme Court or Court of Appeal clerk's office. If you are a party other than the petitioner, the completed form should be filed with first document you file in the Supreme Court or Court of Appeal.
- **Petition for Review.** If you want to request that the Supreme Court waive the fees in a petition for review proceeding, you must complete a *Request to Waive Court Fees* (form FW-001) or a *Request to Waive Court Fees (Ward or Conservatee)* (form FW-001-GC). If you are the petitioner, you should submit the completed form with your petition for review. If you are a party other than the petitioner, the completed form should be filed with first document you file in the Supreme Court.

IMPORTANT INFORMATION!

- **Fill out your request completely and truthfully.** When you sign your request for a fee waiver, you are declaring under penalty of perjury that the information you have provided is true and correct.
- **The court may ask you for information and evidence.** You may be ordered to go to court to answer questions about your ability to pay court fees and costs and to provide proof of eligibility. Any initial fee waiver you are granted may be ended if you do not go to court when asked. You may be ordered to repay amounts that were waived if the court finds you were not eligible for the fee waiver.
- **If you receive a fee waiver, you must tell the court if there is a change in your finances.** You must tell the court immediately if your finances improve or if you become able to pay court fees or costs during this case (file form FW-010 with the court). You may be ordered to repay any amounts that were waived after your eligibility ended. If the trial court waived your fees and costs and you settle your case for \$10,000 or more, the trial court will have a lien on the settlement in the amount of the waived fees.
- **The fee waiver ends.** The fee waiver expires 60 days after the judgment, dismissal, or other final disposition of the case or when the court finds that you are not eligible for a fee waiver.

ATTORNEY OR PARTY WITHOUT ATTORNEY STATE BAR NO.: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (name):	FOR COURT USE ONLY DRAFT Not approved by the Judicial Council 2018-01-25
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILDREN'S NAMES:	
FINANCIAL DECLARATION—JUVENILE DEPENDENCY	
CASE NUMBER:	

1. Personal Information:

Name:		Social Security Number:	
Other names used:			
I.D. or Driver's License Number:		Date of Birth:	Age:
Relationship to Child: <input type="checkbox"/> Mother <input type="checkbox"/> Father <input type="checkbox"/> Other Responsible Person (specify):			
Street or Mailing Address:			
City:	State:	Zip:	Phone: (____) ____-____ Alternate Phone: (____) ____-____
Marital Status: <input type="checkbox"/> Married <input type="checkbox"/> Single <input type="checkbox"/> Domestic partner <input type="checkbox"/> Separated <input type="checkbox"/> Divorced <input type="checkbox"/> Widowed			
Name of Spouse/Partner:		Number of dependents living with you:	
Names and ages of dependents:			

2. I receive (check all that apply): Medi-Cal SNAP (food stamps) SSI SSP
 County Relief/General Assistance CalWORKS or Tribal TANF (Temporary Assistance to Needy Families)
 IHSS (In-Home Supportive Services) CAPI (Case Assistance Program for Aged, Blind, and Disabled)

3. My gross monthly household income (before deductions for taxes) is less than the amount listed below:

Family Size	Family Income	Family Size	Family Income	Family Size	Family Income	If more than 6 people at home, add \$450.00 for each extra person.
1	\$1,264.59	3	\$2,164.59	5	\$3,064.59	
2	\$1,714.59	4	\$2,614.59	6	\$3,514.59	

4. I have been reunified with my child(ren) under a court order (attached).

5. I am receiving court-ordered reunification services.

CHILDREN'S NAMES:	CASE NUMBER:
RESPONSIBLE PERSON'S NAME:	

6. Employment:

Your Employment				Your Spouse/Partner's Employment			
Employer:				Employer:			
Address:				Address:			
City and Zip Code:		Phone: () -		City and Zip Code:		Phone: () -	
Type of Job:				Type of Job:			
How long employed:	Working now?	Monthly salary:	Take home pay:	How long employed:	Working now?	Monthly salary:	Take home pay:
If not now employed, who was your last employer? <i>(Name, Address, City, and Zip Code):</i>				If not now employed, who was this person's last employer? <i>(Name, Address, City, and Zip Code):</i>			
Phone number of last employer: () -				Phone number of last employer: () -			

