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, May 1, 2018
Time:	12:10 a.m.- 1:10 p.m.
Location:	Conference Call
Public Call-In Number	1-877-820-7831/Guest Passcode: 8254930 (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

CALIFORNIA CIVIL JURY INSTRUCTIONS (CACI)

Item 01

Jury Instructions: New, Revised, and Revoked Civil Jury Instructions and Verdict Forms (Release 32) (Judicial Council of California Civil Jury Instructions (CACI)) (Action required – recommend Judicial Council action)

Presenter: Bruce Greenlee

Item 02

Jury Instructions: Approve Additions and Revisions to Civil Jury Instructions (Action required – RUPRO action only)

Presenter: Bruce Greenlee

CIVIL

Item 03

Civil Forms: Enforcement of Judgment Exemption (revise form EJ-155) (Action required – recommend for Judicial Council action)

Presenters: Anne M. Ronan

Item 04

Civil Forms: Name Change and Gender Change Forms (revise forms NC-100, NC-110, NC-130, NC-130G, NC-200, NC-230, NC-300, and NC-330; adopt forms NC-125/NC-225, NC-500, and NC-520; approve forms NC-100-INFO, NC-150, and NC-500-INFO; and revoke forms NC-210/NC-310, NC-220, and NC-320)

Presenters: Anne M. Ronan

CRIMINAL

Item 05

Form: Technical Change (revise form CR-101, Plea Form with Explanations and Waiver of Rights – Felony) (Action required – recommend for Judicial Council action)

Presenter: Eve Hershcopf

FAMILY AND JUVENILE

Item 06

Juvenile Law: Sealing of and Access to Records (adopt rule 5.850; amend rules 5.552 and 5.840; approve forms JV-597 and JV-598; revise forms JV-590, JV-595-INFO, JV-596, and JV-596-INFO) (Action required – recommend for Judicial Council action)

Presenter: Tracy Kenny

Item 07

Juvenile Law: Presumptive Transfer of Specialty Mental Health Services (adopt rule 5.647; adopt forms JV-214, JV-214(A), JV-214-INFO, and JV-215; renumber JV-215 as JV-212) (Action required – recommend for Judicial Council action)

Presenter: Daniel Richardson

Item 10 (Out of order)

Juvenile Law: Advisements to Parents (revise forms JV-600 and JV-625) (Action required – recommend for Judicial Council action)

Presenter: Corby Sturges

MISCELLANEOUS

Item 08

Rules and Forms: Technical Amendments (revise forms CR-112/JV-792, MC-012, JV-216, JV-750, TH-100, TH-110, TH-120, TH-130, TH-140, TH-190, TH-200, and TH-210) (Action required – recommend Judicial Council action)

Presenter: Heather Anderson

Item 09

Forms: Technical Changes—Redesignate and Renumber 41 Miscellaneous (MC) Forms and Amend One Rule of Court (redesignate and renumber forms CR-174, MC-001, MC-002, MC-003, MC-060, MC-070, MC-095, MC-100, MC-101, MC-210, MC-265, MC-270, MC-275, MC-280, MC-281, MC-300, MC-301 (and foreign language versions), MC-305, MC-306, MC-310, MC-315, MC-360, MC-360A, MC-361, MC-361A, MC-362, MC-362A, MC-400, MC-600, MC-601, MC-602, MC-603, MC-700, MC-701, MC-702, MC-703, MC-704, MC-950, MC-955, MC-956, and MC-958; and amend rule 3.36) (Action required – recommend Judicial Council action)

Presenter: Bruce Greenlee and Patrick O'Donnell

III. ADJOURNMENT

Adjourn

Item number: 01

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: May 1, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Recommend to Judicial Council That It Approve Publication of Legally Significant Additions and Revisions (Action Required)

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

Staff contact (name, phone and e-mail): Bruce Greenlee, Attorney, Legal Services 415-865-7698 bruce.greenlee@jud.ca.gov

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

If requesting July 1 or out of cycle, explain:
Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. Jury instructions are currently revised twice a year, and more often if necessary. Release 32 is the first CACI release for 2018. Release 31 was approved by the Judicial Council November 2017.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In addition to recommending approval of 33 new, revised, and revoked CACI instructions and verdict forms to the council, the advisory committee also requests that RUPRO give final approval to 54 revised CACI instructions under the provisions of the guidelines adopted on December 19, 2006 regarding Jury Instructions Corrections and Technical and Minor Substantive Changes.

JUDICIAL COUNCIL OF CALIFORNIA

455 Golden Gate Avenue · San Francisco, California 94102-3688
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REPORT TO THE JUDICIAL COUNCIL

For business meeting on May 24, 2018

Title
Jury Instructions: New, Revised, and Revoked Civil Jury Instructions and Verdict Forms (Release 32)

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

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

Agenda Item Type
Action Required

Effective Date
May 25, 2018

Date of Report
April 17, 2018

Contact
Bruce Greenlee, 415 865-7698
bruce.greenlee@jud.ca.gov

Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the new, revised, and revoked civil jury instructions and verdict forms prepared by the committee. These revisions bring the instructions up to date with developments in the law over the previous six months. On Judicial Council approval, the instructions will be published in the official 2018 midyear supplement to the 2018 edition of the *Judicial Council of California Civil Jury Instructions* (*CACI*).

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective May 25, 2018, approve for publication the following civil jury instructions and verdict forms prepared by the committee:

1. Revisions to 24 instructions and verdict forms: CACI Nos. 206, 430, 435, 470, 1004, 1005, 1500, 1503, VF-1500, 1730, 1731, 1802, 2021, 2521A, 2521B, 2521C, 2522A, 2522B, 2522C, 2620, 2800, 3244, 4208, and 4605;

2. Addition of 8 new instructions: CACI Nos. 2630, 2740, 2741, 2742, 2743, and 5022, and a new series on the California False Claims Act (CACI Nos. 4800 and 4801); and

3. Revocation of CACI No. 4010.

A table of contents and the proposed new, revised, and renumbered civil jury instructions and verdict forms are attached at pages 143–262.

Relevant Previous Council Action

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

This is the 32nd release of *CACI*. The council approved *CACI* release 31 at its November 2017 meeting.

Analysis/Rationale

A total of 33 instructions and verdict forms are presented in this release. The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 54 additional instructions under a delegation of authority from the council to RUPRO.[2]

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

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

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

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

New series: California False Claims Act

Several committee members, including a trial judge and an attorney, have expressed a need for jury instructions on the California False Claims Act (the Act). The Act provides that a public entity that has paid a claim may recover as damages three times the amount of its payment for the claim if the claim was false or fraudulent (as defined).[3]

The committee now proposes this new series consisting of only two instructions:[4]

- CACI No. 4800, *False Claims Act—Essential Factual Elements*
- CACI No. 4801, *Implied Certification of Compliance With All Contractual Provisions—Essential Factual Elements*

Implied certification proved to be a particularly difficult topic. The rule is that when a contractor submits a claim for payment, it impliedly certifies that it has complied with all of the terms of its contract on which the claim for payment is being made.[5] The concern, expressed by several committee members, is that the rule potentially can turn any breach of contract into a false claim resulting in treble damages.

To limit the scope of the rule there is a materiality requirement: a contractual breach is material if it has the "natural tendency to influence agency action or is capable of influencing agency action."[6] In other words, the agency would not have paid the claim had it known about the breach.

A recent United States Supreme Court case, *Universal Health Services v. United States ex rel. Escobar* (*Escobar*),[7] construing the federal False Claims Act cautions that materiality cannot be found if the breach of contract is minor or insubstantial.[8] There are other possible applications of *Escobar* that could make the materiality requirement more restrictive than that presented in the proposed CACI No. 4801. Several commenters argued that the committee should revise No. 4801 to conform to *Escobar*. The committee declined the invitation at this time because *Escobar* does not construe California law. However, the committee did add two excerpts from *Escobar* to the Sources and Authority.

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[3] Gov. Code, § 12651(a).

[4] The issue of whether there should be a minimum number of instructions to justify a new series is one that the committee has pondered from time to time. With this proposal, the committee is confirming that two is enough. The committee notes that the Equitable Indemnity series (CACI No. 3800 et seq.) has only two instructions. Whether one is enough will await another day.

[5] *San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 441.

[6] *Id.* at p. 454 [claim for costs of transporting students to and from school could be false based on contractor's failure to provide safe buses in breach of both the contract and legal requirements].

[7] (2016) __ U.S. __ [136 S.Ct. 1989, 195 L.Ed.2d 348].

[8] *Id.*, 136 S.Ct. at p. 2003.

New subseries: Equal Pay Act

Over a year ago, the committee received an inquiry from the Jury Instructions Subcommittee of the Pay Equity Task Force of the California Commission on the Status of Women and Girls concerning drafting jury instructions for the California Fair Pay Act, effective January 1, 2016, which made major revisions to the California Equal Pay Act.[9] The subcommittee was interested in developing jury instructions themselves and reached out to the committee for expertise. The committee proposed a joint drafting effort, which was agreed to in principle. When after a year the joint effort had still not come to fruition, the committee proceeded on its own.

The committee now proposes an addition to the Labor Code Actions series (CACI No. 2700 et seq.) consisting of four new instructions:

- CACI No. 2740, *Violation of Equal Pay Act—Essential Factual Elements*
- CACI No. 2741, *Affirmative Defense—Different Pay Justified*
- CACI No. 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity*
- CACI No. 2743, *Equal Pay Act—Retaliation—Essential Factual Elements*

The committee received a large number of comments on the proposed new instructions, both from members of equal-pay advocate organizations and from employer representatives. Several issues were raised in the comments that the committee decided were unresolved. Among these are whether a single age-, race-, or ethnicity-based discrepancy between the pay of two employees is sufficient to constitute a violation, or whether a pattern is required.[10] Commenters further pointed out that cases stating that it is appropriate to rely on federal authorities construing the federal Equal Pay Act of 1963 in the absence of California authority are now inapplicable. The 2016 Fair Pay Act introduced significant differences between the California and federal statutes. The committee decided to retain an excerpt on reliance on federal authority while also parenthetically noting the existence of the 2016 Fair Pay Act.

A separate chart summarizing the comments received on the Equal Pay Act and the committee's responses is attached at pages 121–142.

Other new instructions

CACI No. 2630, *Violation of New Parent Leave Act—Essential Factual Elements.* 2017 legislation adopted the New Parent Leave Act[11] (the Act). The Act extends some of the rights

[9] Lab. Code, § 1197.5.

[10] See Lab. Code, § 1197.5(a), (b): "An employer shall not pay any of its employees at wage rates less than the rates paid to *employees* [of the opposite sex/of another race or ethnicity]." (Italics added to emphasize use of plural.) The committee does, however, tend to agree with the advocates that the statute more likely is violated by a one-to-one comparison.

[11] Gov. Code, § 12945.6.

provided to employees by the California Family Rights Act (CFRA)[12] to employees of employers with 20 or more employees.[13] It allows employees to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. Unlike CFRA, it does not provide for a right to personal leave for a serious health condition.[14]

The Act requires the employer to grant the leave on request. The request is deemed to have been denied if the employer does not guarantee to return the employee to the same or a comparable job when the leave has ended.[15] The statute does not expressly make it a violation for the employer to renege on the guarantee and not return the employee to the same or a comparable position. Nevertheless, the committee considered it an absurdity to not actually require the employer to honor the guarantee, and the instruction includes the actual failure to return the employee to the same or a similar position as a violation.

CACI No. 5022, *Introduction to General Verdict Form.* The "paradox of shifting majorities"[16] occurs when the same jury analyzing the same evidence would find liability with a special verdict, but not with a general verdict. The possibility arises because with a special verdict, a juror who votes no on one question but is in a minority of three or fewer must continue to deliberate and vote on all of the remaining questions. If, for example, the vote on element 1 is 9–3 yes with jurors 10, 11, and 12 voting no, and the vote on element 2 is 11-1 yes with juror 1 voting no, there will be liability with a special verdict because each element has received nine yes votes. But if a general verdict is used, there would be no liability because only eight jurors have found true every element of the claim. The California Supreme Court has found this result to be proper with regard to special verdicts.[17]

Few, if any, on the committee are advocates of general verdicts. Still, *CACI* does provide two forms for general verdicts.[18] A committee member who is a trial court judge proposed a new instruction that is designed to eliminate the paradox of shifting majorities.

Under proposed new instruction CACI No. 5022, the jury would be instructed to approach deliberations as if it were to complete a special verdict. They are told to consider and vote, not

[12] Gov. Code, § 12945.2.

[13] See Gov. Code, § 12945.6(a)(1); cf. Gov. Code, § 12945.2(b) [CFRA applies to employers with 50 or more employees].

[14] See Gov. Code, § 12945.2(c)(3).

[15] Gov. Code, § 12945.6(a)(1).

[16] See Raphael, "The Special Verdict Paradox, Part II," *Los Angeles Daily Journal* (May 2, 2017).

[17] See *Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768.

[18] See CACI Nos. VF-5000, *General Verdict Form—Single Plaintiff—Single Defendant—Single Cause of Action* and VF-5001, *General Verdict Form—Single Plaintiff—Single Defendant—Multiple Causes of Action*.

just on the ultimate result, but on each element of each claim separately. If an element receives nine votes, then the jury moves on to the next element.

Note that the process assumes that the rule that the same nine jurors do not have to agree as long as some group of nine do for each element would apply to deliberations under a general verdict. To the committee's knowledge, this proposition has never been addressed in the courts. Because of the "up or down" nature of a general verdict, there would be no reason for a court to look behind the verdict and analyze the deliberations.

Revised instructions

CACI Nos. 430 and 435: asbestos causation. In 2007, the committee considered a proposal from the asbestos plaintiff bar that CACI No. 430, *Causation: Substantial Factor*, should not be given in an asbestos case. There are four sentences in CACI No. 430:

> A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. [¶] [Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

The proponents' objection was to the second and fourth sentences: the "remote or trivial" sentence (the second) and the "would have happened anyway" sentence, sometimes still referred to as "but for." After considerable deliberations, the committee agreed with the proponents, that these two sentences should not be given in an asbestos case. The committee imported the first and third sentences into CACI No. 435, *Causation for Asbestos-Related Cancer Claims*. Then in the Directions for Use, the committee advised only to give 435, and not 430, in an asbestos case.

In a recent case, *Petitpas v. Ford Motor Co. (Petitpas),*[19] the court held that it was not error to give both CACI Nos. 430 and 435 in that case.[20] There were both product liability and premises liability defendants, and CACI No. 435 applies only to defendants who produce or distribute asbestos-containing products. Because the court in *Petitpas* did not address the effect of CACI No. 430's "remote or trivial" language in an asbestos case, and because CACI No. 435 did not apply to the premises liability defendant, the committee has declined to change its view, based on *Petitpas,* that 430 should not be given in an asbestos case. The committee's draft that was posted for public comment addressed with some detail in the Directions for Use why "remote or trivial" is problematic for asbestos causation.

The posted draft generated many comments from both the asbestos plaintiff and the asbestos defense bar. A separate chart summarizing the comments received and the committee's responses is attached at pages 83–120.

[19] (2017) 13 Cal.App.5th 261, 298–299.

[20] The optional "would have happened anyway" sentence of CACI No. 430 was not given.

The committee made only minor revisions in response to the comments. The committee continues to propose the expanded Directions for Use to CACI No. 430, which address "remote or trivial." The committee found that the comment that follows, received from the law firm of Waters Kraus & Paul, by Michael B. Gurien, expressed the views of the committee (edited only for format):

> In reaching its decision as to CACI No. 430, the Court of Appeal [in *Petitpas*] quoted the Supreme Court's statement in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, that, in addition to the asbestos injury causation standard articulated in *Rutherford,* which is now set forth in the second paragraph of CACI No. 435, " '*[t]he standard instructions on substantial factor and concurrent causation (BAJI Nos. 3.76 and 3.77) remain correct in this context and should also be given.*' " (*Petitpas, supra,* 13 Cal.App.5th at p. 299, quoting *Rutherford,* at pp. 982-983, italics added by Court of Appeal.) The Court of Appeal then quoted the current directions for CACI Nos. 430 and 435, which, say not to use CACI No. 430 in an asbestos injury case " '[u]nless there are other defendants who are not asbestos manufacturers or suppliers … .' " (Ibid., quoting CACI No. 435, Directions for Use, second para.) Comparing the italicized statement in *Rutherford* with the statements in the directions for use to CACI No. 430, the Court of Appeal stated that "[i]t appears, therefore, that despite *Rutherford's* statement that the standard instruction on substantial factor remains correct and also should be given, the CACI use notes disagree with this approach." (*Ibid.*) This latter statement is problematic because the standard instruction on substantial factor causation in effect at the time that *Rutherford* was decided – BAJI No. 3.76 – was different than the current standard instruction on substantial factor causation in CACI No. 430.
>
> When *Rutherford* was decided in 1997, BAJI No. 3.76 stated as follows: "The law defines cause in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm." (*Espinosa v. Little Co. of Mary Hosp.* (1995) 31 Cal.App.4th 1304, 1313-1314; see *Rutherford, supra,* 16 Cal.4th at p. 969 [identifying BAJI No. 3.76]. [The second sentence of] CACI No. 430 is different. It states: "A substantial factor … must be more than a remote or trivial factor."
>
> The first and third sentences of CACI No. 430 do not present a problem in asbestos injury cases. In fact, those sentences are contained verbatim in the first paragraph of CACI No. 435, the standard instruction incorporating the *Rutherford* causation standard. The problem is the second sentence of CACI No. 430, stating that a substantial factor "must be more than a remote or trivial factor." First, that sentence was not contained in BAJI No. 3.76 when the *Rutherford* court stated that BAJI No. 3.76 "remain[s] correct in this context and should also be given." (*Rutherford, supra,* 16 Cal. 4th at p. 983; see *Espinosa, supra,* 31 Cal.App.4th at pp. 1313-1314

[quoting BAJI No. 3.76 in its entirety].) Thus, in *Rutherford*, the Supreme Court did not approve the use of that sentence in an asbestos injury case.

Second, the "remote or trivial" sentence is troublesome because, as the Supreme Court explained in *Rutherford*, "plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer … ." (*Rutherford, supra,* 16 Cal.4th at 976-977; accord, id. at p. 982.) The Supreme Court also held that a plaintiff "is free to … establish that his [or her] particular asbestos disease is cumulative in nature, with many separate exposures *each* having constituted a 'substantial factor' (BAJI No. 3.76) that contributed to his [or her] risk of injury." (*Id.* at p. 958; accord, id. at p. 978, italics added.) Thus, under *Rutherford*, separate exposures to even relatively small amounts of asbestos can be sufficient to establish causation, so long as the exposures were "a substantial factor in contributing to the aggregate dose of asbestos." (*Id.* at pp. 976-977.) A jury, however, viewing such small exposures in light of CACI No. 430's statement that a substantial factor "must be more than a remote or trivial factor" – terms the Supreme Court did not use in articulating its causation standard in *Rutherford* – may become confused and fail to understand that small exposures can, indeed, satisfy the standard.

An instructive example is provided by the facts and evidence in *Rutherford*. There, a defense expert testified that "a very light or brief exposure could be considered 'insignificant or at least nearly so' in the 'context' of other, very heavy exposures." (*Rutherford, supra,* 16 Cal.4th at p. 984.) "Plaintiff's expert presented a generally contrary opinion, to the effect that each exposure, even a relatively small one, contributed to the occupational 'dose' and hence to the risk of cancer." (*Ibid.*) Based on its verdict, the jury apparently "accepted much of the defense's factual theory, concluding that exposure to Kaylo contributed a relatively small amount to decedent's cancer risk, but rejected defendant's argument that such a small contribution should be considered insubstantial." (Id. at pp. 984-985.) Nevertheless, consistent with the relatively small exposure from the defendant's product, the jury "allocated only 1.2 percent of the total legal cause to defendant's comparative fault." (*Id.* at p. 985.) Thus, "[i]n the absence of any instruction or evidence that a small amount was necessarily insubstantial, and guided by BAJI No. 3.77's command that every contributing cause was a legal cause regardless of the degree of its contribution, the jury concluded even 1.2 percent of the cause was, on the facts of this case, substantial." (Ibid.) Had the jury, however, been instructed with the second sentence of CACI No. 430, i.e., that a substantial factor "must be more than a remote or trivial factor," it may have been confused or misled into thinking that a small exposure, "even 1.2 percent of the cause," could not be a legal cause of

a person's asbestos-related injury, when, as the Supreme Court in *Rutherford* held, it can be a legal cause.

In *Rutherford,* the Supreme Court noted that it had previously "suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." (*Rutherford, supra,* 16 Cal.4th at p. 969.) The Supreme Court also made clear, however, that "[t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical," (*id.* at p. 978), and it explained in a later case that "a very minor force that does cause harm is a substantial factor." (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79, italics added.) In light of the medical and scientific uncertainties involved with causation in asbestos injury cases, as detailed and discussed by the Supreme Court in *Rutherford,* an instruction telling the jury that a substantial factor "must be more than a … trivial factor" may confuse and invite the jury to disregard or discount smaller exposures that are otherwise medically and legally sufficient to establish causation. It is also worth recognizing that while the Supreme Court in *Rutherford* observed that an "'infinitesimal' or 'theoretical'" force "is not a substantial factor," (*Rutherford,* at p. 969), it did not use that language, those terms, or the term "trivial" in its formulation of the asbestos injury causation standard it said the jury should be instructed with. (*Id.* at pp. 982-983.) Nor, as discussed above, was there any such language in BAJI No. 3.76 when *Rutherford* was decided. (See *Espinosa, supra,* 31 Cal.App.4th at pp. 1313-1314 [quoting BAJI No. 3.76 in its entirety].)

Moreover, as to the term "remote" in the second sentence of CACI No. 430, that term will invite jury confusion because it incorrectly suggests that, for there to be causation in an asbestos injury case, there must be a temporal proximity or closeness in time between a particular exposure or series of exposures and the manifestation of the plaintiff's disease. But as the Supreme Court recognized in *Rutherford,* asbestos-related diseases have a "long latency period." (*Rutherford, supra,* 16 Cal.4th at pp. 957, 975; see *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1135 ["the average latency period of asbestosis is 20 years"], 1136 [mesothelioma "has an average latency period of 30 to 40 years"]; *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 540 ["the decades-long latency periods of asbestos-related disease"].) Because of this decades-long latency period, causative exposures in an asbestos injury case will always, by definition, be remote in time compared to the injury. This unique circumstance has the real potential for causing confusion and misunderstanding if the jury is instructed, under CACI No. 430, that a substantial factor "must be more than a remote … factor," because the jury will be invited to apply an erroneous temporal restriction that excludes exposures that are otherwise medically and legally sufficient to establish causation. Again, it is worth noting that the Supreme Court did not include any temporal or remoteness limitation in the causation standard it said the jury should be instructed with in *Rutherford,* (*Rutherford, supra,* 16 Cal.4th at pp. 982-983),

and there was no such language in BAJI No. 3.76 when *Rutherford* was decided. (*Espinosa, supra,* 31 Cal.App.4th at pp. 1313-1314.)

The committee agrees with these views of Mr. Gurien, which reflect the reasons for the revisions that the committee has made.

CACI No. 1004, *Obviously Unsafe Conditions.* In a recent case, *Jacobs v. Coldwell Banker Residential Brokerage Co.*,[21] the court addressed an exception to the general lack of a landlord's duty with regard to an obviously unsafe condition. While the landlord has no duty to warn, it must still take remedial steps to address the danger if it is foreseeable that the condition may cause injury to someone who, because of necessity *or other circumstances,* encounters the condition.[22]

As this corollary rule was already noted in the Directions for Use, the committee decided to elevate it to the instruction itself. While the first paragraph expressing the lack of a duty to warn remains unchanged, the committee proposes adding a second paragraph addressing the possible duty to remediate.

There was considerable discussion of what the court in *Jacobs* was referring to as "other circumstances." The court gave no examples, and the committee found none; cases all involved whether there was a necessity of encountering the condition. While the initial inclination was to reproduce the *Jacobs* language completely, the committee reconsidered in light of several public comments received. Ultimately, it was concluded that referencing "other circumstances" without any guidance as to what those circumstances might be would not be helpful and might lead the jury to speculation.