7. Other Monthly Income and Assets:

Other Income	Assets: What Do You Own?
Unemployment\$	Cash \$
Disability \$	Real Property/Equity \$
Social Security \$	Cars and Other Vehicles \$
Workers' Compensation \$	Life Insurance \$
Child Support Payments \$	Bank Accounts (<i>list below</i>)..... \$
Foster Care Payments\$	Stocks and Bonds \$
Other Income \$	Business Interest \$
Total \$	Other Assets \$
	Total \$
	Name and branch of bank:
	Account numbers:

CHILDREN'S NAMES:	CASE NUMBER:
RESPONSIBLE PERSON'S NAME:	

8. Expenses:

Monthly Household Expenses	Reunification Plan: Monthly Cost of Required Services
Rent or Mortgage Payment \$	Parenting Classes \$
Car Payment \$	Substance Abuse Treatment \$
Gas and Car Insurance \$	Therapy/Counseling \$
Public Transportation \$	Medical Care/Medications \$
Utilities (Gas, Electric, Phone, Water, etc.)... \$	Domestic Violence Counseling \$
Food \$	Batterers' Intervention \$
Clothing and Laundry \$	Victim Support \$
Child Care \$	Regional Center Programs \$
Child Support Payments \$	Transportation \$
Medical Payments \$	In-Home Services \$
Other Necessary Monthly Expenses	Other \$
Total \$	Total \$

9. Loan/Expense Payments (other than mortgage or car loan):

Name of lender and type of loan/expense	Monthly payment	Balance owed
	\$	\$
	\$	\$
	\$	\$
	\$	\$

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

Date:

_____ (TYPE OR PRINT NAME)

▶ _____ (SIGNATURE OF DECLARANT)

FOR FINANCIAL EVALUATION OFFICER USE ONLY

TOTAL INCOME	\$	COST OF LEGAL SERVICES	\$
TOTAL EXPENSES	\$	MONTHLY PAYMENT	\$
NET DISPOSABLE INCOME	\$	TOTAL COST ASSESSED	\$

The above-named responsible person is presumed unable to pay reimbursement for the cost of legal services in this proceeding and is eligible for a waiver of liability because

- he or she receives qualifying public benefits
- his or her household income falls below 125% of the current federal poverty guidelines
- he or she has been reunified with the child(ren) under a court order and payment of reimbursement would harm his or her ability to support the child(ren).

Date:

_____ (TYPE OR PRINT NAME)

▶ _____ (SIGNATURE OF FINANCIAL EVALUATION OFFICER)

• **Confidential Submissions**—To submit an application with confidential information that you do not wish to be made publicly available, submit your application only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states “THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.” The Agency will review this copy, including the claimed confidential information, in its consideration of your application. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on <https://www.regulations.gov>. Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your application and you must identify this information as “confidential.” Any information marked as “confidential” will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA’s posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: <https://www.gpo.gov/fdsys/pkg/FR-2015-09-18/pdf/2015-23389.pdf>.

Docket: For access to the docket, go to <https://www.regulations.gov> and insert the docket number, found in brackets in the heading of this document, into the “Search” box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852 between 9 a.m. and 4 p.m., Monday through Friday. Publicly available submissions may be seen in the docket.

FOR FURTHER INFORMATION CONTACT: Julie Finegan, Office of Scientific Integrity, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 1, Rm. 4218, Silver Spring, MD 20993, 301-796-8618.