CACI No. 1005, *Business Proprietor's or Property Owner's Liability for the Criminal Conduct of Others* (as retitled). In a recent unpublished case, a fire on the landlord's property did damage to the tenant's business. The court, in an opinion written by a committee member, found that whether the fire was an accident or arson was germane to the landlord's liability. The landlord could be liable for a foreseeable intervening criminal act, that is, arson. If the fire were accidental there would be no liability.[23]

While the committee does not draft *CACI* instructions based on unpublished cases, at times an unpublished case will unearth an issue that calls into question something in *CACI*; that was the situation here. Under CACI No. 1005 as currently drafted, the landlord would be liable for a foreseeable negligent or noncriminal intentional act, not just for a criminal act. Under current

[21] (2017) 14 Cal.App.5th 438, 447.

[22] *Id.* at p. 447.

[23] *Nodulski v. Vargas* (Sep. 6, 2017, No. F072998) __ Cal.App.5th __ [2017 Cal.App. Unpub. Lexis 6105].

CACI 1005, it would make no difference whether the fire was arson or negligently started. The committee decided to revisit CACI No. 1005.

A 1966 case[24] quotes the Restatement of Torts, section 344, that "[a] possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons … ."[25] But the case involved a criminal act, so this language was dicta. In the many intervening years, the committee only found cases involving an intervening criminal act.

While the committee considers the effect of intervening negligent or noncriminal intentional acts to be unresolved, it decided that currently only intervening criminal acts are clearly within CACI No. 1005. The title and text of the instruction have been revised accordingly.

CACI No. 2021, *Private Nuisance—Essential Factual Elements.* A 2016 unpublished case[26] called the committee's attention to whether *CACI*'s private nuisance instruction 2021 lacked a scienter requirement. In that case, the court posited, that "[t]here appears to be an additional element in most private nuisance claims—namely, that the defendant acted intentionally or negligently in creating the interference or allowing it to persist."[27] But the court went on to say that some cases suggest that no such showing is required.

On investigation, the committee did not find a true split of authority. However, the committee concluded that any scienter requirement would be more complex than a simple statement that the defendant acted intentionally or negligently.

In *Lussier v. San Lorenzo Valley Water District,*[28] the court, relying on the Restatement 2d of Torts, section 822, said:

> Although the central idea of nuisance is the unreasonable invasion of this interest and not the particular type of conduct subjecting the actor to liability, liability nevertheless depends on some sort of conduct that either directly and unreasonably interferes with it or creates a condition that does so. [Citations] "The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability. On any of these bases the defendant may be liable. On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the

[24] *Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114.

[25] *Id.* at p. 124.

[26] *Moalem v. Gerard* (Dec. 1, 2016, No. B268963) __ Cal.App.5th __ [2016 Cal.App. Unpub. Lexis 8576].

[27] *Id.* at p. *3.

[28] (1988) 206 Cal.App.3d 92, 100.

> categories mentioned above. In these cases there is no liability." (Rest.2d, *supra*, § 822, com. a, p. 109; *Dufour v. Henry J. Kaiser Co.* (1963) 215 Cal.App.2d 26, 29 [29 Cal.Rptr. 871]; but see Prosser, *supra*, § 87, pp. 619–625 [nuisance liability should be based on only intentional conduct].)

Given the complexity of the issue, for the previous release, the committee did not propose adding a scienter requirement to the instruction. Instead, the issue was noted briefly in the Directions for Use. However, several commenters objected that this approach was inadequate, finding the explanation in the Directions for Use to be insufficiently developed to provide meaningful assistance to a user who wanted to include a scienter element. In view of the comments, the committee withdrew the instruction from the previous release and returned it to the agenda.

After further consideration for this release, the committee now proposes adding a scienter element to the instruction. In reliance on *Lussier,* the committee has opted to base the element on section 822 of the Restatement. The committee has also elected to include a detailed analysis of the role of scienter in a private nuisance claim in the Directions for Use.

CACI Nos. 2521A, B, and C, and 2522A, B, and C: sexual harassment and comparative fault. *CACI* includes six instructions addressing sexual harassment under the Fair Employment and Housing Act (FEHA). CACI Nos. 2521A, B, and C are for claims against the employer. CACI Nos. 2522A, B, and C are for claims against an individual defendant.[29] *CACI* does not have separate instructions for claims against both the employer and an individual.

An attorney had a case in which the court wanted to give a comparative fault instruction to allocate fault between the employer and the individual. The attorney asked that the committee address this issue in *CACI* in some way.

The employer is strictly liable for all acts of sexual harassment by a supervisor.[30] The committee concluded that there could be no comparative fault between an employer and a harassing supervisor as the employer's liability is derivative and not based on any separate conduct of its own.

In contrast, as pointed out by several commenters, the employer is only liable for harassment by a nonsupervisory employee if the employer knew or should have known of the employee's conduct and failed to take immediate and appropriate corrective action.[31] It is possible that comparative fault could apply between a harassing nonsupervisory employee and the employer found liable for failing to take corrective action; however, the committee believes that this is an unresolved question.

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[29] The A instructions are for conduct directed against the plaintiff. The B instructions are for conduct directed against another person. The C instructions are for widespread sexual favoritism.

[30] *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1041–1042.

[31] Gov. Code, § 12940(j)(1).

The committee elected to address the attorney's request in the Directions for Use to all six instructions. The proposed revisions state that comparative fault and Proposition 51 do not apply to employer and supervisor. Any rule with regard to nonsupervisory employees is not addressed at this time.

CACI No. 2800, *Employer's Affirmative Defense—Injury Covered by Workers' Compensation.* In *Lee v. West Kern Water District*[32] (*Lee*) the court clarified that, in order to fall under the exclusive remedy of workers' compensation, an injury not only had to have occurred within the scope of employment, but also the work must have been a contributing cause of the injury. The court referred to this second requirement as industrial causation. The court was clear that scope of employment and industrial causation are two separate elements, and both must be proved.[33]

The distinction between the two elements is subtle; often if scope of employment is clear (the employee was hurt while working), causation is not really in dispute (what caused the injury was part of the employee's job). In many cases, it is easy to merge the two requirements together as it really is not necessary to analyze them separately.

Nevertheless, in light of *Lee*, the committee decided that CACI No. 2800 needed a separate element on industrial causation. However, choosing the words for industrial causation that clearly distinguished it from scope of employment proved to be a major challenge. The language used by the court in *Lee* was that the work was a "contributing cause" of the injury.[34] Many committee members feared that this language would not be clear to jurors. Many tried to improve on it, but no one succeeded. A commenter suggested a slight revision to "contributed to causing." The committee accepted this small change and now proposes revising the instruction to add this industrial causation element.

Revoked instruction

CACI No. 4010, *Limiting Instruction—Expert Testimony.* In *People v. Sanchez*[35] (*Sanchez*), the California Supreme Court held that a limited-purpose instruction is insufficient to cure hearsay problems with case-specific testimony given by an expert witness. In *Conservatorship of K.W.*,[36] the court noted that CACI No. 4010 was such a limited-purpose instruction and found it no longer tenable because an expert's testimony regarding the basis for an opinion must be considered for its truth by the jury. The committee agreed and proposes revoking this instruction.

[32] (2016) 5 Cal.App.5th 606, 625.

[33] *Id.* at p. 625.

[34] *Ibid.*

[35] (2016) 63 Cal.4th 665, 684.

[36] (2017) 13 Cal.App.5th 1274, 1281.

The committee also proposes adding a sentence to the Directions for Use to CACI No. 206, *Evidence Admitted for Limited Purpose,* that notes the holding of *Sanchez*.

Policy implications

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

Comments

The proposed additions and revisions to *CACI* circulated for comment from January 22 through March 2, 2018. Comments were received from 25 different commenters. Some submitted comments on multiple instructions, and some commented on only a single instruction. 18 comments were received on asbestos causation.

The committee evaluated all comments and, as noted above, revised some of the instructions in light of the comments received. A chart summarizing the comments received on all instructions other than asbestos causation and the Equal Pay Act and the committee's responses is attached at pages 15–82.

Alternatives considered

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval; therefore, the advisory committee did not consider any alternative actions.

Fiscal and Operational Impacts

No implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will publish the 2018 mid-year supplement to *CACI* and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

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

Attachments and Links

1. Chart of all comments other than asbestos causation and the Equal Pay Act and the committee's responses, at pages 15-82
2. Chart of comments—asbestos causation and the committee's responses, at pages 83–120
3. Chart of comments—the Equal Pay Act and the committee's responses, at pages 121-142
4. *CACI* instructions and verdict forms, at pages 143–262

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
206, *Evidence Admitted for Limited Purpose*	Association of Southern Defense Counsel, by Lisa Perrochet and John A. Taylor, Jr, Horvitz & Levy	The proposed revisions to the Directions for Use accompanying CACI No. 206 are consistent with [the] principles [of *People v. Sanchez* (2016) 63 Cal.4th 665]. While the instruction provides generally for trial judges to use limiting instructions if evidence is partially inadmissible for certain purposes at trial, the Directions for Use as revised would properly explain that, "A limited-purpose instruction is insufficient to cure hearsay problems with case-specific testimony given by an expert witness," citing *Sanchez*.	No response is required.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the revisions to the Directions for Use, but we believe a fuller explanation would be helpful. In lieu of the proposed new second paragraph, we suggest: "The jury must consider an expert's testimony concerning the basis for the expert's opinion for its truth in order to evaluate the expert's opinion. As such, hearsay problems with case-specific testimony given by an expert witness cannot be avoided by giving a limited-purpose instruction that such testimony should not be considered for its truth. (*People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320].)"	The committee finds this language unnecessarily long and confusing for the simple point of calling the users' attention to *Sanchez*.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
	Civil Justice Association of California	It is not clear that *Sanchez* was intended to apply in civil cases, but assuming it does, the summary leaves little or no room for judicial discretion. It would be better, we suggest, to read: "A limited-purpose instruction may, in certain circumstances, be insufficient to cure hearsay problems with case-specific testimony given by an expert witness." The Direction for Use is unclear as to what constitutes "hearsay problems," particularly given that there are multiple hearsay exceptions that may apply.	The committee does not believe that adding "in certain circumstances" is necessary or helpful.
		Perhaps the Direction for Use could be clearer: "If case-specific out-of-court statements are not admitted through a hearsay exception or appropriate witness, a limited-purpose instruction for case-specific testimony given by an expert witness is insufficient. ("If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements *are necessarily considered by the jury for their truth,* thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception. Alternatively, the evidence can	The comment presents a very good statement of *Sanchez* and what it means. But the committee does not believe that a full explanation of *Sanchez* is necessary for this instruction. The point for CACI No. 206 is simply that a limited purpose instruction will not work for *Sanchez* situations. The Directions for Use are not legal analysis unless the analysis is needed to understand issues with the instruction itself. That is not the case here.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner." (*Sanchez,* 63 Cal.4th at 684.))	
	Walsworth WFBM, by Christine Z. Fan and John A. Kaniewski	In our opinion, this addition to the Directions for Use is not only appropriate, but also underscores a common problem. Too often, we have seen trial courts allowing an expert to testify as to the content of clearly hearsay evidence under the guise that it is part of the basis for the expert's opinion.	No response is necessary.
430, *Causation: Substantial Factor*, and 435, *Causation for Asbestos-Related Disease Claims*	See separate chart		
470, *Primary Assumption of Risk—Exception to Nonliability–Coparticipant in Sport or Other*	Association of Southern California Defense Counsel, by Scott P. Dixle, Horvitz & Levy	ASCDC supports the proposed modifications to the language of the jury instruction itself, and is grateful to the committee for its efforts.	No response is necessary.
		ASCDC recommends revising the comment as follows:	The committee does not agree that "can sometimes be" is right. The long excerpt from *Luna v. Vela* in the Sources and Authority, which summarizes courts on

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
Recreational Activity		While duty is generally a question of law for the court, courts have held that whether the defendant has unreasonably increased the risk ~~is~~ can sometimes be a question of fact for the jury. (Compare *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112-113 with *Foltz v. Johnson* (2017) 16 Cal.App.5th 647, 655 (*Foltz*) and *Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 538-539.)	both sides of the issue, indicates that there is a conflict, not that sometimes it is a jury question and sometimes not. This instruction is not about the general question of duty under primary assumption of risk, but the particular subquestion of the defendant's conduct that increased the risk. The committee has made a minor revision to note that some courts have held to the contrary.
		ASCDC recommends modifying the descriptive parenthetical following the first citation to *Foltz* as follows so that it more accurately describes the case: "[defendant's guarantee of a hard surface for riding did not alter inherent risks of off-road dirt biking].	The committee finds the proposed expansion to be more words than are necessary.
		ASCDC recommends moving up the excerpt from *Foltz* in the Sources and Authority (regarding the appropriateness of applying the primary assumption of risk doctrine on summary judgment) to the Directions for Use. This language provides important guidance regarding the respective roles of courts and juries in applying the primary assumption of risk doctrine, and its significance warrants inclusion in the Directions for Use.	What can be done on summary judgment is not a direction for the use of a jury instruction.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the revisions to element 1, adding a new alternative element 1 and making current element 1 an optional alternative.	No response is necessary.
		We would modify the third paragraph in the Directions for Use to state that whether the defendant has unreasonably increased the risk "may be" (rather than "is") a question of fact for the jury, and would state that the issue can be resolved as a matter of law if the facts can support only one reasonable conclusion. We recommend this same change in CACI Nos. 471, 472, and 473	Addressed above
		We believe the paragraph starting "Conduct is entirely outside the range . . ." should be made optional as well, by adding brackets, because this paragraph defines language in current element 1 ("entirely outside the range of ordinary activity") that will become optional. And we would add language to the Directions for Use stating to give the optional paragraph starting "Conduct is entirely outside the range . . ." if the first alternative element 1 is given.	The committee agrees with this comment, but as noted below, has adopted a change proposed by the Civil Justice Association that makes this point moot.
	Civil Justice Association of California	The proposed addition makes it appear there is a third way to obviate the affirmative defense when in fact there are only two ways—intentional conduct or conduct that is outside the range of ordinary activity involved in the	*Levinson* does support the Civil Justice Association position. The court says: "The person owes the horseback rider only two duties: (1) to not "intentionally" injure the rider; and (2) to not "increase the risk of harm beyond what is inherent in [horseback riding]" by "engag[ing] in conduct that is so

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		sport/activity. Unreasonably increasing the risk of harm inherent in the sport is an example of conduct that is outside the range of ordinary activity involved in the sport/activity, not a separate basis/ground. (*Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 538 ["In analyzing whether [defendant] owed [plaintiff] a duty at the Ride, we consider whether the risk of being struck by a coparticipant's horse that follows other horses so closely as to come into contact with them is 'inherent in' the activity of endurance riding"].) Increasing the risk of harm beyond what is inherent in the sport/activity occurs when a coparticipant engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport/activity. (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1546-1547.) The proposed addition makes it appear that these are two different ways to impose a duty on the defendant	reckless as to be totally outside the range of the ordinary activity involved in the sport." The committee believes that "increased the risk" needs to be in the instruction, but as an explanation of what makes something "outside the range" in the way done in *Levinson*. The committee believes that any conduct that is outside of the range increases the risk. The committee has also added the *Levinson* language and similar language from *Swigart* to the Sources and Authority.
	Orange County Bar Association, by Nikki P. Miliband President	Nowhere in *Luna v. Vela* or in any of the cited cases is there any mention of "reasonable" with regard to increasing the risks inherent in the sports/activities. In fact, the cases simply state repeatedly that the governing standard of care is the duty "not to increase the risks inherent in the sport". Adding "unreasonable" or "unreasonably" makes it seem that	None of the cases cited in the *Luna* excerpt in the Sources and Authority say "unreasonably." If it increased the risk above those inherent, then it is per se unreasonable.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		increasing the risks is okay, as long as it wasn't unreasonably increasing the risks	
	Walsworth WFBM, by Christine Z. Fan and John A. Kaniewski	We believe that the proposed change to this instruction is not appropriate nor is it supported by *Luna v. Vela* (2008) 169 Cal.App.4th 102. CACI 470 only pertains to defendants who are coparticipants in an activity. Yet, the proposed change borrows the language of CACI 472 for assumption of the risk as it applies to property owners (as was the defendant in *Luna*) and event sponsors. In the latter regard, the standard is indeed whether a sponsor, organizer, or operator unreasonably increased the risk to a plaintiff. (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.App.4th 1148, 1162.) However, defendants who are coparticipants owe no such duty. (*Ibid.* ["In delineating legal duty with respect to a sporting or recreational activity, a defendant's relationship to the activity in which the plaintiff was injured is a proper consideration."]) Enforcing the same standard across categories of defendants would defeat the very purpose for having different instructions in the first place. A lower standard of reasonableness for coparticipants in recreational activities also negates the policy behind the assumption of the risk defense, as it would deter active participation in recreational activities.	*Swigart* and *Foltz* are coparticipant cases involving increasing the risk. The changes made in response to the Civil Justice Association and the Orange County Bar Association may partially address this comment's concern.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
1004. *Obviously Unsafe Conditions*	Association of Southern California Defense Counsel, by Joshua C. McDaniel, Howvitz & Levy	Read out of context, the phrase "because of necessity or other circumstances" suggests that a landowner could be liable if it is foreseeable that the condition will cause injury to someone who for any reason encounters the obvious condition. The "other circumstances" language in *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, read in the context of that case and the jurisprudence in this area of the law, thus refers narrowly to premises liability in circumstances compelling someone to choose to encounter a hazard despite its obviousness. (The comment goes on to address the facts of *Jacobs* and why the case should not be read broadly despite the inclusion of "other circumstances.") We therefore propose that the instruction be revised to add the following sentence as a new paragraph: [However, the [owner/lessor/occupier/one who controls the property] must exercise reasonable care to remedy the condition if it is foreseeable that a practical necessity will	The committee agreed with the comment and has removed "or other circumstances." The proposed revision, however, is needlessly wordy.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		require others to choose to encounter the condition despite the obvious hazard.]	
		We propose bracketing the second paragraph because it will not be necessary in every case, but only if it is alleged that there was some practical necessity requiring the plaintiff to encounter the obvious hazard. The Directions for Use should explain when to give the optional second paragraph: "**Give the optional bracketed paragraph if it is alleged that some practical necessity required the plaintiff to encounter the condition despite the obvious hazard. (Jacobs, supra, 14 Cal.App.5th at p. 447; see also *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121-122 [273 Cal.Rptr. 457].) However, if there are no disputed facts regarding the "practical necessity" of a plaintiff's choice to encounter an obvious hazard, the bracketed paragraph should not be given, and the question of duty should instead be resolved by the court as a matter of law. (*Jacobs,* at pp. 447-449.)"**	Brackets would not be inappropriate, necessarily, but the same point could be made about the first paragraph. The two paragraphs together set forth the duties with regard to obviously unsafe conditions; sometimes to warn and sometimes to remediate. The committee prefers using brackets sparingly, when there is a clear choice that must be made between or among options.
		Add to the Sources and Authority: 'A railroad track . . . is itself a warning to any person who has reached years of discretion, and who is possessed of ordinary	*Christoff* simply says that railroad tracks are a warning. Case excerpts in the Sources and Authority should address legal principles, not factual applications.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		intelligence, that it is not safe to walk . . . near enough to it to be struck by a passing train.' " (*Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 126 [36 Cal.Rptr.3d 6]; accord, *Allen v. Jim Ruby Construction Co.* (1956) 138 Cal.App.2d 428, 431-432 [reversing jury verdict for the plaintiff where plaintiff tripped and fell into a pit at a construction site while walking to a washroom, since "[i]t was not shown that it *was necessary* in order to reach the washroom for plaintiff to walk close to the pit" (emphasis added)].)	
		Add to Sources and Authority: "[I]t is evident to us that a large tree growing at the edge of a ski run signals an obvious danger, and that its very presence . . . 'itself serves as a warning.' Consequently, . . . we would conclude [as a matter of law] that [the defendant ski run operator] was under no duty to warn that this particular tree, among the hundreds that border the several ski runs . . . , presented a danger . . . . The tree itself provided a warning to plaintiff of the implicit danger of a collision with it. A fortiori, [the defendant] was under no duty to remove it." (*Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 122 [266 Cal.Rptr. 749].)	The legal principles in the proposed excerpt are already present in the Sources and Authority in more recent cases.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Delete "if it is foreseeable" from the proposed new second paragraph. The existence of a duty of care is a question of law for the court to decide, and the jury only decides whether the defendant breached the duty. When the existence of scope of a duty of care depends on foreseeability, the court decides the issue of foreseeability as a question of law. "Foreseeability, when analyzed to determine the existence or scope of duty, is a question of law to be decided by the court." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678.) The instruction as revised would state that the defendant has a duty to protect against the risk of harm "if it is foreseeable that the condition my cause injury." This may suggest to the jury that the jury must decide the question of foreseeability. We believe the court should decide the foreseeability of injury and instruct the jury on the second paragraph, with no mention of foreseeability, only if the court decides such an injury was foreseeable. We suggest adding language to the Directions for Use explaining that the court must decide the issue of foreseeability of injury and instruct on the second paragraph	*Osborn* quotes *Florez v. Groom Development Co.* (1959) 53 Cal.2d 347, 355, in which the court says: "[t]he jury [is] entitled to balance the [plaintiff's] necessity against the danger, even if it be assumed that it was an apparent one. This [is] a factual issue. [Citations.]" Therefore, the committee sees some balancing role for the jury.

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		of the instruction only if the court finds that such an injury was foreseeable.	
		Delete "or other circumstances" from the proposed new second paragraph. *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 2 Cal.App.5th 438 and *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104 both involved necessity. Although *Jacobs* suggested that the duty of care may also extend to someone who encounters an obviously unsafe condition because of "other circumstances," *Jacobs* did not hold on this point, and the language "other circumstances" is too broad and would provide no guidance to the jury.	Addressed above; "or other circumstances" has been deleted.
	U.S. Chamber Institute for Legal Reform, by John H. Beisner	The proposed revisions to this instruction do not clearly express what must be foreseeable for tort liability to be imposed on a defendant when an unsafe condition is obvious and could improperly expand liability in certain circumstances. Almost by definition, the potential for "harm" will be foreseeable in most cases involving obviously unsafe conditions. As we read the law, what must be foreseeable to justify the imposition of liability for an obviously unsafe condition is not merely the possibility of harm but also the possibility that someone would have to encounter it	The proposed new paragraph says: "… if it is foreseeable that the condition may cause injury to someone who, because of necessity … encounters the condition." It is the encounter that must be foreseeable.

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		despite recognizing the obviously unsafe condition – for example, where she or he is required to do so by an employer. Thus, we suggest revising with language that emphasizes the knowing encounter rather than the potential for harm. More specifically, we urge revising the instruction to say that reasonable care must be used to protect against the risk where "it is foreseeable that someone, because of necessity or other circumstances, may encounter the risk despite appreciating the obviously unsafe condition."	
	Civil Justice Association of California	The proposed instruction could be read to mean that the landowner is liable if it was foreseeable plaintiff would encounter the known danger for convenience rather than by necessity. We suggest removal of "because of necessity, or other circumstances" in the Instruction because it creates prospect for confusion as it is broad, over-inclusive, and unclear.	The committee agrees with removing "or other circumstances," but does not understand why the Civil Justice Association would also remove "because of necessity" as they recognize that necessity may create a duty.
	Manion Gaynor Manning, by Jennifer A. Cormier and Carrie S. Linn	The proposed modification is confusing and unnecessary because the exception relates to a general duty of care or duty to remedy, not the duty to warn that is the principal subject of CACI 1004. In short, it should be a separate instruction, and should not be presented to the jury in a case – such as an	While each paragraph could be a separate instruction, including two separate duties related to an obviously unsafe condition together in one instruction is better, particularly since both paragraphs are short.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		asbestos premises liability case – if the only allegation of negligence or wrongdoing stems from an alleged failure to warn. See *Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal. App. 5th 438, 447. ["While the obviousness of the condition and its dangerousness may obviate the landowner's duty to remedy or warn in some situations, such obviousness will not negate a duty of care."] See, also, *Osborn v. Mission Ready Mix* (1990) 224 Cal. App. 3d 104, 119 (1990) ["[T]he obviousness nature of the danger is not, in and of itself, sufficient to establish that the owner of the premises on which the danger is located is not liable for injuries caused thereby, and that although obviousness of danger may negate any duty to warn, it does not necessarily negate the duty to remedy."]	The committee has, however, revised the language of the Directions for Use slightly to point out the separate functions of each paragraph.
	Walsworth WFBM, by Christine Z. Fan and John A. Kaniewski	We believe that the proposed change should not be made. Examining the plaintiff's necessity and nothing else is consistent with other California decisions. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 122, 273 [balancing only the practical necessity of encountering an obvious danger and no other circumstances.]; *Martinez v. Chippewa Enterprises, Inc.* (2004) 121 Cal.App.4th 1179, 1184; *Beauchamp v. Los Gatos Golf*	As the commentator agrees that there is a necessity exceptionas the committee proposed—the committee does not see any reason why the proposed change should not be made.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		Course (1969) 273 Cal.App.2d 20, 35.) To include a separate inquiry for "other circumstances" is not required. In addition, the phrase "other circumstances" is much too broad to be applied with any legally sufficient specificity.	
1005. *Business Proprietor's or Property Owner's Liability for the Criminal Conduct of Others*	Association of Southern California Defense Counsel, by Lindy F. Bradley, Bradley & Gmelich	The proposed amendment to CACI No. 1005 would replace the term, "Business Proprietor's" in the title with the term "Property Owner's." However, the instruction itself refers to both "an owner of a business" and "a landlord." Moreover, *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, the case cited in support of the instruction, discusses the duties not only of an owner, but also of a landlord and one who has "possession and control." Deleting the term "business proprietor" from the title of the instruction obscures the fact that a business owner, who may have possession and control of leased premises, often is not the owner of the property. Thus, the proposed title revision contradicts the language in the body of the instruction, thereby creating ambiguity and confusion as to the use of this instruction. If the intention of the revision is to instruct juries regarding liability for both business owners and landlords, then conformity between the title and the body of the instruction is necessary.	The committee agrees with the comment and has restored "Business Proprietor" to the title.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		Instead of the proposed language, "that type of conduct," we recommend substituting the term "such criminal conduct." This creates consistency with the original proposed change from "harmful" to "criminal," and eliminates any uncertainty as to the meaning of "that type of conduct."	The committee avoids using "such" in the manner proposed as it is often used in the same way that "said" has been used in legal writing. However, the committee agrees that "type of" is not needed.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
	Civil Justice Association of California	if the language is to be changed at all, it should be changed to the following, with the unbolded text in brackets being commentary, not proposed language: **A duty to take affirmative action to control the wrongful acts of a third party will be imposed only when such conduct can be reasonably anticipated.** (*Ann M. v. Pacific Shopping Center* (1993) 6 Cal. 4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5 [113 Cal.Rptr.3d 327, 235 P.3d 988].) [This is somewhat similar to what is stated in the revised CACI 1005 notes, which does not contain any limitation as to scope directly	The first sentence is the current sentence rewritten to lean toward the defense ("only when"). With regard to the other two sentences, which are called "important limitations," foreseeability is part of the court's duty analysis. (*Ann M., supra,* 6 Cal.4th at p. 678.)

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		below.] **The scope of a landowner's duty is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed.** (*Id.,* 6 Cal. 4th at 678-679.) **Where the burden of preventing future harm is great in relation to the size of the entity upon which the burden is imposed, a high degree of foreseeability is required.** (*Id.*) [These last two sentences are important limitations on the scope of the holding in *Ann M.* which are missing from the proposed language.]	
		We oppose the proposed additional paragraph to the Instruction relating to landowner conduct as it improperly implies the landowner should have taken some steps to prevent third-party criminal conduct. Under the current law in California, the landowner only has a duty to take affirmative steps to protect against the criminal acts of third parties if "the conduct can be reasonably anticipated" [*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676] or is "foreseeable" [*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213]. Therefore, the addition is acceptable only if the Directions for Use explain that the instruction may only be used if the court has determined as a matter of law that the	As the Directions for Use point out, reasonable anticipation in the first paragraph is not for the jury. So if the case is before the jury, the court has determined that the defendant could have reasonably anticipated the intervening criminal act. The new second paragraph is for the jury, however.

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		landowner owed a duty of care because the third party's criminal conduct was "reasonably anticipated" or "foreseeable." If the court has not determined as a matter of law that the landowner had a duty to prevent third-party criminal conduct because it was reasonably anticipated or foreseeable, the jury should not be instructed using the proposed addition	
	Orange County Bar Association, by Nikki P. Miliband President	The draft seeks to remove the "Negligent/Intentional" from the black letter of the instruction and leave only the word "Criminal." Case law seems to indicate that non-criminal conduct of others can hold the property owner liable. (See *Taylor v. Centennial Bowl, Inc.* (1966), 65 Cal. 2d 114, 124.) As such, we would propose leaving the language "Negligent/Intentional/Criminal" in the title. Further, we disagree that "criminal" should replace "harmful" conduct in the body of the instruction. This seems to be an extremely high standard unsupported by the sources and authority and completely unnecessarily limiting the usefulness of the instruction.	The committee debated this issue extensively and concluded that only *Taylor* suggests that the rule applies to noncriminal conduct. But all the court did in *Taylor* was to quote a rule from the Restatement. This rule is not applied in *Taylor* nor in any other case that the committee found. And *Taylor* is a 1966 case.
1500. *Former Criminal Proceeding–Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by	We agree with the proposed revisions to the instruction and the Sources and Authority.	No response is necessary.
		Modify the proposed new paragraph for the Directions for Use as follows:	The committee believes that the proposed additions are more explanation than is needed.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
	Reuben A. Ginsberg, Chair	"In elements 1 and 3 and in the next-to-last paragraph, include the bracketed references to prosecution if the arrest was without a warrant. In the absence of a warrant, false accusations that lead to an arrest, but do not culminate in formal charges and a prosecution, do not give rise to a cause of action for malicious prosecution because in such a case, there has been no adjudicative criminal proceeding resulting in a favorable termination. (See *Van Audernhove v. Perry* (2017) 11 Cal.App.5th 915, 919-925 [217 Cal.Rptr.3d 843].) In contrast, whether a claim of malicious prosecution can be based on an arrest obtained on a warrant that does not result in a ~~Whether~~ prosecution ~~is required in an arrest on a warrant~~ has not definitively been resolved because a warrant arguably involves court involvement and an adjudicatory criminal proceeding. ~~(See *Van Audernhove v. Perry* (2017) 11 Cal.App.5th 915, 919-925 [217 Cal.Rptr.3d 843].)~~"	
VF-1500. *Malicious Prosecution—Former Criminal Proceeding*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with the revisions to the verdict form.	No response is necessary
		We would add to the Directions for Use: "In question 1, include the bracketed reference to prosecution if the arrest was without a warrant."	The committee agreed, and has made the addition.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
	Orange County Bar Association, by Nikki P. Miliband President	For consistency, a use note similar to that found under "Directions for Use" for CACI 1500 should also be included here: "In question 1, include the bracket reference "and prosecuted" if the arrest was without a warrant. Whether prosecution is required in an arrest on a warrant has not definitively been resolved. (See *Van Audenhove v. Perry* (2017) 11 Cal.App.5th 915, 919–925 [217 Cal.Rptr.3d 843].)"	As noted above, The committee has added "and prosecuted." The committee does not see a benefit to repeating the "Whether" sentence as it is in the instruction's Directions for Use.
1503. *Affirmative Defense—Proceeding Initiated by Public Employee Within Scope of Employment*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	It is unclear whether this instruction as revised is intended to address immunity for the public entity or its employee. The instruction begins by stating that the public entity claims immunity, but the Directions for Use and Sources and Authority both refer to public employee immunity. We believe the instruction should cover immunity for both the public entity and public employee. We would modify the instruction: "[*Name of public entity/public employee defendant*] claims that [he/she/it] cannot be held responsible for [*name of plaintiff*]'s harm, if any, because [*name of employee*] who initiated the [*specify proceeding, e.g., civil action*] ~~was initiated by its employee who~~ was acting within the scope of [his/her] employment. To establish this defense, [*name of defendant*] must prove that [*name*	The comment is correct that the statute makes the employee immune. But revising the language to make the instruction apply to both entity and employee raises drafting problems. By pluralizing the parties making the claim, the entire instruction would need to be pluralized, which the comment does not do. Pluralizing will introduce many brackets. I think that the comment is postulating that the instruction will be presented by either the entity or the employee. But the committee does not think that's a very likely scenario. The entity will be the target of the action. The entity liability will be determined by the employee's scope of employment.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		of employee] was acting within the scope of [his/her] employment."	
		We would cite Government Code section 815.2, subdivision (b) (public entity immunity) in the Directions for Use and Sources and Authority.	The committee agreed and has added the citation to the title.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.

1730. Slander of Title—Essential Factual Elements	Orange County Bar Association, by Nikki P. Miliband President	At the second item (?) appearing under Directions for Use, the three sentences proposed for removal should be retained, and set forth as a separate item (?). These three sentences, in a clear and apparent manner, provide relevant information and guidance as to aspects of these claims which might be lost were the proposed revisions adopted. Were these three sentences retained, the proposed revision to the *Albertson v. Raboff (* citation at item 5 (?) would be unnecessary as would the second sentence proposed for inclusion at item 4 (?) addressing other privileges and the need for additional targeted elements or instructions.	Text appears to have been lost from the comment, and the committee cannot really determine what is being proposed. There is no explanation of "item" and the three sentences are not identified. There are three sentences proposed to be deleted in the 2nd paragraph of the Directions for Use. But the second sentence is no longer the law, and the third sentence has been retained. The first sentence cited to *Albertson* would be a "see" cite were it to be retained. *Albertson* does not say that all privileges of Civil Code § 47 apply, but it does apply the litigation privilege. There are also three sentences proposed to be deleted in the 4th paragraph of the Directions for Use. But the content is retained in the proposed new third paragraph. So it does not seem that the comment is referring to these sentences. Nor does the committee understand what is referred to as "the proposed revision to the *Albertson* citation." The committee proposes deleting a sentence cited to *Albertson* and then adding *Albertson* as a "disapproved other grounds" citation. No *Alberson* citations would be deleted.

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1731. *Trade Libel–Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
1802. *False Light*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
	Civil Justice Association of California	We disagree with the proposed revisions and believe the instruction should remain unchanged because there is no new case law upon which the proposed amendments are based. The revisions cherry-pick plaintiff-friendly language from old court decisions.	There never was case law to support the parts of the instruction that are being revised and deleted.
2021. *Private Nuisance—Essential Factual Elements*	Association of Southern California Defense Counsel, by Lisa Perrochet Horvitz & Levy	One of ASCDC's concerns is that the Committee has placed this element in brackets, indicating that it is optional. However, it should be no more optional than any other nonbracketed element in other CACI instructions that may be omitted if the parties agree, or if the trial court finds, that there is no disputed issue of fact as to one particular element. *Lussier v. San*	The committee agreed with the comment and has removed the brackets.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		Lorenzo Valley Water Dist. (1988) 206 Cal.App.3d 92 and cases following it make clear that the jury must focus on the nature of the defendant's conduct as a central matter in deciding whether liability exists. Indeed, *Lussier* specifically noted that a nuisance in many, if not in most, instances, especially with respect to buildings or premises, presupposes negligence. (*Luisser, supra,* 206 Cal.App.3d at p. 104; see also id. at p. 105 [where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved].) *Lussier* found this element to be dispositive, approved the granting of a nonsuit in a case where this element was not met by competent evidence. ASCDC therefore recommends that the brackets be removed and the sentence in the Directions for Use that addresses when to give the element be deleted.	
		New element 3 is somewhat awkwardly phrased. First, the clause regarding conduct that is "unintentional, but negligent or reckless" need not include the words "unintentional, but," because a plaintiff can meet this element with a showing of negligent or reckless conduct, whether the conduct was intentional or unintentional.	The committee considered a number of different approaches to presenting this element. The committee ultimately concluded that it would be best to use the language from the Restatement as set forth in *Lussier*.

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		The clause regarding conduct that is "*the result of* an abnormally dangerous activity" is not quite an accurate characterization of the law. (See *Lussier, supra,* 206 Cal.App.3d at p. 100 [noting that an *invasion* of the plaintiff's interests may be " 'caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability' "]; see also *id.* at p. 101 [liability may arise from "such *interferences* as are intentional and unreasonable or result from negligent, reckless *or abnormally dangerous conduct*" (emphasis added)].) Under *Lussier,* the element is met upon a showing that the *conduct itself* is an abnormally dangerous activity, that is, that the *invasion or interference* was caused by such conduct. The case does not support the suggestion, as framed in the committee's proposal, that liability turns on whether the conduct resulted from an abnormally dangerous activity. (The comment then purports to set forth the preferred language, but actually quotes the committee's proposed language. It would appear that they did not present what they propose, probably by oversight.)	While the point of the comment is a subtle one, the committee agreed and has revised this language.

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		The new second paragraph in the Directions for Use is framed in a way that is likely to cause confusion, in part because of the punctuation used: "If the act that causes the interference is intentional but reasonable or entirely accidental, there is generally no liability." Grammatically, this paragraph suggests that there may be conduct that is intentional and is also either "reasonable or entirely accidental." Fix it as follows: "If the act that causes the interference is intentional but reasonable**, or if it is** entirely accidental, there is generally no liability."	The committee agreed with the comment and has revised the language as proposed to eliminate the potential confusion.
		Include the full quote from *Lussier* that explains when there is liability, not just when there is not.	The committee agreed and has placed this language in the Directions for Use.
		We are concerned that the new excerpts from *Lussier* in the Sources and Authority quote statements outlining grounds for finding liability, but they omit important context for the selected quotes (including context that shows when liability is negated). The excerpts omit any mention of the fact the quoted statements were made in the course of an opinion affirming an	The committee believes that for most case excerpts in the Sources and Authority, the procedural stance of the case is not important.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		order granting a nonsuit for failure to meet the required elements.	
		The new excerpt in the Sources and Authority beginning, "Clearly, a claim of nuisance based on **[intent]** is easier to prove" quotes dicta in a misleading way, suggesting that any form of "intent" (including an intent not to act) can be equated with the hypothetical scenario that the court in *Lussier* was describing. The court was focusing particularly on a defendant's affirmative intent to change the condition of the defendant's land, which in turn harmed the plaintiff. Because the substitution of the bracketed word "[intent]" is not consistent with the import of the court's analysis, we recommend that the paragraph be deleted.	The committee agreed that inserting "[intent]" into the excerpt was not a clear replacement and has instead restored the original court language "our example."
		In its place, the following excerpt could usefully be added: • However, " 'an actor is no longer liable for accidental interferences with the use and enjoyment of land but only for such interferences as are intentional and unreasonable or result from negligent, reckless or abnormally dangerous conduct.' " (*Lussier, supra,* 206 Cal.App.3d at p. 101 [citing Rest.2d Torts, § 822, com. b, pp. 109-110; and Prosser & Keeton, Torts (5th ed. 1984) § 4, pp. 20-23]; id. at pp. 101-102	The excerpt immediately before the one that the commentator would remove covers the first part of the proposed excerpt. The proposed language in brackets at the end does come from *Lussier*. The committee has added it to the excerpt.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		["We do not intend to suggest, however, that one is strictly liable for damages that arise when a natural condition of one's land interferes with another's free use and enjoyment of his property. Such a rule would, quite anomalously, equate natural conditions with dangerous animals, ultrahazardous activities, or defective products, for which strict liability is reserved."].)	
		The new paragraph containing an incomplete quote from footnote 5 of *Lussier* leaves the impression that the court was approving an interpretation of case law under which nuisance liability could flow "in the absence of wrongful conduct." The truncated reference omits the key subsequent paragraphs in footnote 5 questioning and limiting that concept. (See, e.g., *Redevelopment Agency of City of Stockton v. BNSF* (9th Cir. 2011) 643 F.3d 668, 674 ["We cannot agree that such passive but-for causation is sufficient for nuisance liability to attach. Under California law, conduct cannot be said to 'create' a nuisance unless it more actively or knowingly generates or permits the specific nuisance condition."].) We propose that the partial quote to footnote 5 be omitted, or that footnote 5 be quoted in full and	The whole footnote contains more information about the historical development of the law of nuisance than is needed. However, the committee has added a parenthetical noting that the court is questioning the validity of the trees exception.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		subsequent cases confirming the Lussier court's skepticism be referenced.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe proposed new element 3, based on dicta in *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 100, does not accurately state the law. *Lussier,* quoting the Restatement, stated the invasion "may be" (1) intentional and unreasonable, (2) unintentional but negligent or reckless, or (3) the result of an abnormally dangerous activity for which there is strict liability. We regard this as a nonexclusive, rather than exclusive, list of types of conduct supporting nuisance liability. *Lussier* did not hold on this point. Instead, Lussier held that if nuisance liability is based on an omission, the defendant must have been negligent in failing to act. (*Id.* at pp. 102, 105; see *City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1237 [quoting *Lussier,* at p. 105]. We believe the stated rule that nuisance must involve (1), (2), or (3) is potentially misleading, particularly if the word "unreasonable" is not defined. According to *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938, an interference with the plaintiff's use and enjoyment of land (not only an intentional interference, but any interference) must be	The committee has concluded that the instruction must have a scienter element, and as noted above, after much deliberation has settled on *Lussier* and the Restatement. As far as "unreasonable" is concerned, the unreasonableness referred to in the San Diego case (and many others) is the unreasonableness of the interference. As noted in the comment, this is expressed in the balancing test of the final element and CACI No. 2022. The comment's proposed revision would suggest that only negligent or reckless acts constitute a nuisance, and that is clearly not the law.

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		"unreasonable" to create nuisance liability, and an interference is "unreasonable" if "the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account." This requirement is currently expressed in element 8 (renumbered element 9) and CACI No. 2022, Private Nuisance—Balancing Test Factors—Seriousness and Public Benefit, which must be given with this instruction. So it is unnecessary to add an "unreasonable" requirement in proposed new element 3, and troublesome to use this term without defining its meaning in this context. As to "unintentional, but negligent or reckless," this may suggest that an intentional interference that is negligent or reckless does not give rise to nuisance liability, unless a "negligent or reckless" interference is "unreasonable" (as seems to be the case). It would be simpler to say that any interference, whether intentional or unintentional, must be unreasonable to constitute a nuisance, but current element 8 and CACI No. 2022 already set forth this requirement. We would limit element 3 to the holding in *Lussier* by modifying it as follows:	

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		"[That [*name of defendant*]'s conduct in ~~acting or~~ failing to act was ~~[intentional and unreasonable/unintentional, but~~ negligent or reckless~~/the result of an abnormally dangerous activity]~~;]"	
		Accordingly, we would modify the final sentence in the proposed first new paragraph in the Directions for Use: "If ~~there is an issue as to the nature of~~ the defendant's conduct involved the failure ~~in acting or failing~~ to act ~~that caused the interference~~, include Element 3."	The committee has removed the brackets and deleted this sentence.
		The proposed second new paragraph in the Directions for Use derives from the same paragraph in *Lussier* as proposed new element 3. After stating three types of conduct constituting nuisance, *Lussier* stated (quoting the Restatement): "On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above. In these cases there is no liability." (*Lussier, supra,* 206 Cal.App.3d at p. 100.)" We do not find the proposed second new paragraph helpful either as an explanation of how the instruction will work in practice or as a direction for use of the instruction.	The ASCDC proposes expanding this paragraph rather than deleting it. The committee prefers expansion.

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		The term "reasonable" oversimplifies the required balancing under current element 8 and CACI No. 2022. And an accidental act would support liability if the defendant acted negligently or recklessly. The statement in *Lussier* was qualified by "and not fall within any of the categories mentioned above," but the proposed new second paragraph omits this qualification. We would strike the proposed second new paragraph.	
		The proposed new third paragraph in the Directions for Use explains the intent requirement. The only intent requirement in this instruction is in proposed new element 3, and we would strike that part of element 3, so we would strike the proposed new third paragraph too.	The committee will not revise element 3 as requested. Therefore, explaining that only general intent is required is important.
		The proposed new fourth paragraph in the Directions for Use states, "If the conduct results from an abnormally dangerous activity, it must be one for which there is strict liability," citing *Lussier, supra,* 206 Cal.App.3d at page 100, and the Restatement 2d of Torts. But *Lussier* did not hold on this point. Absent a case holding on point, we would strike this paragraph.	As noted above, the committee has settled on the language from *Lussier* and the Restatement.
		The proposed new fifth paragraph in the Directions for Use refers to an exception, apparently meaning an exception to the	While the committee does not see a reason to delete this paragraph, there is a flaw. The text does not say what the "exception" is to, leading the commentator

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		purported rule that an abnormally dangerous activity supports nuisance liability only if strict liability applies. Since we would strike the fourth paragraph and the reference in proposed new element 3 to abnormally dangerous activity, we would strike this fifth paragraph too absent a case holding on point.	to believe that it is to the immediate preceding paragraph. But it is an exception to the scienter requirements of element 3. The committee has revised the paragraph to clear up this confusion.
		We agree with the proposed new fifth paragraph in the Directions for Use citing *City of Pasadena*.	No response is necessary.
		The quotes from *Lussier* added to the Sources and Authority are dicta and are not particularly helpful, so we would strike them	The fact that language is dicta does not mean that it is of no interest. The committee believes that given the challenges of this instruction, these excerpts are helpful.
	Civil Justice Association of California	We are concerned that the revisions are not supported by, and even contradict, recent case law. Instead, the revisions cherry-pick plaintiff-friendly language from old court decisions. We are opposed to this revision. We rely on *Coppola v. Smith* (E.D. Cal. 2013) 935 F. Supp.2d 993, 1018 (and California law cited therein); Rest. (2nd) of Torts Sections 838, 839	The committee sees nothing particularly "plaintiff friendly" about element 3. It is an additional element that the plaintiff must prove. The current instruction with no scienter element would seem to be more "plaintiff friendly." *Coppola* is a federal case, and is not authority for California nuisance law.
		We suggest revising element 3 to read as follows: "That [*name of defendant*] actively or knowingly generates or permits the specific	The Civil Justice Association proposes that three scenarios presented in *Coppola* are elements and should be in an instruction. Were *Coppola* California law, then each would be a different instruction, not elements to CACI No. 2021.