SUPPLEMENTARY INFORMATION:

I. Background

On June 24, 2013, the U. S. District Court for the Eastern District of Tennessee entered a criminal judgment against William Ralph Kincaid pursuant to his guilty plea. Kincaid pled guilty to a felony under the FD&C Act, namely receiving in interstate commerce a misbranded drug with intent to defraud or mislead, in violation of sections 301(c) and 303(a)(2) of the FD&C Act (21 U.S.C. 331(c) and 333(a)(2)) and 18 U.S.C. 2. The basis for this conviction

was Kincaid’s admission that he obtained drugs from Quality Specialty Products (QSP), a foreign company, for use at East Tennessee Hematology-Oncology Associates, P.C. (McLeod Cancer). These drugs were not FDA approved and were misbranded in that they lacked adequate directions for use and were manufactured in an establishment that was not registered with FDA and that did not list with FDA the drug products it manufactured. From approximately September 2007 to early 2008 and from August 2009 to February 2012, McLeod Cancer purchased more than \$2 million in misbranded unapproved drugs for use at McLeod Cancer. Additionally, Kincaid and McLeod Cancer billed Medicare, TennCare, and other government health benefit programs approximately \$2.5 million for these unapproved drugs.

Kincaid is subject to debarment based on a finding, under section 306(a)(2) of the FD&C Act (21 U.S.C. 335a(a)(2)), that he was convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the FD&C Act. By the letter dated May 20, 2015, FDA notified Kincaid of a proposal to permanently debar him from providing services in any capacity to a person having an approved or pending drug product application. The proposal also offered Kincaid an opportunity to request a hearing, providing him 30 days from the date of receipt of the letter in which to file the request and 60 days from the date of receipt of the letter to support that request with information sufficient to justify a hearing. In a letter dated June 17, 2015, Kincaid requested a hearing and indicated that the information justifying the hearing would be forthcoming. More than 60 days have passed from the date Kincaid received FDA’s letter, and Kincaid has not filed any additional information to support his request.

Under the authority delegated to him by the Commissioner of Food and Drugs, the Director of the Office of Scientific Integrity (OSI) has considered Kincaid’s request for a hearing. Hearings will not be granted on issues of policy or law, on mere allegations, denials, or general descriptions of positions and contentions, or on data and information insufficient to justify the factual determination urged (see 21 CFR 21.24(b)).

Because Kincaid has not presented any information to support his hearing request, OSI concludes that Kincaid failed to raise a genuine and substantial issue of fact requiring a hearing. Therefore, OSI denies Kincaid’s request for a hearing.

II. Findings and Order

Therefore, OSI, under section 306(a)(2) of the FD&C Act and under the authority delegated, finds that William Ralph Kincaid has been convicted of a felony under Federal law for conduct relating to the regulation of a drug product under the FD&C Act.

As a result of the foregoing findings, William Ralph Kincaid is permanently debarred from providing services in any capacity to a person with an approved or pending drug product application under section 505, 512, or 802 of the FD&C Act (21 U.S.C. 355, 360b, or 382), or under section 351 of the Public Health Service Act (42 U.S.C. 262), effective (see **DATES**) (21 U.S.C. 335a(c)(1)(B) and (c)(2)(A)(ii) and 21 U.S.C. 321(dd)). Any person with an approved or pending drug product application who knowingly uses the services of Kincaid, in any capacity during his period of debarment, will be subject to civil money penalties. See section 307(a)(6) of the FD&C Act (21 U.S.C. 335b(a)(6)). If Kincaid, during his period of debarment, provides services in any capacity to a person with an approved or pending drug product application, he will be subject to civil money penalties. See section 307(a)(7) of the FD&C Act (21 U.S.C. 335b(a)(7)). In addition, FDA will not accept or review any abbreviated new drug applications submitted by or with the assistance of Kincaid during his period of debarment.

Dated: January 10, 2018.

G. Matthew Warren,

Director, Office of Scientific Integrity.

[FR Doc. 2018-00719 Filed 1-17-18; 8:45 am]

BILLING CODE 4164-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Annual Update of the HHS Poverty Guidelines

AGENCY: Department of Health and Human Services.

ACTION: Notice.