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		nuisance activity, where the nuisance is based on [*name of defendant*]'s creation or assistance in creating the nuisance."	
		We recommend adding a new element 4, as follows: "That [*name of defendant*] did not take reasonable precaution under the circumstances then known to mitigate or abate a known unreasonable risk of loss on land it possessed when presented with a reasonable opportunity to do so, where the nuisance is based on [name of defendant]'s possession of land."	*Coppola* scenario 2. This one is based on Restatement section 839. The committee will not draft either new elements or new instructions based on *Coppola*.
		We suggest amending current element 3 (proposed element 4) by inserting "and unreasonably" after, "That this condition substantially."	"Unreasonably" is subsumed within the balancing test of element 9 and CACI No. 2022. (See *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938–939, in the Sources and Authority.
		We also suggest inserting a new element 6: "That [*name of defendant*] knows or has reason to know that a third party's activity on its land is causing a nuisance (or an unreasonable risk of nuisance), [*name of defendant*] consents to the activity of the third party or fails to take reasonable care to prevent the nuisance, where the nuisance is based on [*name of defendant*]'s right of possession and consent or unreasonably permitting a third party to	*Coppola* scenario 4. As noted above, the committee will not revise or add to CACI based on *Coppola*.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		create a nuisance on the land (such as a leasehold).	
2521A, 2521B, 2521C, 2522A, 2522B, 2522C on Sexual Harassment	California Employment Lawyers Association, by David deRobertis	CELA supports the proposed addition to the "Directions for Use," and notes that this question (joint and several liability) often arises in the trial courts on these claims. Thus, this addition is a useful practical addition that will aid trial courts quite often.	No response is necessary.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	An employer is liable for harassment by a nonsupervisory employee only if the employer knew or should have known about the harassment and failed to take corrective action. (Gov. Code, § 12940(j)(1).) Element 6 reflects this, but the proposed new first sentence in the Directions for Use, "If there are both employer and individual defendants . . . both are liable for any damages," seems to suggest that the employer is automatically liable for harassment by an employee. And the reference to "vicarious liability" in the second sentence seems inappropriate. Under FEHA, employer liability for harassment by a nonsupervisory employee is direct rather than vicarious. Employer liability for harassment by a supervisor under FEHA is described as "strict" rather than "vicarious." (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1041 [under FEHA an employer is strictly liable for harassment by a	The committee agreed with the comment and has revised the instruction along the lines proposed. References to vicarious liability have been changed to strict liability.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		supervisor, and liability is not based on agency principles]; see Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2017) ¶¶ 10:315.1-10:315.2 [employer liability under Title VII is vicarious, while under FEHA employer liability is strict and therefore is based on agency].) Accordingly, we would modify the final sentence in the Directions for Use: "If there are both employer and individual defendants . . . , and both are found liable, the liability is joint and several ~~both are jointly and severally liable for any damages~~. Comparative fault and Proposition 51 do not apply to the defendants' liability ~~vicarious liability.~~ . . ."	
		We question the appropriateness of the new excerpt from *Bihun v. AT&T Information Systems, Inc.* (1993) 13 Cal.App.4th 976, 1000 in the Sources and Authority in light of the foregoing.	The committee notes that there does seem to be some tension between *Bihun* and *State Department of Health Services* with regard to strict versus vicarious liability. But the court in *Bihun* said what it said. The committee believes that users should be made aware of its language. However, the committee has added an excerpt from *State Dept Health Services* to the Sources and Authority.
	California Manufacturers and Technology Association, by Nicole Rice and Jarrell Cook, Policy	The proposed addition assumes that individual defendants are jointly and severally liable when an employer defendant is liable, and vice versa. This is not a correct statement of the law.	The committee agreed with the comment and has revised the Directions for Use to limit the inapplicability of comparative fault and Proposition 51 to employer strict liability for supervisor harassment.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
	Directors and Civil Justice Association of California (same comment)	Supervisors are not always liable for resulting damages. For example, a non-harassing supervisor who fails to act to prevent sexual harassment is not personally liable for sexual harassment under FEHA. (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1322.) Likewise, an employer defendant is not always liable when an individual defendant is found liable for harassment. An employer is vicariously liable for harassment committed by a supervisor of the plaintiff's. But an employer will be liable for harassment committed by a non-supervisory coworker only if the employer (a) knew or should have known of the harassing conduct and (b) failed to take immediate and appropriate corrective action. (*State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal.4th 1026, 1040–1041.) This is a negligence standard, and the employer is liable based on its own negligence, and not as a matter of public policy/respondeat superior. The proposed revision will result in confusion regarding the correct standard of liability in harassment cases in which both the employer and individuals are named as defendants, especially if the employer's	The committee believes that whether comparative fault and Proposition 51 apply between a harassing nonsupervisor employee and the employer who knew of but failed to prevent the harassment, is not settled.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		liability is based on its negligence (coworker harassment) and not on respondeat superior or strict liability.	
	U.S. Chamber Institute for Legal Reform, by John H. Beisner	We submit that, as written, these revised Directions for Use would overstate the circumstances in which liability for employers should be joint and several. The directions provide for joint and several liability "for any damages" in all cases in which there is both an individual defendant and an employer defendant. But the case law on which the directions rely does not support imposing joint and several liability "for any damages" in every case. Instead, at least as to noneconomic damages, the relevant precedents suggest that where the employer's liability is based on its own independent actions (i.e., not on vicarious liability or respondeat superior theories), the employer should be liable only in proportion to the employer's percentage of fault. We propose revising the directions for use accordingly, to state that, "[if] there are both employer and individual defendants, and the employer defendant is liable on a respondeat superior or vicarious liability theory, both are jointly and severally liable for any damages."	As noted above, the committee agreed with the comment and revised the Directions for Use. Note that the ILR does not ask that the text clearly state that Proposition 51 does apply if the employer is liable for nonsupervisor harassment on a "knew and should have stopped it" theory.
2620. *CFRA Rights Retaliation—*	California Employment	CELA supports the proposed additions to the Directions for Use and·to the Sources and Authority.	No response is necessary.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
Essential Factual Elements	Lawyers Association, by David deRobertis		
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We suggest modifying the title and providing specific alternative language in this instruction for use in a retaliation claim under the New Parent Leave Act, rather than simply stating that the instruction may be used for such a claim. This could be done fairly easily by adding "new parent" as a third option to "family care" and "medical" leave in the opening paragraph and in elements 1, 2, and 4.	The committee considered modifying the instruction as proposed, but elected not to proceed. Drafting an instruction to accommodate two different statutes runs the risk of making assembly of the instruction (selecting the options presented) overly complicated. The committee has, however revised the Directions for Use to give more specific directions s to how to modify the instruction for the New Parent Leave Act, per the comment's approach.
2630. *Violation of New Parent Leave Act—Essential Factual Elements*	California Employment Lawyers Association, by David deRobertis	CELA supports the proposed instruction number 2630.	No response is necessary.
		Element 4 is incomplete in that it does not account for the statutory point that an employer denies leave by failing to provide a guarantee of reinstatement to the same or a comparable position before the leave' s commencement. For the instruction to be both complete and accurate, element 4 should be revised as follows: 4. That [*name of defendant*] [refused to grant [*name of plaintiff*]'s request for parental leave] [refused to return [*name of plaintiff*] to the same or a comparable job	CELA asserts three ways that the statute could be violated; (1) refusal to grant the leave; (2) failure to guarantee a return to the same or similar job; (3) refusal to actually return the employee to the same or similar job. The statute only provides for 1 and 2. It expressly makes it a violation to fail to guarantee return before the leave, but does not make it a violation to actually deny the employee his/her job back. With regard to the guarantee, what the statute says is that if the employer does not guarantee the return

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		when [his/her] parental leave ended] [failed, by the time the leave began, to provide [*name of plaintiff*] a guarantee of employment in the same or a comparable position when the leave ends]; Or, alternatively, a bracketed option could be added after element 6 as follows: [If [*name of defendant*] failed, by the time the leave began, to provide [*name of plaintiff*] a guarantee of employment in the same or a comparable position when the leave ends, then [*name of defendant*] refused to grant [*name of plaintiff*]'s request for parental leave.]	before the leave is granted, that constitutes denial of the request for the leave at that time. Therefore, the committee agrees with the comment; that the instruction must say something about the guarantee. The committee prefers the alternative of defining "refused to grant" as including a refusal to guarantee. With regard to the employer's actual failure to return the employee to the same or similar job, the committee believes that this would be a violation and should be included in the instruction, despite the lack of specific statutory language. The committee is confident that no court would ever construe the statute to not make it a violation to renege on the guarantee. It would absurdly defeat the purpose.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	This instruction states a cause of action under Government Code section 12945.6, so we would add the code citation to the title.	The committee agreed and has added the citation to the title.
		We believe the statutory threshold of 20 employees must be satisfied as of the calendar year when the employee requested leave or the preceding calendar year, rather than at the time of trial (see Cal. Code Regs., tit. 2 § 11087(d), so we would modify element 1:	The regulation cited currently applies only to the California Family Rights Act. (See 2 CCR 11087 "The following definitions apply only to this article.") The statute says "employs," so the committee does not think it should be changed to "employed."

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		1. That [*name of defendant*] employed at least 20 employees within 75 miles of the site where [*name of plaintiff*] worked;"	
		The "previous 12-month period" under the statute refers to the 12 months prior to the commencement of leave (Cal. Code Regs. tit. 2, § 11087(e)), so we would modify element 2: 2.. That [*name of plaintiff*] worked for [*name of defendant*] for more than a year, and for at least 1,250 hours during the ~~previous~~ twelve months prior to the commencement of the leave;"	Again, the regulation does not currently apply to the New Parent Leave Act.
		The NPLA requires employers, before or on the day the leave starts, to provide the employee a guarantee of reinstatement. (Gov. Code, § 12945.6(a)(1).) We believe the third sentence in the first paragraph in the Directions for Use should make this clear: The act also requires the employer to, on or before commencement of the leave, guarantee employment in the same or a comparable position on the termination of the leave."	The committee agreed with the comment and has made an addition to the Directions for Use' bit without saying "on or before commencement of the leave."
		Unlike the CFRA, which expressly requires an employee to provide prior notice of the foreseeable need for leave, the NPLA does	The statute does include the words "upon request." The proposed instruction has "requested" in element

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		not expressly require prior notice. Rather than construe this omission as unintentional and infer a requirement of prior notice, we believe the Directions for Use should simply identify the issue and acknowledge the uncertainty: "~~Nevertheless, it is likely that a reasonable notice requirement would be implied. Lack of reasonable notice could possibly be viewed as an affirmative defense.~~ Whether an employee's failure to provide reasonable notice of the need for parental leave will provide employers with an affirmative defense is not yet known."	3. The committee has concluded that there really is no open question regarding notice.
		Government Code section 12945.6(g) contains an antiretaliation provision. We believe the Directions for Use should reference the appropriate CACI instruction: " For an instruction on a claim of retaliation under the New Parent Leave Act, see CACI No. 2620, CFRA or NPLA Rights Retaliation—Essential Factual Elements (Gov. Code, §§ 12945.2(l), 12945.6(h)."	The committee agreed with the comment and has added the proposed cross reference.
	California Manufacturers and Technology Association, by Nicole Rice and	Gov. Code, § 12945.6(a)(1) states that "[a]n employer may require an employee who plans to take a leave pursuant to this subdivision to give the employer reasonable notice of the date the leave shall commence and the estimated duration of the leave."	As noted above, the committee has concluded that there is no unresolved issue regarding notice. However, this comment quotes the CFRA statute. The New Parent Leave Act says nothing about any duty to give reasonable notice. It does, however, say "upon request."

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
	Jarrell Cook, Policy Directors The Civil Justice Association of California makes the same point.	The proposed instructions should have a reasonable notice element that reflects the law: That [*name of plaintiff*] provided reasonable notice to [*name of defendant*] of [his/her] need for [parental] leave, including its expected timing and length. [If [*name of defendant*] notified [his/her/its] employees that 30 days' advance notice was required before the leave was to begin, then [*name of plaintiff*] must show that [he/she] gave that notice or, if 30 days' notice was not reasonably possible under the circumstances, that [he/she] gave notice as soon as possible.]	
		The first two elements misstate the eligibility requirements for employers and employees under Cal. Gov. Code, § 12945.6(a)(1). Element one and two should be revised to make it clear to jurors that the relevant time period is when the plaintiff requested parental leave. As drafted, jurors will be confused about whether eligibility is determined at the time of the leave request or at the time of trial (i.e., when the jury instruction is given).	While the committee thinks that the comment's position on when eligibility is determined is most likely correct, the statute does not address it, and the CFRA regulations expressly do not apply.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		Both elements should be replaced with a single revision that mirrors the existing instruction for leave under the CFRA: "That, at the time [*name of plaintiff*] requested parental leave, [*name of plaintiff*] was eligible for parental leave.	
	U.S. Chamber Institute for Legal Reform, by John H. Beisner The Civil Justice Association of California makes the same point.	The proposed instruction is new and, for the most part, tracks the statutory language – except in one respect. Specifically, the instructions authorize liability where the plaintiff "[requested/took] leave" – which could be interpreted to mean that liability could be found where a plaintiff took but did not first request leave. The proposed language for this new instruction should be modified to include the employee's obligation to request leave before taking it. The statute expressly conditions parental leave on the employee's request, which we understand to impose at least a limited notice obligation on the employee. The instruction should be revised accordingly.	The committee agreed with the comment, and has revised element 3 to state that a request is required.
	Orange County Bar Association, by Nikki P. Miliband President	Since the new act also requires the employer to maintain the employee's insurance coverage during the leave, as well as other requirements, we suggest adding to the introductory paragraph of 2630:	"Other protected activity" suggests that there might be any number of other protected activities, but that is not the case.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		"[*Name of plaintiff*] claims that [*name of defendant*] refused to [grant [him/her] parental leave/return [him/her] to the same or a comparable job when [his/her] parental leave ended/*other protected activity*]" And to change element 4 to read: "That [*name of defendant*] refused to [grant [*name of plaintiff*]'s request for parental leave/return [name of plaintiff] to the same or a comparable job when [his/her] parental leave ended/*other protected activity*]"	The Directions for Use reference the requirement to maintain health care coverage during the leave. The committee believes that is sufficient.
		Since the new act somewhat mirrors the CFRA as to the length of service requirement, under which the employee need not work for the employer for 12 consecutive months, we suggest changing element 2 to the following in order to avoid confusion and to more accurately track the wording of the new code section: "2. That [*plaintiff*] has more than twelve (12) months of service with [*defendant*] and worked for [*defendant*] for at least 1250 hours during the previous 12 months;"	It would appear that the point of the comment is to object to making some plain-language edits to the statutory language: changing "with more than 12 months of service" to "worked for" and changing "12 months" to "a year." The committee sees no issues with this simplified language.
		We also suggest adding to the "Directions for Use" the following: "The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be	It is true that "refuse to hire" is among the prohibited adverse actions. And possibly, a job applicant could indicate in the job interview that s/he will be requesting parental leave.

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		modified if the defendant is a prospective employer or other person. (See Gov. Code, § 12945.6(g).)"	But the committee does not think that the possibility as likely or important enough to require a Direction for Use. "Or other person" is wrong as the act applies to "employers."
		We also suggest adding to the "Directions for Use" the following: "Both the California Family Rights Act and the New Parent Leave Act reach a broad range of adverse employment actions short of actual discharge. (See Gov. Code, §§ 12945.2(l), 12945.6(g).) Element 4 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, "Adverse Employment Action" Explained, and CACI No. 2510, "Constructive Discharge" Explained, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction." [similar to the Directions for Use for 2620 for use in retaliation claims.]	There are some significant differences between New Parent Leave essential factual elements and retaliation. The essence of a retaliation claim is an adverse action. But the essential factual elements of a Parental Leave Act claim do not require an adverse action. The wrong is complete on the employer's failure to grant the leave or failure to guarantee return to a comparable position (and presumptively the refusal to honor the guarantee on return). The employer does not have to terminate the employee or take any other adverse action. The question of potential adverse actions will be encompassed in the battle over the question of comparable work.
2740, 2741, 2742, and 2743 on the Equal Pay Act	See separate chart.		

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2800. *Employer's Affirmative Defense—Injury Covered by Workers' Compensation*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The proposed revisions to the introductory paragraph of the instruction and element 3 are helpful, and we agree with them.	No response is necessary.
		We believe the language "a contributing cause" may not be self-explanatory to jurors. We would modify element 4 for clarification: "4. That this [task/work] ~~was a contributing cause of~~ <u>contributed to causing</u> the injury."	The committee agreed with the comment and has made the proposed change.
		We would add a citation to the Sources and Authority on the contributing cause requirement: " 'Substantial evidence supported the WC's finding that Elavil and Vicodin, prescribed for Clark's industrial injury, contributed to his death.' (*South Coast Framing, Inc. v. Workers' Compensation Appeals Bd.* (2015) 61 Cal.4 th 291, 303.)"	The committee did not add the proposed excerpt. It is basically just an application to the facts.
	California Manufacturers and Technology Association, by Nicole Rice and Jarrell Cook, Policy Directors (Civil Justice Association of California has submitted	The proposed revisions to CACI 2800 adds a new and unnecessary element of proof. CACI 2800 is an affirmative defense that the loss resulted from an injury covered under the Workers Compensation Act. Therefore, there is no reason to add an element not required to establish workers' compensation coverage.	As noted in the Directions for Use, *Lee* 5 Cal.App.5th at pp. 624–625 explains that scope of employment and industrial causation are different requirements, and that both must be proved. Even if the comment is right, that causation is presumed if the injury occurs at work, that does not mean that it is not an element that must be proved to establish coverage.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
	essentially the same comment)	*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 625 does not stand for the principle that "industrial causation" must be explicitly proven, overruling decades of statutory and common law. Rather, *Lee* concerned only the limited exception to an employer's liability under the workers' compensation bar for intentional acts. The new fourth element is not required to establish workers' compensation coverage. Instead, workers' compensation coverage is established irrespective of whether the work was a contributing factor in the injury; causation is presumed once it is established that the injury occurred while the employee was working. Adding this redundant element would make it more difficult to establish that a claim fell under the workers' compensation bar than the statute intends.	
3244. *Civil Penalty—Willful Violation*	Association of Southern California Defense Counsel, by Lisa Perrochet, Horvitz & Levy	The changes represent a significant improvement over the existing instruction, better capturing the body of law concerning the jury's task in deciding whether and how much to award in civil penalties for a violation of the Song-Beverly Act.	No response is necessary.
		The revisions do not fully capture key language from *Kwan* that a lay jury would probably find to be helpful guidance, namely, that a penalty "ordinarily would not be appropriate if [*name of defendant's*]	"Honest mistake" appears only in a part of the *Kwan* opinion in which the court is surveying the meaning of "willful" in statutes other than Song-Beverly. It is not part of the language that the court concludes should have been in the instruction.

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		actions proceeded from an honest mistake or a sincere and reasonable difference of factual evaluation." That phrasing is probably more easily understood and applied than the language in the instruction as proposed, which ask the jury to find whether the defendant had a reasonable and good faith belief that the facts did not require certain conduct to meet the defendant's statutory obligations. However, the Committee's proposed additions to the Sources and Authority section do include the "honest mistake" language from *Kwan,* so in an appropriate case, the Sources and Authority materials may aid the trial court and counsel in deciding whether a supplemental special instruction is warranted.	
		We suggest one small wording change that is in the nature of correcting a typographical error. In the first line of the first paragraph, replacing the word "violation" with "obligation" in the bracketed clause would more clearly explain what information should be added. (It is the failure to meet an obligation, not the failure to commit a violation, that is intended there.)	The committee agreed with the comment and has made the change (although it was not a typographical error).
		Add the citations in bold to the excerpt from *Kwan* in the Sources and Authority:	CACI standards discourage string citing or citing more than one case for the same principle.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		"[Defendant] was entitled to an instruction informing the jury its failure to refund or replace was not willful if it reasonably and in good faith believed the facts did not call for refund or replacement. Such an instruction would have given the jury legal guidance on the principal issue before it in determining whether a civil penalty could be awarded." (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 186–187 [28 Cal.Rptr.2d 371]; **accord *Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1051; *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 815 [relevant inquiry for jury is whether manufacturer had a good faith belief that it could readily repair the vehicle in light of "the nature and details of those prospective repairs"]; *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 136 [" 'A violation 'is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present.' "]**.)	
		We note that the committee proposes a new excerpt from *Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249-1250. To clarify the import of that decision for jury instruction purposes, we urge that the committee provide a new	Geez, all this over a lousy Sources and Authority excerpt. It is hard to find a good excerpt from *Bishop*. Therefore, the committee selected the "see also" reference to *Bishop* from *Schreidel*, which has very

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		excerpt from the subsequent decision in *Bishop v. Hyundai Motor Am.* (1996) 44 Cal.App.4th 750. The proposed new quote to *Schreidel* is from the court's general description of the Song-Beverly Act at the beginning of the opinion, and is not part of any legal analysis about jury instructions because, as the court specifically noted, defendant Honda in that case "[did] not challenge the correctness of the instruction" that was given on willfulness for purposes of Song-Beverly penalties. (*Schreidel, supra,* 34 Cal.App. 4th at 1254.) In contrast, the later decision in *Bishop* addressed a claim on appeal that an instruction using language very similar to that which the Committee quotes from *Schreidel* was erroneous. The court expressly agreed with the defendant/appellant that the language would be improper as a jury instruction, holding that defendant Hyundai accurately noted that such language, standing alone, "would permit the jurors to make a finding of willfulness even though Hyundai was unaware of its obligations or had a good faith belief it was fulfilling them." (*Bishop, supra,* 44 Cal.App.4th at p. 759.)	good language, even if its placement in the opinion makes it less persuasive. The problem with the comment's proposed excerpt is that it picks and chooses words from the opinion and then inserts them into a more treatise-like explanation. The court in *Bishop* quotes the instruction given and then says what's wrong with it, and what's right with it. To use this as an excerpt would be very long. (Also, the procedural add-on about the defendant's failure to object is of no significance.) The proposal shortens and clarifies the point being made, but it's no longer an excerpt from the case. The comment is not exactly right in its view of the "see also." The court notes that defendant Hyundi agreed that the jury was properly instructed with this language: "[T]he defendant acted 'willfully' if you determine that it knew of its obligations under the Song-Beverly Act but intentionally declined to fulfill them." The "see also" is a bit imprecise as to what language the defendant agreed was proper. The committee has revised the parenthetical a bit to address this imprecision.

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		In other words, the *Bishop*'s court ultimately found a waiver (id. at p. 760 rationale about the impropriety of language for a jury instruction is still binding on trial courts fashioning instructions. The *Schreidel* decision, which was not presented with any claim of instructional error on appeal, does not have the same force in that context. As proposed by the Committee, *Bishop* appears only at the end of the *Schreidel* excerpt as a short parenthetical. And that parenthetical is inaccurate or at least imprecise in saying that the "defendant agreed that the jury was properly instructed with this language." The defendant in *Bishop* directly challenged the instruction as improper on appeal, and even at trial the defendant did not affirmatively "agree" the instruction as given was proper. (*Bishop, supra,* at pp. 759-760.) There is a meaningful difference between agreeing that an instruction is proper, and failing to object to an instruction. (See Code Civ. Proc., § 647.) ASCDC therefore suggests that *Bishop* not be relegated to a "see also" cite with a somewhat misleading parenthetical at the end of a quote from *Schreidel,* and that it	

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		instead be placed in a separate excerpt, consistent with the fact that it is a more recent and more relevant case for consideration in crafting jury instructions than *Schreidel*. We propose this new paragraph, describing the important rationale from *Bishop*: **Jury instruction is erroneous if it states that "willfulness" under Song-Beverly Act " 'does not necessarily imply anything blamable, or any malice toward the plaintiff, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: that the defendant knows what it is doing and intends to do what it is doing.' " Such an instruction "would permit the jurors to make a finding of willfulness even though Hyundai was unware of its obligations and had a good faith belief it was fulfilling them." The court "recognize[d] the error in the formulation of this instruction and the possibility of misdirection," but did not reverse on this ground because Hyundai failed to object to the proposed instruction or request a modification. (*Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750, 758-759.)**	

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We would modify the second sentence in the third paragraph of the instruction for greater clarity: "However, a violation is not willful if you find that [*name of defendant*] reasonably and in good faith believed that ~~the facts did not require~~ [he/she/it] was not required to [*describe statutory obligation, e.g., repurchasing or replacing the vehicle*]."	The committee does not believe that this sentence, which comes from *Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 186–187, should be changed.
	Civil Justice Association of California	We suggest adding the following after the second paragraph in the Instruction: A violation is not willful if [*name of defendant*] had a good faith and reasonable belief that it was not legally obligated to replace or refund the vehicle. This might be the case, for example, if [*name of defendant*] reasonably believed that the product conformed to the warranty, that a reasonable number of repair attempts had not been made, or that [*name of plaintiff*] desired further repair rather than replacement or a refund, [or any other facts negating the statutory obligation]. We rely on *Kwan v. Mercedes-Benz of North America, Inc.* (1994) 23 Cal. App. 4th 174, 185 for the above proposed revision ("The considerations discussed above lead us to conclude such a violation is not willful if the	Please see the comment made by the Association of Southern California Defense Counsel and the committee's response, above.

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		defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product did conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund.") This case is cited in the last paragraph under Sources and Authority of this jury instruction.	
	U.S. Chamber Institute for Legal Reform, by John H. Beisner	The proposed revisions to the definition of "willful[ness]," which is essential for imposing liability, should be clarified. The proposed language states that a violation is not willful if the jury finds that the defendant "reasonably and in good faith believed that facts did not require" it to act otherwise. While this is a correct statement of the law, we submit that juries would benefit from the plainer language used to illustrate this terminology in the Sources and authority – i.e., that a violation is not willful if it proceeds from "an honest mistake or a sincere and reasonable difference of factual evaluation" – either instead of or in addition to the language presently proposed.	"Honest mistake" is addressed and rejected above. The committee finds "sincere and reasonable difference of factual evaluation" to not be plain language. The point is adequately made with "reasonably and in good faith believed that the facts did not require."

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	Orange County Bar Association, by Nikki P. Miliband President	It is incorrect to state that "willful" can only be established by proving that the defendant "knew of its/her/his legal obligations"; a more correct statement would be that the defendant "knew the operative facts pertaining to the violation(s) and …"; see *Kwan vs. Mercedes-Benz of North America* (1994) 23 CA4th 174, 180-187 ("The considerations discussed above lead us to conclude such violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief (that) the facts imposing the statutory obligation were not present.");	The instruction does not say that "willful" can only be established by proving that the defendant knew of its legal obligations. The defendant must also have intentionally failed to follow them. Also, the proposed revision retains "reasonably and in good faith believed."
		VF-3203 also requires revisions to conform to this CACI 3244 since it fails to list any good faith defense nor any factors for establishing "willful" violations.	Question 7 asks whether the violation was "willful." CACI No. 3244 is cross referenced in the Directions for Use. That is sufficient; willful" does not need to be defined in the verdict form.
		There needs to be a CACI instruction covering the "nonwillful" violations of Civil Code section 1794(e), or at least some references in CACI 3244 that non-willful violations of Civil Code #1794(e) can also be the basis for civil penalties not exceeding 2 times. (See *Suman vs. Superior Court* (1995) 39 CA4th 1309, 1312-1318.)	The suggestion is beyond the scope of proposed revisions for this release. It will be placed on the agenda for the next release cycle, at least to the extent of looking into the statute and case.
		VF-3203 is also inconsistent with this CACI because the verdict form is entitled "Breach of Express Warranty-New Motor Vehicle-Civil Penalty Sought" even though it is	VF-3203 is not at issue in this release, except to the extent that it might be inconsistent with 3244.

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		established that the civil penalties exist for more than just "express warranties" (e.g. service contracts, failures to provide service literature, failure to maintain independent service facilities, assistive devices such as wheelchairs, failure of retailers to comply with the requirements for "used" vehicles).	The Orange County Bar Association's comment about the title will be considered in the next release cycle.
		The Sources and Authority should specifically reference and cite the holdings that a plaintiff can elect to sue for both punitive damages and tort violations at the same time and based on the same facts it/she/he sues for these statutory civil penalties. The punitive damage claims would only be subject to constitutional due process limitations, while these Song-Beverly violations would be subject to the two times actual damages limitations. The punitive damage claims would have a different criteria than presented by the "willful" Song-Beverly criteria. And of course the plaintiff may be determined to have waived one or the other by an election of remedies issue. (See *Johnson vs. Ford Motors* (2005) 35 Cal.4th 1191; *Ortega vs. Toyota Motors* (2008) 572 F.Supp2d 1218.)	In *Johnson,* the relevance to 3244 "willful" is minimal to none. The only mention is to what the lower court held, which is not sufficient for a Sources and Authority excerpt. And *Ortega* is a federal district court case, which CACI does not include in the Sources and Authority of an instruction based on California law.
4010. *Limiting Instruction—Expert Testimony*	Association of Southern California Defense Counsel, by Lisa Perrochet and	ASCDC agrees that, in light of *People v. Sanchez, supra,* it is appropriate to revoke CACI No. 4010, which provided the language for a limiting instruction in the event that an expert relayed to jurors the hearsay	No response is necessary.

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	John A. Taylor, Jr., Horvitz & Levy	contents of certain medical records. Admission of such information for a limited purpose, subject to a limiting instruction, is no longer appropriate. (See *Sanchez, supra,* 634 Cal.4th at p. 684 ["Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth"]; id. at p. 686, fn. 13 [disapproving prior decisions holding that "a limiting instruction, coupled with a trial court's evaluation of the potential prejudicial impact of the evidence under Evidence Code section 352, sufficiently addresses hearsay and confrontation concerns"].)	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
4208. *Affirmative Defense—Statute of Limitations—Actual and*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by	We agree with the revisions to the instruction and the Sources and Authority.	No response is necessary.
		We would modify the proposed new language in the Directions for Use for greater clarity:	The committee has replaced "for use for" with "assert."

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
Constructive Fraud	Reuben A. Ginsberg, Chair	"This instruction may not be modified ~~for use for~~ to state the seven-year period under Civil Code section 3439.09(c).	
	Civil Justice Association of California	We oppose deleting from the instruction the clause relating to the maximum elapsed time to bring a suit. The Directions for Use contains a discussion of the clear and well-known seven-year statute of limitations provision under the Uniform Fraudulent Transfer Act ("UFTA"); thus, we strongly suggest not eliminating this statement of law from the instruction to maintain clarity and consistency.	As noted in the addition to the Directions for Use, per *PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 178–185, Civil Code section 3439.09(c) is a statute of repose, not a statute of limitations.
4605. *Whistleblower Protection—Health or Safety Complaint–Essential Factual Elements*	California Employment Lawyers Association, by David deRobertis	Agree	No response is necessary.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
	Civil Justice Association of California	We believe the addition of four sub-elements to the instruction is vague, ambiguous and unnecessary because it is not supported by case law (as evidenced by the absence of any cited legal authority).	The revisions reflect recent amendments to the statute.

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
		We believe existing law and the instruction adequately express the factual elements for establishing whistleblower protection claims.	
4800. *False Claims Act—Essential Factual Elements*, and 4801. *Implied Certification of Compliance With All Contractual Provisions—Essential Factual Elements*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
	Orange County Bar Association, by Nikki P. Miliband President	Change "or" to "and/or" at the end of the third way that "knowingly" is established. "(3) acted in deliberate ignorance of the truth or falsity of whether [he/she/it] had failed to disclose [his/her/its] noncompliance; "and/or" (While the comment is directed only to 4801, the same content appears in 4800.)	"And/or' is wrong when it is important to make clear whether only one of the group need be proved, or all of them must be proved. The statute says "any of the following." (Gov. Code, § 12650(b)(3).) Therefore, it must be "or."
	Prime Health Care Services, by A. Joel Richlin, Deputy General Counsel	The comment argues that revisions to the materiality requirement in both instructions should be made in light of *Universal Health Services, Inc. v. United States ex rel. Escobar* (2016) --- U.S. ---, 136 S. Ct. 1989. The comment makes the same points as the comments of the Institute for Legal Reform and the Civil Justice Association, below, which are directed only at 4801.	*Escobar* is not authority. Yes, California courts do look to federal interpretations of the False Claims Act for guidance. But that does not make federal court interpretations of the federal statute California law until a California court says that it applies to the state statute. The comment acknowledges that "no California court has yet had occasion to apply *Escobar*."

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Instruction	Commentator	Comment (comments are not produced verbatim)	BG Proposed Response
			See additional responses to comments of ILR and CJA below.
4800. *False Claims Act—Essential Factual Elements*,	Civil Justice Association of California	We recommend clarifying the definition of "knowingly," to avoid any confusion or ambiguity.	There is no suggestion as to how it might be clarified. The factors in the instruction come directly from the statute.
	Orange County Bar Association, by Nikki P. Miliband President	Add annotation from CACI 4801 under Sources and Authority, before Secondary Sources: "[A]n alleged falsity satisfies the materiality requirement where it has the ' " 'natural tendency to influence agency action or is capable of influencing agency action.' " [Citation.]' " (*San Francisco Unified School Dist. ex rel. Contreras, supra,* 182 Cal.App.4th at p. 454.)	As the materiality requirements for both 4800 and 4801 are similar, the committee agreed to add the excerpt to the Sources and Authority for 4800 also.
4801. *Implied Certification of Compliance With All Contractual Provisions—Essential Factual Elements*	U.S. Chamber Institute for Legal Reform, by John H. Beisner and Civil Justice Association of California (same comment)	The plaintiff should be required to show that the defendant knew the false statement to be material to the government's decision to pay the claim. (*United Health Services, Inc. v. United States ex rel. Escobar* (2016) --- U.S. ---, 136 S. Ct. 1989, 1996 ["What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision."].)	While the comment is only directed at 4801, this part of it would seem to be equally applicable to 4800. As stated above, *Escobar* is not authority for a CACI jury instruction.

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		The proposed new instruction should be revised to provide that "minor" and "insubstantial" contractual noncompliance is not material. (*Escobar, supra,* 136 S.Ct. at p. 2003.) Indeed, federal law holds that even a term expressly designated as a condition of payment does not necessarily satisfy the materiality requirement. (See *id.* at 2003-04 [rejecting the "extraordinarily expansive view" that "any . . . contractual violation is material so long as the defendant knows that the Government would be entitled to refuse payment were it aware"].) These important points should be emphasized to jurors to cut against the risk that False Claims Act liability could be used to transform a "garden variety" breach of contract into one giving rise to treble damages and an additional civil fine if the breach was not actually material to the governmental entity at issue. (See id. at 2003 ["The False Claims Act is not an all-purpose antifraud statute or a vehicle for punishing garden-variety breaches of contract or regulatory violations."].) Thus, we would propose adding a second sentence that states: "Not every breach of a term of a contract, even if the breach would have given the	*Escobar* cannot be the basis for a California jury instruction until a California court adopts its language and reasoning. Further, the committee finds that *Escobar* does not conflict with proposed CACI No. 4801. Both ultimately set forth the requirement that the plaintiff must prove that had the entity been aware of the breach, it would not have paid the claim. *Escobar* does contain language that emphasizes that a garden variety breach of contract is not a false claim unless materiality is proved. While some of this language may ultimately prove appropriate for CACI, for now, the committee has added two excerpts from *Escobar* to the Sources and Authority.

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		state the option to decline to pay, will be material to the decision to make a requested payment."	
		We suggest revising the Directions for Use to include a list of the factors the jury can consider in evaluating materiality. A nonexhaustive list of these factors, none of which is dispositive and may have varying relevance or importance based on the facts of particular cases, includes: i) whether the contract expressly identified a provision as a condition of payment; ii) whether the government regularly pays claims in which a particular contractual provision has been violated; iii) whether the defendant knew that the government regularly pays claims in which a particular contractual provision has been violated; and iv) whether the government in fact paid the particular claim at issue despite knowledge of the alleged contractual breach. (*Escobar, supra,* 136 S.Ct. at pp. 2003-04	These factors have been extracted from *Escobar*. As noted above, the committee has decided to limit *Escobar* to the Sources and Authority for now.
5022. *Introduction to General Verdict Form*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The third paragraph in this proposed new instruction refers to what the jury "should consider" with respect to the burden of proof. As set forth below, we believe stronger language is appropriate with respect to this foundational requirement: "must decide."	The committee agreed and has made this revision.

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		The plaintiff always has a burden of proof, but the defendant has a burden of proof only if the defendant asserts an affirmative defense. We would avoid referring generally to "the party with the burden of proof," because it may suggest that the defendant has the burden of proof, when in many cases the defendant has no burden of proof. We would modify the third paragraph as set forth below for greater clarity.	The committee does not see how "the party with the burden of proof" suggests that the defendant has the burden of proof if s/he/it does not.
		CACI No. 200, Obligation to Prove—More Likely True Than Not True, defines "burden of proof," but generally instructions on the elements of each claim and instructions on affirmative defenses avoid this term and instead refer to what the plaintiff or defendant "must prove." We believe this language is more comprehensible to lay jurors. As set forth below, we would refer to what the plaintiff and defendant (if applicable) must prove rather than to the parties' "burden of proof."	The proposal is overly complex for a secondary point.
		The instructions on the elements of each claim typically describe what the plaintiff must prove (these are facts) without referring to "elements." As set forth below, we would avoid use of the term "elements," which may be unfamiliar to lay jurors, and instead would refer to what the plaintiff must prove as "facts." We would not refer	The purpose of the instruction is to direct the jury's attention to each element in the underlying instructions. "Facts" is not the appropriate substitute for "elements." A case may involve many facts, but there is no one-to-one correlation between elements and facts.

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		to "all of the necessary facts in support of each element" because the instructions only state what the plaintiff must prove, and those are facts, not "elements" or facts in support of elements.	
		We would delete the reference in the third paragraph to "other instructions." The jury hears most of the instructions all at once, and they are collectively "the instructions." (See CACI No. 5000, Duties of the Judge and Jury.) Attorneys see individual instructions, but the jury generally hears them all collectively. This concluding instruction is part of the instructions, and to the jury there are no "other instructions," except maybe pretrial instructions (see CACI No. 5000).	The committee does not really understand the point of the comment. "Other instructions" refers to all instructions except 5022.
		Accordingly, and for greater clarity in other ways, we would revise the third paragraph of the instruction: "~~In reaching~~ To reach your verdict [and answer~~ing~~ the additional questions[s]], you ~~should consider~~ must decide whether ~~the party with the burden of proof~~ [*name of plaintiff*] has proved all of the ~~necessary~~ facts ~~in support of each element of~~ that I have instructed you [*name of plaintiff*] must prove to establish [his/her/its] claim ~~or defense. You should review the elements addressed in~~	As noted above, the committee agreed only with using "must decide." This proposed rewrite either misses or buries the point of the instruction, which is to try to get the jury to go through each element of each claim separately to determine if there are nine votes for each, as would happen with a special verdict.

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		~~the other instructions that I have given you and determine if at least nine of you agree that each element has been proven by the evidence received in the trial. The same nine do not have to agree on each element.~~ [I have also instructed you on [a defense/certain defenses] offered by [*name of defendant*]. You must decide whether [*name of defendant*] has proved all the facts that I have instructed you [*name of defendant*] must prove to establish [his/her/its] defense[s]]. At least nine of you must agree that a fact has been proved for the jury to decide that a fact has been proved, but the same nine do not have to agree on each fact."	
	Civil Justice Association of California	We recommend clarifying the third paragraph of the proposed instruction. As it reads, it would broadly allow a plaintiff to argue that the burden of proof should be shifted to a defendant on all affirmative defenses. The jury will be susceptible to confusion by arguments that a defendant did not meet his/her/its burden, resulting in a verdict in favor of the plaintiff by default.	The committee finds no words that might possibly suggest any shift in the burden of proof. And the defendant does have the burden of proof on all affirmative defenses.
	U.S. Chamber Institute for Legal Reform, by John H. Beisner	The instruction should be revised to eliminate the statement that the same nine jurors need not agree on each answer, and the last two paragraphs of the directions for use should be deleted. The proposed new language would change existing law by	If this comment is correct, that the same nine jurors do have to agree to each component issue behind a general verdict, then the theory behind the instruction is flawed, at least in part. When nine jurors agree on element 1, but one of the nine does not agree on element 2, the case is over and the defendant wins,

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		allowing a jury to reach a general verdict despite the fact that nine-jurors did not agree on every element of the claim. We acknowledge that when the jury returns a special verdict – at least if, for example, there are separate questions for liability and damages – the same nine-member majority need not agree on each answer, as the California Supreme Court held in *Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768, the case on which this proposed instruction relies. But that is not true with respect to the underlying elements of a single claim. Indeed, even while approving verdicts when different nine-member majorities support liability and damages findings in a special verdict form, *Juarez* expressly acknowledged – and did not purport to disturb – the "well settled [principle] that in a nonbifurcated trial nine identical jurors had to agree on all elements of the ultimate verdict." (31 Cal. 3d at 766.) The Instruction states that it intends to eliminate the possibility that the same jury analyzing the same evidence would reach a decision using a special verdict form, but not reach one using a general verdict form. Though that may be a laudable goal as a	even if one of the jurors who voted no on element 1 jurors votes yes on element 2. So the paradox of shifting majorities (different results depending on whether a general or special verdict is used) remains. But the committee finds no clear answer as to whether the comment is correct. The "well-settled" principle in *Juarez* re: nine identical jurors having to agree on all elements of the verdict, was only well-settled before 1975 and *Li v. Yellow Cab.* The court in *Juarez* say absolutely nothing about the head count under a general verdict. And that is because it makes no difference. There's only one vote; plaintiff wins or loses. The purpose of this proposed new instruction is to get the jury to deliberate as if it had a special verdict and address and vote on each element of each claim separately. The idea is to avoid the paradox of shifting majorities so that the result will be the same whether a special or general verdict is used. But for this to happen, the rule that the same nine jurors do not have to agree on everything would have to apply to a general verdict. And while *Juarez* is not clear authority that it does not, there is no authority that says that it does. Nevertheless, the committee has elected to propose the instruction essentially as originally drafted. The committee generally does not view general verdicts favorably, but CACI does include two general verdict

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		matter of policy, the authority cited expressly applies only to special verdicts.	forms. (See CACI Nos. VF-5000 and VF-5001.) The committee is concerned about the paradox of shifting majorities, and wants to encourage bench officers to attempt to avoid it when a general verdict is used.
All other instructions except as noted above	Orange County Bar Association, by Nikki P. Miliband President	Agree	No response is necessary

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430, *Causation: Substantial Factor*, and 435, *Causation for Asbestos-Related Disease Claims*	Waters Kraus Paul, Attorneys at Law, by Michael B. Gurien	In reaching its decision as to CACI No. 430, the Court of Appeal [in *Petitpas*] quoted the Supreme Court's statement in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, that, in addition to the asbestos injury causation standard articulated in *Rutherford,* which is now set forth in the second paragraph of CACI No. 435, *"'[t]he standard instructions on substantial factor and concurrent causation (BAJI Nos. 3.76 and 3.77) remain correct in this context and should also be given.'"* (*Petitpas, supra,* 13 Cal.App.5th at p. 299, quoting *Rutherford,* at pp. 982-983, italics added by Court of Appeal.) The Court of Appeal then quoted the current directions for CACI Nos. 430 and 435, which, say not to use CACI No. 430 in an asbestos injury case "'[u]nless there are other defendants who are not asbestos manufacturers or suppliers . . . .'" (Ibid., quoting CACI No. 435, Directions for Use, second para.) Comparing the italicized statement in *Rutherford* with the statements in the directions for use to CACI No. 430, the Court of Appeal stated that "[i]t appears, therefore, that despite *Rutherford's* statement that the standard instruction on substantial factor remains correct and also should be given, the CACI use notes disagree with this approach." (*Ibid.*) This latter statement is problematic because the standard instruction on substantial factor causation in effect at the time that *Rutherford* was decided – BAJI No.	While this commentator is actually last of the asbestos commentators in alphabetical order, the committee has elected to place this comment first because it reflects the committee's conclusions and proposals almost exactly. This comment addresses and responds to many of the comments opposing the committee's proposed revisions to CACI No. 430 that follow. This comment explains why the committee has made only minor revisions in light of the comments that follow. The comment points out why the recent case of *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261 should not be read as endorsing giving CACI No. 430 in all asbestos cases. The comment further makes clear why instructing the jury that "A substantial factor … must be more than a remote or trivial factor" is likely to cause confusion in an asbestos case, a point not developed in *Petitpas*.

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		3.76 – was different than the current standard instruction on substantial factor causation in CACI No. 430. When *Rutherford* was decided in 1997, BAJI No. 3.76 stated as follows: "The law defines cause in its own particular way. A cause of injury, damage, loss or harm is something that is a substantial factor in bringing about an injury, damage, loss or harm." (*Espinosa v. Little Co. of Mary Hosp.* (1995) 31 Cal.App.4th 1304, 1313-1314; see *Rutherford, supra,* 16 Cal.4th at p. 969 [identifying BAJI No. 3.76]. [The second sentence of] CACI No. 430 is different. It states: "A substantial factor … must be more than a remote or trivial factor." The first and third sentences of CACI No. 430 do not present a problem in asbestos injury cases. In fact, those sentences are contained verbatim in the first paragraph of CACI No. 435, the standard instruction incorporating the *Rutherford* causation standard. The problem is the second sentence of CACI No. 430, stating that a substantial factor "must be more than a remote or trivial factor." First, that sentence was not contained in BAJI No. 3.76 when the *Rutherford* court stated that BAJI No. 3.76 "remain[s] correct in this context and should also be given." (*Rutherford, supra,* 16 Cal. 4th at p. 983; see *Espinosa, supra,* 31 Cal.App.4th at pp. 1313-1314 [quoting BAJI	

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		No. 3.76 in its entirety].) Thus, in *Rutherford,* the Supreme Court did not approve the use of that sentence in an asbestos injury case. Second, the "remote or trivial" sentence is troublesome because, as the Supreme Court explained in Rutherford, "plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer . . . ." (*Rutherford, supra,* 16 Cal.4th at 976-977; accord, id. at p. 982.) The Supreme Court also held that a plaintiff "is free to . . . establish that his [or her] particular asbestos disease is cumulative in nature, with many separate exposures each having constituted a 'substantial factor' (BAJI No. 3.76) that contributed to his [or her] risk of injury." (*Id.* at p. 958; accord, id. at p. 978, italics added.) Thus, under *Rutherford,* separate exposures to even relatively small amounts of asbestos can be sufficient to establish causation, so long as the exposures were "a substantial factor in contributing to the aggregate dose of asbestos." (*Id.* at pp. 976-977.) A jury, however, viewing such small exposures in light of CACI No. 430's statement that a substantial	

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		factor "must be more than a remote or trivial factor" – terms the Supreme Court did not use in articulating its causation standard in *Rutherford* – may become confused and fail to understand that small exposures can, indeed, satisfy the standard. An instructive example is provided by the facts and evidence in *Rutherford*. There, a defense expert testified that "a very light or brief exposure could be considered 'insignificant or at least nearly so' in the 'context' of other, very heavy exposures." (*Rutherford, supra,* 16 Cal.4th at p. 984.) "Plaintiff's expert presented a generally contrary opinion, to the effect that each exposure, even a relatively small one, contributed to the occupational 'dose' and hence to the risk of cancer." (*Ibid.*) Based on its verdict, the jury apparently "accepted much of the defense's factual theory, concluding that exposure to Kaylo contributed a relatively small amount to decedent's cancer risk, but rejected defendant's argument that such a small contribution should be considered insubstantial." (*Id.* at pp. 984-985.) Nevertheless, consistent with the relatively small exposure from the defendant's product, the jury "allocated only 1.2 percent of the total legal cause to defendant's comparative fault." (*Id.* at p. 985.) Thus, "[i]n the absence of any instruction or evidence that a small amount was necessarily insubstantial, and	

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Instruction	Commentator	Comment	Response
		guided by BAJI No. 3.77's command that every contributing cause was a legal cause regardless of the degree of its contribution, the jury concluded even 1.2 percent of the cause was, on the facts of this case, substantial." (Ibid.) Had the jury, however, been instructed with the second sentence of CACI No. 430, i.e., that a substantial factor "must be more than a remote or trivial factor," it may have been confused or misled into thinking that a small exposure, "even 1.2 percent of the cause," could not be a legal cause of a person's asbestos-related injury, when, as the Supreme Court in *Rutherford* held, it can be a legal cause. In *Rutherford,* the Supreme Court noted that it had previously "suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." (*Rutherford, supra,* 16 Cal.4th at p. 969.) The Supreme Court also made clear, however, that "[t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical," (*id.* at p. 978), and it explained in a later case that "a very minor force that does cause harm is a substantial factor." (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79, italics added.) In light of the medical and scientific uncertainties	

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Instruction	Commentator	Comment	Response
		involved with causation in asbestos injury cases, as detailed and discussed by the Supreme Court in *Rutherford,* an instruction telling the jury that a substantial factor "must be more than a . . . trivial factor" may confuse and invite the jury to disregard or discount smaller exposures that are otherwise medically and legally sufficient to establish causation. It is also worth recognizing that while the Supreme Court in *Rutherford* observed that an "'infinitesimal' or 'theoretical'" force "is not a substantial factor," (*Rutherford,* at p. 969), it did not use that language, those terms, or the term "trivial" in its formulation of the asbestos injury causation standard it said the jury should be instructed with. (*Id.* at pp. 982-983.) Nor, as discussed above, was there any such language in BAJI No. 3.76 when *Rutherford* was decided. (See *Espinosa, supra,* 31 Cal.App.4th at pp. 1313-1314 [quoting BAJI No. 3.76 in its entirety].) Moreover, as to the term "remote" in the second sentence of CACI No. 430, that term will invite jury confusion because it incorrectly suggests that, for there to be causation in an asbestos injury case, there must be a temporal proximity or closeness in time between a particular exposure or series of exposures and the manifestation of the plaintiff's disease. But as the Supreme Court recognized in	

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Instruction	Commentator	Comment	Response
		Rutherford, asbestos-related diseases have a "long latency period." (*Rutherford, supra,* 16 Cal.4th at pp. 957, 975; see *Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1135 ["the average latency period of asbestosis is 20 years"], 1136 [mesothelioma "has an average latency period of 30 to 40 years"]; *Buttram v. Owens-Corning Fiberglas Corp.* (1997) 16 Cal.4th 520, 540 ["the decades-long latency periods of asbestos-related disease"].) Because of this decades-long latency period, causative exposures in an asbestos injury case will always, by definition, be remote in time compared to the injury. This unique circumstance has the real potential for causing confusion and misunderstanding if the jury is instructed, under CACI No. 430, that a substantial factor "must be more than a remote . . . factor," because the jury will be invited to apply an erroneous temporal restriction that excludes exposures that are otherwise medically and legally sufficient to establish causation. Again, it is worth noting that the Supreme Court did not include any temporal or remoteness limitation in the causation standard it said the jury should be instructed with in *Rutherford,* (*Rutherford, supra,* 16 Cal.4th at pp. 982-983), and there was no such language in BAJI No. 3.76 when *Rutherford* was decided. (*Espinosa, supra,* 31 Cal.App.4th at pp. 1313-1314.)	