SUMMARY: This notice provides an update of the Department of Health and Human Services (HHS) poverty guidelines to account for last calendar year’s increase in prices as measured by the Consumer Price Index.

DATES: Applicable beginning January 13, 2018, unless an office administering a program using the guidelines specifies a different applicability date for that particular program.

ADDRESSES: Office of the Assistant Secretary for Planning and Evaluation, Room 404E, Humphrey Building, Department of Health and Human Services, Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: For information about how the guidelines are used or how income is defined in a particular program, contact the Federal, state, or local office that is responsible for that program. For information about poverty figures for immigration forms, the Hill-Burton Uncompensated Services Program, and the number of people in poverty, use the specific telephone numbers and addresses given below.

For general questions about the poverty guidelines themselves, contact Kendall Swenson, Office of the Assistant Secretary for Planning and Evaluation, Room 422F.5, Humphrey Building, Department of Health and Human Services, Washington, DC 20201—telephone: (202) 690-7409—or visit <http://aspe.hhs.gov/poverty/>.

For information about the percentage multiple of the poverty guidelines to be used on immigration forms such as USCIS Form I-864, Affidavit of Support, contact U.S. Citizenship and Immigration Services at 1-800-375-5283.

For information about the Hill-Burton Uncompensated Services Program (free or reduced-fee health care services at certain hospitals and other facilities for persons meeting eligibility criteria involving the poverty guidelines), contact the Health Resources and Services Administration Information Center at 1-800-275-4772. You also may visit <https://www.hrsa.gov/get-health-care/affordable/hill-burton/index.html>.

For information about the number of people in poverty, visit the Poverty section of the Census Bureau's website at <https://www.census.gov/topics/income-poverty/poverty.html> or contact the Census Bureau's Customer Service Center at 1-800-923-8282 (toll-free) or visit <https://ask.census.gov> for further information.

SUPPLEMENTARY INFORMATION:

Background

Section 673(2) of the Omnibus Budget Reconciliation Act (OBRA) of 1981 (42 U.S.C. 9902(2)) requires the Secretary of the Department of Health and Human Services to update the poverty guidelines at least annually, adjusting them on the basis of the Consumer Price Index for All Urban Consumers (CPI-U). The poverty guidelines are used as an eligibility criterion by Medicaid and a number of other Federal programs. The

poverty guidelines issued here are a simplified version of the poverty thresholds that the Census Bureau uses to prepare its estimates of the number of individuals and families in poverty.

As required by law, this update is accomplished by increasing the latest published Census Bureau poverty thresholds by the relevant percentage change in the Consumer Price Index for All Urban Consumers (CPI-U). The guidelines in this 2018 notice reflect the 2.1 percent price increase between calendar years 2016 and 2017. After this inflation adjustment, the guidelines are rounded and adjusted to standardize the differences between family sizes. In rare circumstances, the rounding and standardizing adjustments in the formula result in small decreases in the poverty guidelines for some household sizes even when the inflation factor is not negative. In cases where the year-to-year change in inflation is not negative and the rounding and standardizing adjustments in the formula result in reductions to the guidelines from the previous year for some household sizes, the guidelines for the affected household sizes are fixed at the prior year's guidelines. As in prior years, these 2018 guidelines are roughly equal to the poverty thresholds for calendar year 2017 which the Census Bureau expects to publish in final form in September 2018.

The poverty guidelines continue to be derived from the Census Bureau's current official poverty thresholds; they are not derived from the Census Bureau's Supplemental Poverty Measure (SPM).

The following guideline figures represent annual income.

2018 POVERTY GUIDELINES FOR THE 48 CONTIGUOUS STATES AND THE DISTRICT OF COLUMBIA

Persons in family/household	Poverty guideline
1	\$12,140
2	16,460
3	20,780
4	25,100
5	29,420
6	33,740
7	38,060
8	42,380

For families/households with more than 8 persons, add \$4,320 for each additional person.