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Instruction	Commentator	Comment	Response
		The one significant problem, however, is the statement in the revisions to CACI No. 430 that, in an asbestos injury case, "[g]ive CACI No. 435, Causation for Asbestos-Related Cancer Claims, and do not give this instruction, as CACI No. 435 is intended as a complete statement of causation for asbestos-related diseases with regard to defendant manufacturers and suppliers." The directions to CACI No. 435, in turn, state: "Unless there are other defendants who are not asbestos manufacturers or suppliers, do not give CACI No. 430." (CACI, No. 435, Directions for Use, second para.) Read together, these statements could incorrectly lead trial courts to conclude that CACI No. 435 should only be given in asbestos injury cases if some or all of the defendants are "manufacturers" or "suppliers," and that in cases with no defendants who are "manufacturers" or "suppliers," such as a case with a contractor or a premises liability defendant, CACI No. 430 should be given, not CACI No. 435. That would be wrong. CACI No. 435 should be given in every asbestos injury case, regardless of the type of defendant involved, as it sets forth the complete causation standard articulated by the Supreme Court in *Rutherford* for all asbestos injury cases.	As noted above, The committee did not consider expansion of CACI No. 435 beyond manufacturers and suppliers. The issue will be placed on the agenda for the next release cycle.

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Instruction	Commentator	Comment	Response
	Association of Defense Counsel of Northern California and Nevada	The proposed changes to the Directions misstate the law on causation, and would tilt the jury toward a result the law does not intend. The comment then points out that but-for (would have happened anyway) evidence should be relevant to comparative fault.]	CACI Nos. 430 and 435 do not have anything to do with evidence. It is clear that 'but-for" is not a causation limitation for asbestos. (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn.3.)
		The proposed Directions say that in asbestos disease cases, "Give CACI 435 … and do not give this instruction, as CACI No. 435 is intended as a complete statement of causation for asbestos-related diseases with regard to defendant manufacturers and suppliers." This is incorrect and overbroad in at least three ways. First, as the next citation in the proposal itself recites (citing *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261), it is not error to give both 430 and 435 in cases with both product liability and premises defendants.	The committee has removed the "complete statement" language. CACI No. 435 requires exposure to the defendant's product. If the defendant has no product (e.g., a premises liability defendant), then 435 as currently drafted will not apply.
		Second, not every defendant in an asbestos disease case made an asbestos-containing product. *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, cited in the proposed Directions, allowed a relaxed burden of causation, but only with respect to defendants whose products contained asbestos to which a	The commentator's citation doesn't include a page citation that would point to where in *Rutherford* the court says that the relaxed standard applies only to defendants whose products contain asbestos. But as noted above, the commentator is correct that 435 should not be given for these defendants.

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Instruction	Commentator	Comment	Response
		plaintiff or decedent was exposed. It does not apply to, for example, premises defendants, or defendants that made products used with asbestos-containing products (e.g., brake grinders used on asbestos-containing brake linings, or saws used to cut asbestos-containing pipe).	
		Third, the *Rutherford* standard only makes sense in connection with what are known to be asbestos-caused diseases, because we cannot scientifically know which fiber from which product actually caused the disease reaction: "there is scientific uncertainty regarding the biological mechanisms by which inhalation of certain microscopic fibers of asbestos leads to lung cancer and mesothelioma." (16 Cal.4th at 974.) If there is any evidence that a particular plaintiff's disease is not unequivocally caused by asbestos, then any rationale for applying 435 instead of 430 falls away.	The committee does not fully understand the intended point of the comment. But If there is any evidence that the plaintiff's disease could have been caused by defendant's asbestos, then CACI No. 435 should be given.
		The proposed Directions complain that "remote," "trivial" and "infinitesimal" "could cause confusion in an asbestos case." But the first and third terms were used by the California Supreme Court in *Rutherford*. And there is no indication that use of the term "trivial" in 430 has led to any incorrect results.	See the committee's response to the comment of Waters and Kraus, above. The word "remote" does not appear in *Rutherford*.
		Asbestos-related *cancer* should not be changed to "disease." *Rutherford* explicitly says "asbestos-related cancer," not "disease,"	The committee has returned to using "cancer," rather than "disease." While it would seem most logical that asbestos causation standards would be the same with

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		over a dozen times, including four times on the page cited. (16 Cal.4th at 957 [twice], 960, 961, 974 [twice], 975 [twice], 976, 977 [four times], 978 [three times], 980, 982.) The disease at issue in *Rutherford* was lung cancer, so even when the decision used the word "disease" that is what it was talking about. There is no reason, no intervening decisional authority, requiring a change in terminology.	regard to any asbestos related disease, the commentator is correct that no court has expressly so held. The committee will await the case that expressly addresses a noncancer asbestos-related disease.
		CACI No. 435 should be changed to track *Rutherford's* language. [*Name of plaintiff*] may prove that exposure to asbestos from [*name of defendant*]'s product was a substantial factor causing [his/her/[name of decedent]'s illness by showing, through expert testimony, that there is a reasonable medical probability that the exposure was a substantial factor [in] contributing **to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence** to [his/her] risk of developing cancer. "[A] substantial factor in contributing to the aggregate *dose* of asbestos the plaintiff or decedent inhaled or ingested." (*Rutherford v. Owens-Illinois, Inc.* (1977) 16 Cal.4th 953, 976, emphasis in original.) The present Sources and Authority relies heavily on *Rutherford,* yet leaves out this critical phrase.	The committee has not considered this point, and will address it in the next release cycle.

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Instruction	Commentator	Comment	Response
	Association of Southern California Defense Counsel, by Lisa Perrochet, Horvitz & Levy	We note that the Directions for Use include this new citation: "(But see *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and 435 in case with both product liability and premises liability defendants].) *Petitpas,* being an asbestos case that accordingly addressed a particular subset of product liability claims, likely has little bearing outside of toxic tort cases. Other product liability claims don't generally also involve premises liability claims. The reference to *Petitpas* therefore seems out of place in the Directions for Use to CACI No. 430. Moreover the "but see" nomenclature suggests that the Committee believes *Petitpas* is questionably reasoned in some way. Given the limited circumstances in which *Petitpas* applies, as clearly defined in the opinion itself, it is important to characterize the opinion carefully, both to avoid undermining its application in cases to which it does apply, and to avoid suggesting that it extends beyond those cases.	The committee recognizes that the discussion to be added to the Directions for Use to CACI No. 430 would seem to be better located in CACI No. 435. But the issue is whether certain sentences in 430 should be given in an asbestos case. Therefore, the committee believes that the discussion is best placed in No. 430. The committee has changed the "But see"citation to *Petitpas* to a "Cf."
		The paragraph in the Directions for Use addressing "remote" should be removed. The comment that "remote" connotes a time limitation, to set up the argument that *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 975 contains no such limitation, is	The committee has revised the language to state that "remote" often connotes a time limitation. "Remote" does have other meanings unrelated to time. But one of its meanings is related to time, and it is that meaning in the context of asbestos exposure that can mislead a jury.

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		misleading. "Remote" generally connotes a spatial limitation, suggesting a location that is removed in distance. But, of course, the word has other connotations, some having nothing to do with either time or space. For example, a person can behave in a "remote" or distant way, and may have a "remote" chance of winning the lottery. "Remote" in the context of legal causation simply captures the ways in which conduct may be attenuated from a plaintiff's injury. The word "remote" is thus aptly used, for example, in CACI No. 2507, to reflect that an improper basis for an adverse employment decision must be a "substantial motivating reason" to support liability, and cannot be a "remote or trivial reason." It is also used in CACI No. 4544 to reflect that a causal link is lacking between a defendant's conduct and a plaintiff's claimed lost profits where those profits "are speculative or remote."	
		The paragraph in the Directions for Use addressing "trivial" should be deleted. The paragraph is flatly and undeniably wrong in advancing the argument that "a very minor force that does cause harm is a substantial factor." Innumerable cases explain that "but for" causation is not, in itself, enough to be deemed a "substantial factor" of harm. It is generally for the jury, and not for the Directions for Use, to determine what "is" a substantial factor if the parties dispute the	As noted in the comment of Waters and Kraus, above, the California Supreme Court has stated that "a very minor force that does cause harm is a substantial factor." (*Bockrath v. Aldrich* Chem. Co. (1999) 21 Cal.4th 71, 79.) The committee believes that instructing on "trivial" can cause the jury to lose sight of this rule.

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Instruction	Commentator	Comment	Response
		nexus between the defendant's conduct and the plaintiff's injury.	
		The new addition of quotes from mostly older cases in the Sources and Authority section is also argumentative, with quotations limited to those that would be used in points and authorities on only one side of the ongoing dispute about causation, especially in toxic tort cases. The CACI Committee should abide by a goal of reflecting rather than creating or shading the law, without putting its thumb on the scale for one side or the other where the law is in flux. ASCDC thus urges that the Committee omit the proposed additional paragraphs from CACI No. 430, not add them to CACI No. 435, and instead await new guidance from the courts regarding the general standard for causation in ordinary tort cases.	The proposed additions are all direct quotes from cases, including California Supreme Court cases that support the proposed revisions to the Directions for Use. CACI standards are to give users language that the committee believes would be of interest. The committee agrees that case language limited to asbestos issues should be in the Sources and Authority to CACI No. 435 rather than in CACI No. 430. Of the four new excerpts proposed for 430, three are from asbestos cases. But only one of them (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990) has language that is limited to asbestos, and that excerpt is already in the Sources and Authority to 435. The others all have language about "substantial factor" that is not restricted to asbestos. The committee has removed the *Jones* excerpt and retained the other three.
		Add to the Sources and Authority to 430: A matter should not be submitted to the jury when the plaintiff "fails to show that [a] breach contributed to plaintiff's injuries in this case"; "'A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.'" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763,	The "mere possibility" language from Prosser is in the Sources and Authority already, in an excerpt from *Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029–1030.

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		775-776 [original emphasis; quoting Prosser & Keeton, Torts (5th ed. 1984) § 41, p. 269, fns. omitted].)	
		Add to the Sources and Authority to 430: "Proof that a negligent act was a substantial factor in causing the injury does not relieve the plaintiff of the burden of proving the negligent act was a cause in fact of the injury." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1115 [citing *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239-1244].) A plaintiff's burden of proof on causation cannot be satisfied by assumptions, speculation, conjecture, guess, or surmise. (*Jennings, supra,* at p. 1117.)	There are currently seven references to "cause in fact" in the Sources and Authority to CACI No. 430.
		Add to the Sources and Authority to 430: "Liability for medical malpractice is predicated upon a proximate causal connection between the negligent conduct and the resulting injury. (*Budd v. Nixen* (1971) 6 Cal.3d195, 200.) '[C]ausation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case. [Citations.] That there is a distinction between a reasonable medical 'probability' and a medical "possibility" needs little discussion. There can be many possible "causes," indeed, an infinite number of	This excerpt would go in CACI No. 500, *Medical Negligence—Essential Factual Elements*. No revisions to CACI No. 500 are proposed for this release.

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Instruction	Commentator	Comment	Response
		circumstances which can produce an injury or disease. A possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury.'" (*Dumas v. Cooney* (1991) 235 Cal.App.3d 1593, 1603; accord *Williams v. Wraxall* (1995) 33 Cal.App.4th 120, and *Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1093.)	
		Add to the text of CACI No. 435: "Many factors are relevant in assessing the medical probability that any alleged asbestos exposure was a substantial factor in causing an injury. These factors include the type of asbestos, the nature of the exposure, the frequency of exposure, the regularity of exposure, the duration of exposure, the proximity of the asbestos-containing product, and the type of asbestos-containing product." Authority: *Rutherford, supra,* 16 Cal.4th at p. 975; *Lineaweaver v. Plant Insulation Co.* (1995) 31 Cal.App.4th 1409, 1416-1417; see also *Whitmire v. Ingersoll-Rand Co.* (2010) 184 Cal.App.4th 1078, 1094; but see *Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 494-497 (court not required to give instruction on these factors).	The committee previously considered and rejected adding these factors to the instruction. The committee does not wish to revisit this decision.

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Instruction	Commentator	Comment	Response
	Luis A. Barba, Attorney at Law, Irvine	The commentator objects to changing "cancer" to "disease" based on the language in *Rutherford*. (See comment of Associated Defense Counsel of Northern California and Nevada, above.) The comment suggests that asbestosis is a noncancerous asbestos-related disease, to which *Rutherford* would not apply.	As noted above, the committee has decided to restore "cancer." However, there is no authority for the proposition in this comment that *Rutherford* does not apply to asbestosis.
		The commentator disagrees that a trivial or remote exposure to asbestos can still constitute a substantial factor. He cites *Rutherford's* favorable citation to BAJI 3.76 and the Restatement Second of Torts, § 431 to conclude that *Rutherford's* "infinitesimal or theoretical" equates to 430, "remote or trivial."	As noted in the comment of Waters and Kraus, above, BAJI 3.76 Is not an asbestos instruction, and it does not include the "remote or trivial" language. No conclusion can be drawn from *Rutherford's* citation of BAJI 3.76.
	Bassi Edlin Huie & Blum, San Francisco, by Jeremy Huie	The commentator argues that "remote or trivial" should be given in an asbestos case for reasons addressed in other comments.	See response to comment of Waters and Kraus, above.
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary.
	CertainTeed Corporation, by	The proposed revisions unveil their actual purpose: they are not designed to "mak[e]recommendations to the Judicial	See the comment of Waters and Kraus, above. The committee understands that it does not have the authority to overrule an appellate decision.

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	Neil Lloyd, Schiff Hardin	Council for updating, revising, and adding topics to the council's civil jury instructions" in light of the Committee's "regular[] review[of] case law and statutes affecting jury instructions;" they are designed to overrule the Court of Appeal's published decision in *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, rev. denied.	
		Nothing however, supports the Committee's proposed CACI 430 usage note that CACI 435 "is intended as *a complete statement* of causation for asbestos-related diseases with regard to defendant manufacturers and suppliers. (But see *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298-299[.])." (Emphasis added.) Making *Petitpas* a "But see" in the CACI 430 usage notes guts the decision's precedential force before trial courts have even had an opportunity to apply it and before other reviewing courts have had the opportunity to consider verdicts rendered after juries have been properly instructed with both CACI 430 and 435. The Judicial Council should resist the invitation to step into the middle of developing law.	The committee has removed the "complete statement" language and has changed "But see" to "Cf."
		Geneticists have discovered a new cause for mesothelioma, one requiring no asbestos exposure — a mutation in the BAP1 tumor suppressor gene. Some geneticists have concluded that BAP1 predisposes an individual to developing mesothelioma, requiring no	While the committee finds this interesting information for the future, the committee sees nothing that would affect current jury instructions.

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		environmental trigger. Others have opined that BAP1 makes an individual more susceptible to developing mesothelioma, requiring an environmental trigger such as sufficient asbestos exposure, though less exposure than one without the BAP1 mutation. (The commentator has attached a 20 page court order permitting genetic testing for the BAP1 gene. Also attached is a motion for review or depublication filed with the California Supreme Court, a motion which was denied.)	
		In an attempt to skirt a jury's Proposition 51 allocation of fault, plaintiffs in asbestos personal injury cases have in recent years increasingly alleged causes of action for battery, intentional misrepresentation, and intentional concealment. The plaintiffs contend that a jury verdict on any of these theories gives them the option of seeking to void the jury's Proposition 51 allocation. The Committee's proposed usage notes state – without citation or explanation – that permitting a jury in an asbestos case brought against a manufacturer or supplier to be instructed under CACI 430 "could confuse the jury in allocating comparative fault at the lower end of the exposure spectrum." On the contrary, adopting the proposed CACI 430	The language quoted in the comment regarding comparative fault and "remote or trivial" is in a paragraph of explanation cited to *Rutherford* and *Bockrath v. Aldrich Chem. Co. (*1999) 21 Cal.4th 71, 79. The question of joining asbestos claims with other traditional tort claims is one that the committee may consider in the next release cycle.

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Instruction	Commentator	Comment	Response
		usage notes could cause a jury to disregard the separate causation standards that apply to intentional torts like battery, intentional concealment, and intentional misrepresentation.	
		The California Supreme Court denied both review and depublication for *Petitpas*.	The committee acknowledges that the comment is correct.
	CJA	We believe the paragraph inserted into the Directions for Use asserting "a very minor force that does cause harm is a substantial factor" is unsupported by legal authority and would create prospect for confusion for jurors in evaluating causation rather than comparative fault, as the Direction purports to honor the latter principle.	The language is a direct quote from *Bockrath, supra,* 21 Cal.4th at p. 79.
		We believe the proposed changes in the Directions for Use to strike the word "cancer" and replace it with the word "disease" is an inappropriate broadening of the *Rutherford* holding; thus, should be eliminated. We believe that the *Rutherford* court very specifically addressed asbestos-related cancer as opposed to all asbestos-related disease, creating a narrow holding and application. There should continue to be separate instructions for asbestos-related cancer cases and asbestos-related disease cases. Currently, CACI No. 430 is utilized for asbestos-related disease cases; whereas CACI No. 435 is limited to asbestos-related cancer cases. We believe	As noted above, the committee is restoring "cancer." The committee does not agree that CACI No. 430 is for asbestos-related disease cases and ACI No. 435 is for asbestos-related cancer cases. There is no authority for such a distinction.

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		that CACI No. 430 as written, and as applied only to asbestos-related disease cases, continues to be appropriate. As discussed, we believe that CACI No. 435, as the instruction used in asbestos-related cancer cases, should be revised to more closely reflect the Court's holding in *Rutherford*. Once that is done, however, it should continue to be applied – and applied exclusively – in the context of asbestos-related cancer cases.	
		We believe the proposed changes in the Directions for Use misconstrues the California Supreme Court's decision in *Viner v. Sweet* (2003) 30 Cal.4th 132	*Viner v. Sweet* establishes that something is not a substantial factor if the same harm would have occurred anyway (what is sometimes referred to as the "but for" rule). This rule does not apply to asbestos causation. (*Jones v. John Crane, Inc.* (2005) 132 Cal.App.4th 990, 998, fn.3
		Revise 435 to add the language in bold: "Instead, we can bridge this gap in the humanly knowable by holding that plaintiffs may prove causation in asbestos-related cancer cases by demonstrating that the plaintiff's exposure to defendant's asbestos-containing product in reasonable medical probability was a substantial factor **in contributing to the aggregate dose of asbestos the plaintiff or decedent inhaled or ingested, and hence to the risk of developing asbestos-related cancer."** [emphasis added]	As noted above, the committee will consider this suggestion in the next release cycle.
		In stating that '[a] substantial factor in causing harm is a factor that a reasonable person	The language in bold is currently in CACI No. 435.

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		would consider to have contributed to the harm," CACI No. 435 provides no guidance to one seeking to apply it that would allow one to reasonably distinguish a "substantial" factor from "any" factor. Here again, CACI No. 435 conflicts with what was actually written by the majority in the *Rutherford* holding. The actual direction provided by the Court in *Rutherford* was as follows: "We therefore hold that, in the trial of an asbestos-related cancer case, although no 'shifting the burden of proof as to causation' to defendant is warranted, the jury should be told that the plaintiff's or decedent's exposure to a particular product was a substantial factor in causing or bringing about the disease **if in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's risk of developing cancer** [emphasis added]. Again, without using the actual verbiage employed by the Court in *Rutherford,* CACI No. 435 will not serve to properly guide anyone seeking to apply it so as to be consistent with the Rutherford holding.	
	Exxon Mobil Corporation and MetalClad Insulation, by Rick Norris,	Defendant objects to any effort to limit the effectiveness of CACI 430's instruction that when addressing a defendant's negligent conduct, the conduct must be more than a "remote or trivial factor" even if it is not the	See response to comment of Waters and Kraus, above.

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	Dentons. Counsel for Both (same letter submitted on behalf of both)	only cause of the harm. This specific language was approved by the *Petitpas* court.	
		Defendant also objects to any suggestion that CACI 435 is a complete statement of the law with regard to defendant manufacturers or suppliers, because this does not address failure to warn claims that are founded in negligence, or other negligent product liability theories.	As noted above, the committee has removed the "complete statement" language. However, the committee notes that CACI No. 435 currently applies only to manufacturers and suppliers of asbestos-containing products. So claims founded in negligence against other defendants would not be within 435's "complete statement."
		Finally, Defendant objects to the committee's replacement of "cancer" by "disease" in the Directions for Use, without any reference to medical or legal authority to support this change.	Addressed above
		It Is Imperative That A Defendant's Negligent Conduct Be A Cause In Fact Of The Harm, Which Is Provided For In CACI 430, But Not In CACI 435. "Actual causation is an entirely separate and independent element of the tort of negligence." (*Saelzler, supra,* 25 Cal.4th at 778.) This is most apparent in CACI 430's provision of the optional sentence, which is not included in CACI 435: "Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct . . ." (See, *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572 [omission of optional last sentence can be error].)	As addressed above, the "would have happened anyway" rule does not apply to asbestos.

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		[The comment includes several additional paragraphs of supporting argument.]	
		Rutherford and CACI 435 Have Never Expanded Beyond Exposure To A Defendant's Product. Nowhere in the *Rutherford* opinion does the court address claims for alleged negligent conduct, i.e. a premises owner that has asbestos on its property which is removed or disturbed; a contractor that may encounter asbestos in its work; or a claim based on the failure of a company to properly warn of the dangers of asbestos which would have altered the conduct of the plaintiff. CACI 435 has always been consistent with *Rutherford* in that it was limited to "exposure to asbestos from [*name of defendant*]'s product." The Use Notes for CACI 435 never suggest that a defendant's conduct, failure to warn or other act should be substituted for exposure from a product.	The committee is not proposing at this time to expand CACI No. 435 beyond those who produce or disseminate asbestos-containing products.
		The proposed comment states that the CACI 430 sentence that a "trivial" factor is not substantial may "confuse the jury in allocating comparative fault at the lower end of the exposure spectrum." The proposed comment relies on the rule in *Bockrath* that "a very minor force that does cause harm is a	The committee is not clear on what point the comment is making by noting that *Rutherford* and *Bockrath* are both strict liability cases.

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Instruction	Commentator	Comment	Response
		substantial factor" and the fact that the *Rutherford* court upheld a 1.2 percent allocation of comparative fault. (See, *Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79; *Rutherford, supra,* 16 Cal.4th at p. 985.) But both *Bockrath* and *Rutherford* are strict products liability cases, which did not focus on a negligent act. Moreover, *Bockrath* was decided at the pleading stage and simply applies the *Rutherford* test . (*Id.* at 80 [plaintiff must plead that "each defendant's product was a substantial factor, as that term is defined in *Rutherford,* in causing his multiple myeloma"].)	
		The Placement Of Comments Regarding Strict Product Liability Toxic Exposure Cases Under CACI 430 Instead Of 435 Is Unnecessary	Addressed above
	Imai Tadlock	The proposed commentary suggests that the term “remote” is improper for asbestos cases, as it might lead the jury to conclude that the instruction could be related to remoteness in time, causing them to ignore evidence of the long latency periods for asbestos-related diseases. Plaintiffs provide no instance of any jury ever having been confused in this way as a result of the use of CACI 430 in asbestos cases. In the context of causation, the term “remote” means “not arising from a primary or proximate action.” (https://www.merriam-	Addressed above

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Instruction	Commentator	Comment	Response
		webster.com/dictionary/remote?src=search-dict-box) This is consistent with case law interpreting "substantial factor," which states that an otherwise tortious actor can be relieved from duty by the independent act of another which is not reasonably foreseeable. (See, *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 665-666, citing 4 Witkin, Summary of Cal. Law (8th ed.) Torts, § 628; Rest.2d Torts, §§ 435, 447.)	
		CACI 430 and 435 should instruct the jury regarding how it should approach its determination of whether an exposure was significant enough to be considered a legal cause of the disease, without dictating what that determination should be. The use of the word "trivial" in CACI 430 serves this purpose, as it provides no suggestion of any quantitative measure to be applied by the jury in their evaluation of the exposures at issue. Instead, it invites jurors to consider the factual and scientific evidence submitted at trial and make their own evaluation of the "worth and importance" of the alleged exposures as contributory causes of the increased cancer risk. The proposed comment mischaracterizes the term "trivial factor" stating that it may be synonymous with "infinitesimal" or "theoretical" contributions to injury, which have been cited in case law as examples of	See response to comment of Waters and Kraus, above.

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Instruction	Commentator	Comment	Response
		what cannot be considered as substantial contributing factors. Both terms are quantitative in nature. The adjective "infinitesimal" means "(1) taking on values arbitrarily close to but greater than zero, (2) "immeasurably or incalculably small." "Infinitesimal," therefore, is in effect a mathematical concept. If implemented in an instruction as a definition of the upper limit of "substantial contributing factor," it might be interpreted as a judicial direction that the jury should disregard scientific opinion evidence regarding exposure levels of disease, and find as a matter of course that exposures above a level arbitrarily close to zero are per se substantial contributors. By requiring a finding based on an infinitesimal standard, any exposure that is not close to zero is a substantial factor. The term "theoretical," means "confined to theory or speculation often in contrast to practical applications : speculative." (https://www.merriam-webster.com/dictionary/theoretical) Under this definition, "theoretical" connotes a mere mental construct, without reference to the factual or scientific evidence supporting or denying a factual connection between and exposure and the increased disease risk. In the context of a jury instruction, the term	

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		"theoretical" can be considered a quantitative term insofar as it implies that any exposures greater than zero (i.e., any non-speculative findings of exposure) support a finding of substantial contributing factor. The California Supreme Court noted that "[t]he term "substantial factor" has not been judicially defined with specificity, and indeed it has been observed that it is "neither possible nor desirable to reduce it to any lower terms." (*Rutherford v. Owens-Illinois, Inc., supra,* 16 Cal.4th 953, 969.) Stated another way, the court must not fashion a jury instruction which dictates the jury's liability verdict by setting a numerical threshold above which substantial contributing factor should be found. The term "trivial factor" avoids this trap, by authorizing the jurors to make their own assessment of the "worth and importance" of a contributing factor based on the factual and scientific evidence submitted at trial. CACI 430 as worded is therefore entirely consistent with the *Rutherford* holding, and its inclusion as an instruction in asbestos cases along with CACI 435 will not confuse juries. The proposed commentary, therefore, would provide no clarification of the use of these instructions, but only confusion. For this reason, we urge the commission to reject the proposed commentary.	

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	Kazan, McClain, Satterley & Greenwood, Attorneys at Law, Oakland, by Ted W. Pelletier	The Committee's proposed revisions to CACI 430 and 435 would not change the instructions themselves but instead would only modify the Directions for Use (of both) and add several case citations (to 430 only). We submit that these revisions properly address the recent decision in *Petitpas,* which endorses giving both 430 and 435 in an asbestos-disease case (based solely on the CACI use notes) *Petitpas* could be read to endorse giving both 430 and 435 in every asbestos-disease case. The proposed revisions address this, properly noting that 435 is a "complete statement of causation for asbestos-related diseases" – and thus that when 435 is appropriate, 430 should not also be given. [Proposed Use Note for CACI 430, disagreeing with *Petitpas* ("But see").] On this narrow point, we agree with the proposed revisions.	The committee has removed the "complete statement" language, and changed "But see" to "Cf."
		The revisions should be modified further to remove the existing, unsupported limitation of CACI 435 to only those asbestos-disease cases involving defendants who were asbestos-product "manufacturers" or "suppliers" – i.e., not to premises owners or contractors who caused asbestos exposure via tortious conduct. The *Rutherford* causation standard expressly applies to all "cases of asbestos-related	As noted above, the issue will be placed on the agenda for the next release cycle.

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		cancer." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 957; accord id. at 982 ["holding" applies to any "cause of action for asbestos-related injuries"].) In 2007, this Committee inserted into CACI 435 the existing use note purportedly limiting the Rutherford standard to asbestos "manufacturers" and "suppliers." This broad limitation, violating Rutherford, does not appear to have been the express intent of the Committee. (See comment for extensive argument in support of this view.) If the proposed revision becomes effective, defendants will argue even more forcefully that the *Rutherford* causation standard applies only to product manufacturers and suppliers – citing this Committee's unsupported use notes. Defendants like premises-owner Exxon (*Petitpas*) and installation contractor Bechtel (*Whitmire*), although committing misconduct that results in exposure to asbestos products, will argue for "but for" causation – precisely what *Rutherford* holds inapplicable in every asbestos-disease case.	
	Mannion Gaynor	CACI 430, unlike CACI 435, advises that a "substantial factor" in causing harm "must be more than a remote or trivial factor." CACI 435, by contrast, contains no qualifying language with respect to what constitutes a	See the response to the comment of Waters and Kraus, above.

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		"substantial factor" to asbestos-related disease. Instead, CACI 435, read by itself, suggests to the jury that an exposure is a "substantial factor" as long as the plaintiff's expert says it is, without reference to whether the jury independently finds such expert testimony "reasonable" or credible. By itself, CACI 435 does not fully, or accurately, reflect the test for causation as articulated by the California Supreme Court. See, *Rutherford v. Owens-Illinois* (1997) 16 Cal. 4th 953, 969. In fact, the California Supreme Court re-affirmed the principle that, even in the context of dose-response asbestos-related disease, the increased risk of disease caused by an exposure must be more than "theoretical" or "infinitesimal." *Id.*	
		The California Supreme Court expressly rejected the basis for these proposed revisions, i.e., the idea that the "substantial factor" test for causation, as expressed in CACI 430, is somehow incompatible with the standard for causation in asbestos product liability claims generally. See *Rutherford, supra.* In fact, the California Supreme Court stated that the instructions in all fairness should be given together. ("Instruction on the limits of the plaintiff's burden of proof of causation, together with the standardized instructions defining cause-in-fact causation under the substantial factor test, and the	As noted in the comment or Waters and Kraus, above, the court in *Rutherford* was referring to the BAJI instructions, which do not contain the "remote or trivial" language.

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		doctrine of concurrent proximate legal causation, will adequately apprise the jury of the elements required to establish causation.") *Id.* at 958. ("The standard instructions on substantial factor and concurrent causation…remain correct in this context and should also be given.") *Id.* at 982-983.	
		The Second District Court of Appeals recently affirmed a trial court's decision to give both instructions in an asbestos liability action, rejecting the plaintiff's argument that the two instructions were confusing and incompatible. See, *Petitpas v. Ford Motor Company* (2017) 13 Cal. App. 5th 261, 299. The Court of Appeal rejected the plaintiff's claim of error when the trial court allowed both CACI 430 and CACI 435 to be read to the jury, noting that, outside of the CACI use notes themselves, there was no legal authority supporting plaintiff's claim.	See response to the comment of Waters and Kraus, above.
		CACI 435 essentially assumes two often disputed facts: 1) that the product at issue contained asbestos; and 2) that the disease at issue was caused by exposure to asbestos. Many claims that plaintiff characterize as "asbestos-related cancer" are not caused by exposure to asbestos; CACI 430 is therefore proper instruction. Some of the products plaintiffs claim caused them exposure to asbestos are not products in which asbestos was added as a raw ingredient. Plaintiffs	The commentator is correct that CACI No. 435 assumes that the product contains asbestos. The instruction does not assume that the disease was caused by exposure to asbestos. That is the issue that the instruction presents to the jury.

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		contend that the product was contaminated, but those allegations are in fact plaintiff's burden of proof. Again, in such cases, CACI 430 may be the proper instruction. Taking that decision out of the hands of the court means plaintiffs only have to allege an asbestos-related cancer, and the threshold questions regarding exposure to asbestos, and asbestos as a cause, are assumed rather than proven.	
	Orange County Bar Association, by Nikki P. Miliband, President	Please change the word "case" to "cases" in the following sentence: (But see *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and 435 in *case* with both product liability and premises liability defendants].)	The singular "case" means that in *Petitpas,* it wasn't error to give both instructions. The extension of this view to other scenarios is open to much debate, as demonstrated by the many comments that the committee received.
		In paragraph 3 of the "Directions for Use", newly added parenthetical for *Major v. R.J. Reynolds*, [court did not err in refusing to give last sentence in case involving . . .] Modify for clarity by adding words "of instruction" so it reads: "[court did not err in refusing to give last sentence *of instruction* in case involving . . ."	The committee has made this addition.
	Simmons Hanly Conroy, Attorneys at Law, by Paul C. Cook	CACI 430 is inconsistent with the standard for asbestos injury causation articulated by this Court in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, and remains an improper causation instruction if the	As noted, the committee will consider this issue in the next release cycle.

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		defendant happens to be a premises owner or contractor exposing the plaintiff to asbestos, as opposed to an asbestos product manufacturer or supplier. There is no basis in law or reason to alter the causation standard based on a defendant's status as a premises owner, contractor, product manufacturer or supplier. The same causation standard applies to each of these categories of defendants. The error in giving a substantial factor instruction that includes language that excludes "remote" or "trivial" exposures, and which opens the door to the potential use of "but for" causation language disapproved by *Rutherford,* is not remedied by the mere fact that a defendant happens to be a contractor, a premises owner, or other non-manufacturing or non-supplying entity. *Petitpas* itself provides no justification for this distinction without a difference, other than acknowledging one of the defendants there was a premises owner. (*Petitpas, supra,* 13 Cal.App.5th at 298 – 299.) How does that distinction affect causation? *Petitpas* offers no answer. The cited source of this distinction is the Use Note to CACI 435 (*Id.,* at 299), but respectfully, the Use Note itself provides no legal support for the distinction. The medical and biological processes by which asbestos exposure causes disease does not change simply because the defendant negligently	

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		maintained its premises, or negligently disturbed asbestos-containing materials during its work activities, instead of manufacturing or supplying an asbestos-containing product.	
	Simon Greenstone Panatier Bartlett, Attorneys at Law, by Brian T. Barrow	We generally agree with the proposed revisions, particularly with regard to the citation of *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261.	No response is necessary.
		The proposed revisions continue to suggest, perhaps inadvertently, that the asbestos causation standard set forth in *Rutherford v. Owens-Illinois* (1997) 16 Cal.4th 953 (which is the basis for CACI No. 435) should only be given in cases involving manufacturers and suppliers of asbestos products. This is incorrect, as the *Rutherford* standard for causation of asbestos injuries applies in all asbestos cases, not just those involving manufacturers and suppliers of asbestos-containing products.	For the next release cycle.
	3M Company, by Jules S. Zeman, Dentons	The proposed changes ignore that CACI 430 applies to claims against manufacturers and suppliers of non-asbestos-containing products, while CACI 435 applies to claims against manufacturers and suppliers of asbestos and asbestos-containing products. Over decades of litigation and following numerous bankruptcies of asbestos product manufacturers and suppliers, plaintiffs have	The committee does not see how it is ignoring the difference between manufacturers and suppliers on the one hand, and others, like 3M, who might create exposure to asbestos through other means. If 3M does not make anything that contains asbestos, then CACI No. 435 as currently drafted, referring to "exposure to the defendant's product," does not apply to 3M. Nothing in the proposed revisions suggests that it would.

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		expanded their claims to include manufacturers and suppliers of products that do not contain asbestos. For example, manufacturers of respiratory protection equipment, such as 3M, are often sued in the same action as asbestos product manufacturers for claims arising out of the same asbestos-related injuries. In recognition of the critical distinction between the standard applicable to asbestos product manufacturers and the standard applicable to non-asbestos product manufacturers, in 2007 the Judicial Council specifically incorporated language into CACI 435 noting that CACI 430 may be given in actions involving "defendants who are not asbestos manufacturers or suppliers." The different causation standard applicable to manufacturers and suppliers of asbestos products versus "other defendants" was most recently recognized in *Petitpas v. Ford Motor Company* (2017) 13 Cal.App.5th 261 ("*Petitpas*"). In that decision, the Second Appellate District Court of Appeal affirmed that a defendant premises owner is entitled to the standard instruction embodied in CACI 430, even where other asbestos product defendants are bound by the causation standard articulated by the California Supreme Court in *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 ("*Rutherford*") and	

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		contained in CACI No. 435.4 The distinction arises directly from *Rutherford* and has been part of California law for decades. Rutherford dealt only with manufacturers of asbestos-containing products, and its holding is necessarily limited to those defendants. CACI 430 and CACI 435 correctly reflect California's distinction between the two types of defendants involved in claims arising from asbestos-related injuries; the proposed changes ignore it.	
		The proposed comment in the CACI 430 Directions that CACI 435 is intended as a "complete statement of causation for asbestos-related diseases" misconstrues *Rutherford* and disregards *Petitpas*.	As noted, the committee is removing the "complete statement" language
		The proposed CACI 430 language providing an asbestos-specific explanation of substantial, remote and trivial factors is incompatible with *Rutherford*.	See the response to the comment of Waters and Kraus, above
		The proposed changes inappropriately cite cases applicable only to CACI 435 under CACI 430. Those cases are limited to CACI 435, and it is misleading to suggest they support CACI 430.	Addressed above
	Walsworth WFBM, by Christine Z. Fan and John A. Kaniewski	There seems to be the desire to move away from the common lay terms "remote" and "trivial" to the more scientific-sounding terms "infinitesimal," "theoretical," and "*de minimis*." Ultimately, the jury must decide, from a common sense standpoint, what	The committee does not propose to use "infinitesimal," "theoretical," or "*de minimis*."

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		constitutes a "substantial factor." Indeed, as currently phrased, CACI 435 reflects this concept in asbestos-related products cases: "A substantial factor in causing harm is a factor that a *reasonable person* would consider to have contributed to the harm." (Emphasis added.) Moreover, as the Supreme Court stated in *Rutherford*: "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' " (16 Cal.4th at 969.)	
		The proposed changes to the Directions also significantly broadens the scope of causation in asbestos premises cases. Essentially, it appears that judges are being encouraged to qualify CACI 430 with a warning that as to premises defendants, remote or trivial factors could still constitute as a substantial factor for causation. Until a California appellate court holds that CACI 435 also applies to premises defendants in asbestos cases, CACI 430 still needs to be given in its present form.	See the response to the comment of Waters and Kraus, above. The committee recognizes that *Petitpas* could be construed as the comment suggests. As noted, the committee will consider instructions for defendants other than manufacturers and suppliers in the next release cycle.

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2740. *Violation of Equal Pay Act—Essential Factual Elements*	California Employment Lawyers Association, by David diRobertis	Much of the authority cited in the Directions for Use and Sources and Authority is stale and/or inapposite to the current version of California's Equal Pay Act statute. Stale California cases pre-dating the statutory overhaul and inapposite federal cases should not be cited. While CELA recognizes that there is no case law interpreting the 2015-forward statutory amendments, we submit that it would be better to have no cases cited than to have cases cited which will engender confusion and mislead trial courts. ~~the~~ The following cases should be removed from the "Directions for Use" and "Sources and Authority" from any of the CEPA instructions: *Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99. *Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620. *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318	The committee added a parenthetical to one of the *Green* excerpts noting that there was a change in the law in 2015.
		Delete the excerpt from *Green, supra,* that says that "in the absence of California authority, it is appropriate to rely on federal authorities construing the federal statute."	Rather than delete the excerpt, the committee has added a parenthetical pointing out that the case predates the Fair Pay Act.

		The quote predates the Fair Pay Act, when "[t]he California statute [was] nearly identical to the federal Equal Pay Act of 1963" (111 Cal.App.4th at 623). It no longer holds true because the laws now differ in significant respects.	
		Under Sources and Authority, delete the fourth bullet point, which discusses Green v. Par Pools, Inc. (2003) 111 Cal.App.4th 620 and the three-stage burden shifting test articulated in that case. The analytical framework used in employment discrimination claims to assist in determining whether the employer had a discriminatory intent does not apply to claims brought under the California Equal Pay Act. Both CELA and the subcommittee make some interesting arguments appropriate for an appellate brief, but not for jury instructions.	Until a California court agrees with the comment, *Green* is still the law. The commentator does not point out anything in the subsequent amendments that made this point no longer correct.
		The statute makes clear that the correct analysis is whether the plaintiff employee was paid less than others "for substantially similar work, *when viewed as a composite* of skill, effort, and responsibility .... " (Lab. Code § 1197.S(a), (b) (italics added).) The fact-finder is to consider all of the listed factors in the aggregate in doing the "substantially similar work" analysis.	Element 2 says: "That [plaintiff] was performing substantially similar work as the other person[s] with regard to skill, effort, and responsibility." The only change is that "composite" is translated to "with regard to." The committee sees no difference. And it does not believe that a jury will understand "composite" in the way that CELA would like. See the response to the same comment from the subcommittee below.

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		The "when viewed as a composite" language is necessary to ensure that this approach is used (rather . than an approach that improperly compartmentalizes each factor so that the employer can subjectively assert certain factors were so much more important than the others). By eliminating the concept of viewing "skill, effort, and responsibility" as a "composite," the proposed instruction is incomplete and creates a risk of a fragmented, compartmentalized analysis rather than the proper totality of circumstances analysis.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The introductory sentence uses the present tense "is," while the elements use the past tense "was." We believe the past tense is appropriate for a claim that arose before trial, and would change "is" in the introductory sentence to "was." We would also insert the word "unlawfully" before "paid" for greater clarity: "[*Name of plaintiff*] claims that [he/she] ~~is~~ was unlawfully paid at a wage rate that is less than the rate paid to employees	The committee changed "is" to "was." It sees no~~t~~ benefit to adding "unlawfully."
		We would modify element 2 for greater clarity:	The committee sees no difference between "with regard to" and "in terms of."

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		"That [*name of plaintiff*] was performing substantially similar work as the other person[s] ~~with regard to~~ in terms of skill, effort, and responsibility; and"	
		The California Equal Pay Act prohibits certain pay discrepancies without the need to show that those discrepancies were "due to," "because of," or "based on" gender, race, or ethnicity. We would modify the first sentence in the Directions for Use for greater clarity: "The California Equal Pay Act prohibits ~~discrepancies on pay due to gender, race, or ethnicity~~ paying employees at lower wage rates than rates paid to employees of the opposite sex or a different race or ethnicity for substantially similar work."	While the distinction is subtle, the committee agrees with the comment and has made the proposed change. No discriminatory animus is required; just a pay differential without a valid reason.
	California Manufacturers and Technology Association, by Nicole Rice and Jarrell Cook, Policy Directors	CACI 2740 should be revised to read: 1. That *[name of plaintiff*] was paid at lower wage rates than the wage rates paid to [a] person[s] of [the opposite sex/another race/another ethnicity]; (instead of "less than the rate")	The committee believes that its language is a justifiable plain-language translation of the statute.
		CACI 2740 should be revised to read: That [*name of plaintiff*] was performing substantially similar work as those	As addressed above, the committee does not find the "composite" language to be helpful.

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		other person[s] <u>when viewed as a composite of</u> skill, effort, and responsibility; (instead of "with regard to")	
		CACI 2740 should be revised to read: That <u>the work for which</u> [*name of plaintiff*] was <u>paid lower wage rates was performed</u> under similar working conditions as <u>the work performed</u> by those other person[s]. (instead of just "plaintiff was working under similar working conditions)	The committee finds the proposed language to be unnecessary.
	Civil Justice Association of California	The comment also would change "is" to "was" as suggested by the California Lawyers Association above. The comment also makes the same point as the comment of ILR below regarding the need to clarify that the comparison must be with employees of the defendant. The comment also wants the same three edits as suggested by the comment of CMTA above.	The committee changed "is" to "was." The committee agreed that the instruction should make it clear that comparison must be to employees of the defendant. The committee did not agree to the other suggested edits.
	U.S. Chamber Institute for Legal Reform, by John H. Beisner	Instruction 2740 should clearly state the requirement that the relevant comparator employees must work at the same employer. As drafted, the	This change was made.

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		instruction refers in its introductory language to "the rate paid to employees" generally, which is ambiguous and could be understood by a jury to mean, for example, all similar employees of the many employers in a particular segment of the economy. And none of the three elements that follow clarify that the comparator employees must work for the same employer, either. To ensure that this requirement is clear, we suggest revising the first element to read as follows: "That [*name of plaintiff*] was paid less than the rate paid to [a] person[s] of [the opposite sex/another race/another ethnicity] **working for the same employer**." (Emphasis added to proposed additional language.)	
	Orange County Bar Association, by Nikki Miliband, President	The instruction should have, as an essential element, that defendant was, in fact, the employer. Though this may be addressed in demurrer, motion for judgment on the pleadings, or pretrial motions, the issue could survive until trial.	The committee sees little likelihood that the employment relationship would be at issue for the jury. If it is because of an independent contractor claim, that issue will be dealt with in other instructions
	Jury Instructions Subcommittee, California Pay Equity Task Force, by Jennifer Reisch, Legal Director, Equal	This instruction should be revised to consistently use the singular when referring to the employee to whom the plaintiff is compared. To use the current plural form (". . . the rate paid to employees of the opposite sex . . .") may misleadingly indicate that a	The committee finds this to be a significant unresolved issue, and has included singular/plural options. The statute says plural "employee*s,"* which perhaps suggests that some pattern is required. The comment assumes that a single comparison showing inequity is sufficient, but provides no support for that view.