2018 POVERTY GUIDELINES FOR ALASKA

Persons in family/household	Poverty guideline
1	\$15,180
2	20,580
3	25,980
4	31,380
5	36,780
6	42,180
7	47,580
8	52,980

For families/households with more than 8 persons, add \$5,400 for each additional person.

2018 POVERTY GUIDELINES FOR HAWAII

Persons in family/household	Poverty guideline
1	\$13,960
2	18,930
3	23,900
4	28,870
5	33,840
6	38,810
7	43,780
8	48,750

For families/households with more than 8 persons, add \$4,970 for each additional person.

Separate poverty guideline figures for Alaska and Hawaii reflect Office of Economic Opportunity administrative practice beginning in the 1966-1970 period. (Note that the Census Bureau poverty thresholds—the version of the poverty measure used for statistical purposes—have never had separate figures for Alaska and Hawaii.) The poverty guidelines are not defined for Puerto Rico or other outlying jurisdictions. In cases in which a Federal program using the poverty guidelines serves any of those jurisdictions, the Federal office that administers the program is generally responsible for deciding whether to use the contiguous-states-and-DC guidelines for those jurisdictions or to follow some other procedure.

Due to confusing legislative language dating back to 1972, the poverty guidelines sometimes have been mistakenly referred to as the "OMB" (Office of Management and Budget) poverty guidelines or poverty line. In fact, OMB has never issued the guidelines; the guidelines are issued each year by the Department of Health and Human Services. The poverty guidelines may be formally referenced as "the poverty guidelines updated periodically in the Federal Register by

the U.S. Department of Health and Human Services under the authority of 42 U.S.C. 9902(2).”

Some federal programs use a percentage multiple of the guidelines (for example, 125 percent or 185 percent of the guidelines), as noted in relevant authorizing legislation or program regulations. Non-Federal organizations that use the poverty guidelines under their own authority in non-Federally-funded activities also may choose to use a percentage multiple of the guidelines.

The poverty guidelines do not make a distinction between farm and non-farm families, or between aged and non-aged units. (Only the Census Bureau poverty thresholds have separate figures for aged and non-aged one-person and two-person units.)

Note that this notice does not provide definitions of such terms as “income” or “family,” because there is considerable variation in defining these terms among the different programs that use the guidelines. These variations are traceable to the different laws and regulations that govern the various programs. This means that questions such as “Is income counted before or after taxes?”, “Should a particular type of income be counted?”, and “Should a particular person be counted as a member of the family/household?” are actually questions about how a specific program applies the poverty guidelines. All such questions about how a specific program applies the guidelines should be directed to the entity that administers or funds the program, since that entity has the responsibility for defining such terms as “income” or “family,” to the extent that these terms are not already defined for the program in legislation or regulations.

Dated: January 12, 2018.

Eric D. Hargan,

Acting Secretary of Health and Human Services.

[FR Doc. 2018-00814 Filed 1-12-18; 4:15 pm]

BILLING CODE 4150-05-P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Automated Commercial Environment (ACE) Becoming the Sole CBP-Authorized Electronic Data Interchange (EDI) System for Processing Electronic Drawback Filings

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: General notice.

SUMMARY: This document announces that the Automated Commercial Environment (ACE) will be the sole electronic data interchange (EDI) system authorized by U.S. Customs and Border Protection (CBP) for processing electronic drawback filings under part 181 (NAFTA drawback) and part 191 (non-TFTEA drawback) of Title 19 of the Code of Federal Regulations. This document also announces that the Automated Commercial System (ACS) will no longer be a CBP-authorized EDI system for purposes of processing such filings. This notice further announces the deployment of a new ACE filing code for all electronic drawback filings, replacing the six distinct drawback codes previously filed in ACS.

DATES: As of February 24, 2018, ACE will be the sole CBP-authorized EDI system for processing drawback filings under part 181 (NAFTA drawback) and part 191 (non-TFTEA drawback) of Title 19 of the Code of Federal Regulations, and ACS will no longer be a CBP-authorized EDI system for such purpose.

FOR FURTHER INFORMATION CONTACT: Randy Mitchell, Commercial Operations and Entry Division, Trade Policy and Programs, Office of Trade at (202) 863-6532 or RANDY.MITCHELL@CBP.DHS.GOV.

SUPPLEMENTARY INFORMATION:

I. Background

Section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), establishes the requirement for importers of record to make entry for merchandise to be imported into the customs territory of the United States. Customs entry information is used by U.S. Customs and Border Protection (CBP) and Partner Government Agencies (PGAs) to determine whether merchandise may be released from CBP custody. Importers of record are also obligated to complete the entry by filing an entry summary declaring the value, classification, rate of duty applicable to the merchandise and such other information as is necessary for CBP to properly assess duties, collect accurate statistics and determine whether any other applicable requirement of law is met.

The customs entry requirements were amended by Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057, December 8, 1993), commonly known as the Customs Modernization Act, or Mod Act. In particular, section 637 of the Mod Act amended section 484(a)(1)(A) of the

Tariff Act of 1930 (19 U.S.C. 1484(a)(1)(A)) by revising the requirement to make and complete customs entry by submitting documentation to CBP to allow, in the alternative, the electronic transmission of such entry information pursuant to a CBP-authorized electronic data interchange (EDI) system. CBP created the Automated Commercial System (ACS) to track, control, and process all commercial goods imported into the United States. CBP established the specific requirements and procedures for the electronic filing of entry and entry summary data for imported merchandise through the Automated Broker Interface (ABI) to ACS.

II. Transition Into the Automated Commercial Environment

In an effort to modernize the business processes essential to securing U.S. borders, facilitating the flow of legitimate shipments, and targeting illicit goods pursuant to the Mod Act and the Security and Accountability for Every (SAFE) Port Act of 2006 (Pub. L. 109-347, 120 Stat. 1884), CBP developed the Automated Commercial Environment (ACE) to eventually replace ACS as the CBP-authorized EDI system. Over the last several years, CBP has tested ACE and provided significant public outreach to ensure that the trade community is fully aware of the transition from ACS to ACE.

On October 13, 2015, CBP published an Interim Final Rule in the **Federal Register** (80 FR 61278) that designated ACE as a CBP-authorized EDI system. The designation of ACE as a CBP-authorized EDI system was effective November 1, 2015. In the Interim Final Rule, CBP stated that ACS would be phased out and anticipated that ACS would no longer be supported for entry and entry summary filing. Filers were encouraged to adjust their business practices so that they would be prepared when ACS was decommissioned.

CBP developed a staggered transition strategy for decommissioning ACS. The phases of the transition were announced in several **Federal Register** notices. See 81 FR 10264 (February 29, 2016); 81 FR 30320 (May 16, 2016); 81 FR 32339 (May 23, 2016); 82 FR 38924 (August 16, 2017); and 82 FR 51852 (November 8, 2017). This notice announces another transition as the processing of electronic drawback filings under parts 181 and 191 of title 19 of the Code of Federal Regulations (CFR) is transitioning into ACE.

Computation Sheet

Number in Family	2017 Federal Poverty Guidelines (A)	125% of Poverty Guidelines (B) (B = A x 125%)	2017 California Monthly Income (C) (C = B / 12)*
1	\$12,140.00	\$15,175.00	\$1,264.59
2	16,460.00	20,575.00	1,714.59
3	20,780.00	25,975.00	2,164.59
4	25,100.00	31,375.00	2,614.59
5	29,420.00	36,775.00	3,064.59
6	33,740.00	42,175.00	3,514.59
7	38,060.00	47,575.00	3,964.59
8	42,380.00	52,975.00	4,414.59
For each additional person, add:	4,320.00	5,400.00	450.00

*These amounts have been rounded up to the nearest whole cent. Language on the forms reflects this slight excess by stating that the household income is “less than” the amounts in the chart.