	Rights Advocates, and Doris Ng, Staff Counsel, California Department of Industrial Relations, Division of Labor Standards Enforcement (comments endorsed by California Employment Lawyers Association) (The Equal Rights Advocates, Legal Aid at Work, and the California Women's Law Center, commenting jointly, sent the same letter)	plaintiff must identify more than one employee comparator to establish her Equal Pay Act claim.	While the committee sees the position of the comment as quite plausible, without authority, it has elected to retain the singular/plural option.
		The comment makes the same point as the comment of CELA, above, regarding element 2 and not including "when viewed as a composite" in the element. Consideration of whether an employee performs "substantially similar work" to another must take into account the overall job content and involve a comparison of all three factors (skill, effort, and responsibility) taken together, not separately or as "individual segments." Thus, the instructions should clarify that if two employees perform work that requires different levels of one factor (e.g., effort) but "substantially similar" levels of the other factors (e.g., skill and responsibility), the employee being paid less could still establish that they were performing "substantially similar work" overall. See e.g., *Corning Glass Works v. Brennan*, 417 U.S. 188, 203 n.24 (1974) (noting that Court of Appeals had concluded that extra packing, lifting, and cleaning performed by night inspectors was of so little consequence that the job remained substantially equal to those of day	The exclusively federal authority that is cited for the difference between taking the three factors together and taking them separately as individual segments do not seem to the committee to really stand for any difference between "composite" and "with regard to." The point from the federal cases per the EEOC Compensation Guidance (cited in the comment) is that minor differences in the job duties, or the skill, effort, or responsibility required for the jobs will not render the work unequal." The committee does not see how "composite" expresses that point.

		inspectors). See also EEOC Compensation Guidance, available at https://www.eeoc.gov/policy/docs/compensation.html ("[M]inor differences in the job duties, or the skill, effort, or responsibility required for the jobs will not render the work unequal.")	
		Under the Directions for Use, the subcommittee recommends adding to the end of the first paragraph: "The Labor Commissioner may also bring a claim on behalf of an employee or group of employees." This would clarify that not only affected employees may bring Equal Pay Act claims, but also that the Labor Commissioner's Office, which has authority to enforce the Act, may also seek the remedies under Labor Code section 1197.5(g) when it commences a civil action on behalf of one or more employees.	This point is of no significance to a jury.
		The comment makes the same point as the comment from CELA regarding the excerpt from *Green v. Par Pools, Inc., supra,* and the three-stage burden shifting test articulated in that case.	See response to comment of CELA.
		The Subcommittee recommends revising the fifth bullet point under "Sources and Authority," also from *Green, supra,* to state that where the purpose, intent and plain language of the California Equal Pay Act and the	Case excerpts are not revised to say things that the court didn't say. But as noted in response to the comment of CELA above, the committee is adding a parenthetical pointing out that the case predates the Fair Pay Act.

		federal law are the same, it is appropriate to look to federal case law interpreting the federal Equal Pay Act. Where the purpose, intent, or plain language differs, however, unqualified reliance on federal case law would not be appropriate.	
		The final sentence of the last case excerpt from *Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324–325 says: "[A plaintiff] cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females.'" This sentence appears to apply to class actions or group claims. For individual claims, the sentence may cause confusion, as stakeholders may construe it to provide that a single plaintiff may not compare his or her work to that of another employee who happens to be employed in a job classification that consists of both male and female employees (or of multiple races or ethnicities). The Subcommittee does not read the plain language of the Equal Pay Act to restrict potential plaintiffs in that manner. The	The committee believes that the sentence is helpful and has retained it.

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		Subcommittee therefore recommends deleting this sentence.	
2741. *Affirmative Defense—Different Pay Justified*	California Employment Lawyers Association, by David diRobertis	Instruction 2741 must make clear that "prior salary" only comes into play as an alleged bona fide factor other than sex, race or ethnicity. Thus, the employer must establish the requirements of Instruction 2742 when relying on "prior salary" in combination with other factor(s) to justify the pay disparity. The proposed instruction correctly tracks the language of the statute making clear that prior salary, alone, cannot justify a pay disparity. But the instruction then fails to make clear that, if the employer is nonetheless asserting that prior salary (in combination with other factor(s)) justified the current disparity, it must then prove the requirements of the bona fide factor other than sex, race or ethnicity as to the reliance on prior salary. Thus, CELA proposes that the bold sentence below be added to the existing proposed sentence at the end of the Instruction so that the instruction would now read as follows:	There is no authority for this position; the Legislature didn't say anything about how prior salary might be used in conjunction with other factors.

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		Prior salary does not, by itself, justify any disparity in current compensation. **To rely on prior salary in combination with [another factor] [other factors] to justify any disparity in current compensation, [*name of defendant*] must establish not only that the disparity is justified by [a] factor[s] other than prior salary, but also that the reliance on prior salary was justified as a bona fide factor other than [sex] [race] [or] [ethnicity].**	
		CELA believes the current version of 2741 does not make entirely clear that an alleged bona fide factor other than sex, race or ethnicity as stated in element I(d) is merely an alleged bona fide factor, which the employer must still prove was a legitimate bona fide factor under instruction 2742. CELA submits that this ambiguity can be easily fixed as follows: [d. (*Specify bona fide factor other than sex, race, or ethnicity, such as education, training, or experience*) **which [*name of defendant*] alleges is a bona ficle factor other than [sex], [race], [or] [ethnicity].]**	While the committee does not see this point as very important, it can be addressed with one word: “alleged” rather than with the language proposed in the comment.
	California Lawyers Association,	In the second sentence in the introductory paragraph, consistent with other affirmative defenses, we would	The committee agreed and has made this change.

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	Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	refer to this defense as a "defense" rather than a "claim."	
		A bona fide factor other than sex, race, or ethnicity may, but does not necessarily, justify a pay differential. Accordingly, we would modify the second paragraph in the Directions for Use: "If the catchall factor d is selected . . . which establishes what bona fide factors other than sex, race, or ethnicity may justify a pay differential. . . ."	The committee agreed and has made this change.
	California Manufacturers and Technology Association, by Nicole Rice and Jarrell Cook, Policy Directors	CACI 2741 opening paragraph should be revised to read: [*Name of defendant*] claims paying [*name of plaintiff*] wage rates that were less than the rates paid to an employee of [the opposite sex/another race/another ethnicity] was lawful because there are legitimate reasons for setting different wage rates. To succeed, [*name of defendant*] must prove all of the following: (instead of simply saying "was justified; also deletes "on this claim; changes from "rate" to "rates" and from "employees" to "an employee.")	The committee does not find the proposed lengthening of the opening paragraph to be useful. "Was justified" takes the place of quite a few alternative words. "On this defense" (rather than "claim") is standard language used throughout CACI. The committee sees no need to pluralize "rate."

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		Change factor d, (*Specify bona fide factor other than sex, race, or ethnicity, such as education, training, or experience*.) from an italicized "specify" direction to static text.	"Such as" signals an open factor, which works best if the user supplies the factor that is alleged to be relevant.
		Revise element 2 to say: That the factor(s) relied upon [was/were] applied reasonably; and	The committee finds this additional language to be unnecessary. The use of "upon" is often legalese and to be avoided if "on" can be used.
		Revise element 3 to say: That one or more of the factor[s] relied upon account[s] for the entire wage differential. (instead of "That the factor[s] that [*name of defendant*] relied on")	"One or more" is not necessary. "Factor(s)" accounts for one and it accounts for more than one. It is sufficient if one factor accounts for the entire wage differential. And this language permits that result. Unlike "each factor" (for element 2), each factor here does not need to account separately.
	Civil Justice Association	Makes many of the same suggested revisions suggested by CMTA above. In addition, would delete: "Prior salary does not, by itself, justify any disparity in current compensation."	The prior-salary limitation is now part of the statute.
	Equal Rights Advocates, Legal Aid at Work, and the California Women's Law Center, by Jennifer Reisch, Legal Director, Equal Rights Advocates	We suggest clarifying in the Directions for Use that, in order for an employer to rely on prior salary to justify a wage differential, the employer must first demonstrate that prior salary is a "bona fide factor other than sex," which was not "based on or derived from a sex-based difference in compensation" and is consistent with "business necessity," within the meaning of subdivision	Addressed above in response to comment of CELA.

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All comments are paraphrased unless indicated by quotation marks.

		(a)(1)(D). Notably, the employer would have to show that the prior salary was not derived from a sex-based difference, meaning there was not gender wage differential reflected in the prior salary from the prior job.	
	Orange County Bar Association, by Nikki Miliband, President	Seemingly, it would be helpful it might be helpful to add the following: (the comment then would import proposed 2742, addressing factor d, into 2741.) Then the comment goes on to say: "Alternatively, consider including a separate instruction for this section, indicating (sic)."	The committee prefers to keep the explanation of factor d in separate instruction 2742.
		Perhaps 2 should read "That <u>each factor relied upon</u> was applied reasonably." This tracks the statute and may avoid the confusion that could ensue if the jury decided to lump all the factors together to see if the factors were applied reasonably as a whole rather than as individual reasons.	The committee agreed and has revised element 2 to say "each factor."
		Element 3 should read: "That <u>the one or more factors relied upon</u> account for the entire wage differential." (instead of "That the factor[s] that [name of defendant] relied on")	As noted above, the committee does not believe the proposed language is necessary.

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	Jury Instructions Subcommittee, California Pay Equity Task Force, by Jennifer Reisch, Legal Director, Equal Rights Advocates, and Doris Ng, Staff Counsel, California Department of Industrial Relations, Division of Labor Standards Enforcement (The Equal Rights Advocates, Legal Aid at Work, and the California Women's Law Center, commenting jointly, sent the essentially same letter)	The Subcommittee repeats its comment above relating to use of the plural form, and recommends using the singular term "an employee."	As noted above, the committee considers the issue unresolved and will retain the singular/plural option.
		The Subcommittee recommends revising the last sentence of the draft instruction to read: "Prior salary cannot, by itself, justify any disparity in compensation." The statute does not contain the word "current."	While it is true that the statute does not contain "current," without it the sentence becomes confusing because prior salary must be compared with something, which can only be the current salary.
		The Subcommittee makes the same comment and recommendation as above relating to reliance on federal cases, for the second bullet point under Sources and Authority." This is especially important here, since there is no parallel language to section 1197.5(a)(1)(D) in federal law, which does not restrict or qualify the "factor[s] other than sex" on which an employer may rely to justify a pay disparity in any way.	Addressed above
		California's statute requires that in order to proffer a "bona fide factor other than sex" defense, an employer must demonstrate that the factor is (1) not based on or derived from a sex- or race-based difference in pay, (2) job related to the position in question, and (3) consistent with a business necessity, as defined therein. (See Lab. Code § 1197.5(a)(1)(D).) As written, this	The committee believes reversing the order would be counterintuitive. In CACI No. 2741, the employer may assert factors a, b, or c, and not need to rely on d's other factors. Only If the employer is relying on other factors, does the jury need to be guided to the limitations imposed on those factors set forth in CACI No. 2742.

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		instruction suggests that any reason an employer offers as a bona fide factor other than sex may be considered without regard to the additional requirements of § 1197.5(a)(1)(D). The Subcommittee therefore suggests reversing the order of proposed instructions 2741 and 2742 to make it clear that a jury must find that a bona fide factor other than sex meets the requirements of section 1197.5(a)(1)(D) before determining whether the employer has raised such a factor as a valid defense—i.e., before determining whether the factor was applied reasonably and accounts for the entire differential.	
2742. *Bona Fide Factor Other Than Sex, Race, or Ethnicity*	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We would modify the final sentence in the instruction for greater clarity. The stated facts only defeat the defense of a bona fide factor. They do not establish the elements required for liability, so it seems inappropriate to state the defendant "is in violation." "~~[*Name of defendant*] is in violation~~ This defense does not apply, however, if [*name of plaintiff*] proves an alternative business practice exists that would serve the same business purpose without producing the pay differential."	The committee agreed and has made this change.

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	California Manufacturers and Technology Association, by Nicole Rice and Jarrell Cook, Policy Directors	Revise the last paragraph to say: [*Specify factor*] shall not justify the pay differential, however, if [*name of plaintiff*] proves that an alternative business practice exists that would serve the same business purpose without producing the pay differential. (instead of "defendant is in violation")	The committee prefers the revision proposed above by the California Lawyers Association committee.
	Civil Justice Association	The comment makes the same point as CMTA above. Delete the words "or derived from" from element 1; "That the factor is not based on or derived from a [sex/race/ethnicity]-based differential in compensation." This phrase is vague, ambiguous, confusing, and subject to misinterpretation.	The committee tends to agree that the meaning of "derived from" is not clear, but it is in the statute.
		Delete "job" (and "with respect to") from element 2 so that it reads, "That the factor is related to [*name of plaintiff*]'s position" to avoid misinterpretation.	The language that would be deleted is in the statute. The comment provides no explanation of how it could be misinterpreted. The committee finds it more likely that the element could be misinterpreted if it doesn't say "*job* related."
		Clarify the vague definition of "business necessity."	The committee tends to agree that the statutory definition is not clear. But the comment does not suggest any way to clarify, and there is no authority to deviate from the statute.
	Jury Instructions Subcommittee, California Pay Equity Task	The Subcommittee repeats its comment above relating to use of the plural form, and recommends using the singular term "an employee."	Addressed above

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	Force, by Jennifer Reisch, Legal Director, Equal Rights Advocates, and Doris Ng, Staff Counsel, California Department of Industrial Relations, Division of Labor Standards Enforcement (The Equal Rights Advocates, Legal Aid at Work, and the California Women's Law Center, commenting jointly, sent the essentially same letter)	The Directions for Use should clarify that to raise this defense, an employer must show that the "bona fide factor other than sex" on which it relied to justify a difference in pay meets all of the threshold requirements, e.g., it is not based on or derived from a sex-, race-, or ethnicity-based differential; it is job related to the position in question; and it is consistent with business necessity. (Lab. Code § 1197.5(a)(1)(D).) The Subcommittee recommends clarifying this draft instruction by stating in the Directions for Use that if a factor does not meet these requirements, then the employer cannot rely on such factor as an affirmative defense.	The instruction says that the defendant "must prove all of the following."
2743. *Equal Pay Act—Retaliation—Essential Factual Elements*	California Employment Lawyers Association, by David diRobertis	CELA submits that a language fix should made to ensure that elements I and 3 of proposed instruction 2743 (equal pay retaliation) are entirely symmetrical and use the same language to the extent possible. As the instruction is drafted, element one (protected activity) instructs in brackets to "specify acts taken by plaintiff to	The committee sees no risk in using a shortened label in element 3. The acts that would be specifically stated in element 1 could be a bit wordy. To repeat all these words in element 3 might make that element also (and unnecessarily) very wordy. I don't think there is any risk in using shorthand in element 3.

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		enforce or assist in the enforcement of the right to equal pay," but then element three (causal nexus) uses different proposed language -i.e., "pursuit of/assisting in the enforcement of another's right to] ... " CELA submits that the protected activity and causal nexus elements should contain the same language to ensure ease of understanding and eliminate any ambiguity. Having the same language in the protected activity element as the causal nexus element makes it easier conceptually for the fact-finder to understand that the causal nexus requirement looks to whether the protected activity motivated the adverse action.	
	California Lawyers Association, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We agree with this instruction.	No response is necessary.
		The employee's pursuit of equal pay is not the only activity protected under the act, which also protects encouraging or assisting others to pursue equal pay or inquiring about others' wages, as stated in the first paragraph of the Directions for Use. We would modify the second paragraph in the Directions for Use accordingly: "Note that there are two causation elements. First there must be a causal	The committee does not see a need to make this addition. The point of the paragraph is to point out the two causation elements and the difference between them, a point that is often missed under FEHA. There is no need to add words that do not address the point.

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		connection between the employee's pursuit of equal pay (or other activity protected by the act) and the adverse employment action (element 3). Second, the employee must have suffered harm because of the employer's retaliatory acts (element 5).	
	Civil Justice Association	We oppose adding Element 3 to the instruction. The 3rd element applies a substantial motivating factor element to Equal Pay Act retaliation cases. Paragraph 3 under Directions for Use specifically notes that whether this standard applies to Equal Pay Act retaliation cases has not been addressed by the courts. As such, we would suggest this element should not be included as it would not be an accurate reflection of current law. We suggest a reference to "causal connection" or a "but for" standard.	There must be a causation element in the instruction. After *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232, the committee decided to export "substantial motivating reason" as the causation standard in all employment-related claims Then, as here, the Directions for Use state that "Whether this standard applies to the [claim of the instruction] has not been addressed by the courts. The committee reconsidered this approach, but decided to continue it.
	U.S. Chamber Institute for Legal Reform, by John H. Beisner	The Directions for Use should clarify that the analysis is to follow the federal burden-shifting framework, under which the employer may respond to a prima facie showing of retaliation by proffering evidence that it had a legitimate reason for the adverse employment decision. Such a clarification is included in the Directions for Use for Instruction 2740, establishing the essential elements of a traditional Equal Pay Act	The Directions for Use to 2740 do not say anything about burden shifting. It's in the Sources and Authority in an excerpt from *Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 626. The employee-side advocate groups argue that *McDonnell Douglas* does not apply under the Equal Pay Act.

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	Jury Instructions Subcommittee, California Pay Equity Task Force, by Jennifer Reisch, Legal Director, Equal Rights Advocates, and Doris Ng, Staff Counsel, California Department of Industrial Relations, Division of Labor Standards Enforcement (The Equal Rights Advocates, Legal Aid at Work, and the California Women's Law Center, commenting jointly, sent the essentially same letter)	The Subcommittee recommends that the first sentence of this instruction state all the protected acts covered under the anti-retaliation provisions of the Equal Pay Act, which are: disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, aiding or encouraging any other employee to exercise his or her rights under this section, or any action taken by the employee to invoke or assist in any manner the enforcement of this section. (Lab. Code § 1197.5(k)(1).)	The committee believes that including all of the protected acts in the instruction would make it very cumbersome to understand and use. By the time the jury is being instructed, everyone will know what specific act is alleged to have brought about retaliation.
		The Subcommittee recommends deleting elements 4 and 5 from this instruction as they duplicate the previously articulated requirements for an adverse action and causal connection.	As noted in the Directions for Use, there are two causation elements, each with a different function. The committee has encountered a number of cases in which this point has been missed.
		Under "Directions for Use," the Subcommittee recommends adding to the end of the first paragraph: "The Labor Commissioner may also bring a claim on behalf of the affected employee." This would clarify that not only affected employees may bring a retaliation claim under the Equal Pay Act, but also that the Labor Commissioner's Office has authority to enforce the Act and may file civil actions on behalf of employees who	What the Labor Commissioner can do has no relevance to a jury..

		have been discriminated or retaliated against. See Labor Code § 98.7.	

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206. Evidence Admitted for Limited Purpose

During the trial, I explained to you that certain evidence was admitted for a limited purpose. You may consider that evidence only for the limited purpose that I described, and not for any other purpose.

New September 2003; Revised May 2018

Directions for Use

~~Where~~ If appropriate, an instruction limiting the purpose for which evidence is to be considered must be given upon request. (Evid. Code, § 355; *Daggett v. Atchison, Topeka & Santa Fe Ry. Co.* (1957) 48 Cal.2d 655, 665-666 [313 P.2d 557]; *Continental Airlines, Inc. v. McDonnell Douglas Corp.* (1989) 216 Cal.App.3d 388, 412 [264 Cal.Rptr. 779].) It is recommended that the judge call attention to the purpose to which the evidence applies.

A limited-purpose instruction is insufficient to cure hearsay problems with case-specific testimony given by an expert witness. (*People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320].)

For an instruction on evidence applicable to one party or a limited number of parties, see CACI No. 207, *Evidence Applicable to One Party*.

Sources and Authority

- Evidence Admitted for Limited Purpose. Evidence Code section 355.
- Refusal to give a requested instruction limiting the purpose for which evidence is to be considered may constitute error. (*Adkins v. Brett* (1920) 184 Cal. 252, 261–262 [193 P. 251].)
- Courts have observed that "[w]here the information is admitted for a purpose other than showing the truth of the matter asserted ... , prejudice is likely to be minimal and a limiting instruction under section 355 may be requested to control the jury's use of the information." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1525 [3 Cal.Rptr.2d 833].)
- An adverse party may be excused from the requirement of requesting a limiting instruction and may be permitted to assert error if the trial court unequivocally rejects the argument upon which a limiting instruction would be based. (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 298-299 [85 Cal.Rptr. 444, 466 P.2d 996].)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Circumstantial Evidence, §§ 32–36

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 20.11–20.13

1A California Trial Guide, Unit 21, *Procedures for Determining Admissibility of Evidence*, § 21.21 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.66, 551.77 (Matthew Bender)

California Judges Benchbook: Civil Proceedings—Trial (2d ed.) §§ 4.106, 13.26 (Cal CJER 2010)

430. Causation: Substantial Factor

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

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

New September 2003; Revised October 2004, June 2005, December 2005, December 2007, May 2018

Directions for Use

As phrased, this definition of "substantial factor" subsumes the "but for" test of causation, that is, "but for" the defendant's conduct, the plaintiff's harm would not have occurred. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052 [1 Cal.Rptr.2d 913, 819 P.2d 872]; see Rest.2d Torts, § 431.) The optional last sentence makes this explicit, and in some cases it may be error not to give this sentence. (See *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 572–573 [34 Cal.Rptr.2d 607, 882 P.2d 298]; Rest.2d Torts, § 432(1).)

"Conduct," in this context, refers to the culpable acts or omissions on which a claim of legal fault is based, e.g., negligence, product defect, breach of contract, or dangerous condition of public property. This is in contrast to an event that is not a culpable act but that happens to occur in the chain of causation, e.g., that the plaintiff's alarm clock failed to go off, causing her to be at the location of the accident at a time when she otherwise would not have been there. The reference to "conduct" may be changed as appropriate to the facts of the case.

The "but for" test of the last optional sentence does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046]; *Barton v. Owen* (1977) 71 Cal.App.3d 484, 503–504 [139 Cal.Rptr. 494]; see Rest.2d Torts, § 432(2).) Accordingly, do not include the last sentence in a case involving concurrent independent causes. (See also *Major v. R.J. Reynolds Tobacco Co.* (2017) 14 Cal.App.5th 1179, 1198 [222 Cal.Rptr.3d 563] [court did not err in refusing to give last sentence of instruction in case involving exposure to carcinogens in cigarettes].)

In cases of multiple (concurrent dependent) causes, CACI No. 431, *Causation: Multiple Causes,* should also be given.

In a case in which the plaintiff's claim is that he or she contracted cancer from exposure to the defendant's asbestos-containing product~~asbestos-related cancer cases~~, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203] requires a different instruction regarding exposure to a particular product. Give CACI No. 435, *Causation for Asbestos-Related Cancer Claims,* and do not give this instruction. (Cf. *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and 435 in case with both product liability

and premises liability defendants].)

Under this instruction, a remote or trivial factor is not a substantial factor. This sentence could cause confusion in an asbestos case. "Remote" often connotes a time limitation. Nothing in *Rutherford* suggests such a limitation; indeed asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases. (See *City of Pasadena v. Superior Court (Jauregui)* (2017) 12 Cal.App.5th 1340, 1343–1344 [220 Cal.Rptr.3d 99] [cause of action for a latent injury or disease generally accrues when the plaintiff discovers or should reasonably have discovered he has suffered a compensable injury].)

Although the court in *Rutherford* did not use the word "trivial," it did state that "a force [that] plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." (*Rutherford, supra,* 16 Cal.4th at p. 969.) While it may be argued that "trivial" and "infinitesimal" are synonyms, a very minor force that does cause harm *is* a substantial factor. This rule honors the principle of comparative fault. (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398].) In *Rutherford*, the jury allocated the defendant only 1.2 percent of comparative fault, and the court upheld this allocation. (See *Rutherford*, *supra*, 16 Cal.4th at p. 985.) Instructing the jury that a *de minimis* force (whether trivial or infinitesimal) is not a substantial factor could confuse the jury in allocating comparative fault at the lower end of the exposure spectrum.

Sources and Authority

- "The test for joint tort liability is set forth in section 431 of the Restatement of Torts 2d, which provides: 'The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.' Section 431 correctly states California law as to the issue of causation in tort cases." (*Wilson v. Blue Cross of So. Cal.* (1990) 222 Cal.App.3d 660, 671–672 [271 Cal.Rptr. 876].)

- "California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. The substantial factor standard generally produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct. The substantial factor standard, however, has been embraced as a clearer rule of causation—one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact." (*Rutherford, supra,* 16 Cal.4th at pp. 968–969, internal citations omitted.)

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

negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford, supra,* 16 Cal.4th at pp. 968–969, internal citations omitted.)

- "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor', but a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath v. Aldrich Chemical Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398], internal citations omitted.)

- "The text of Restatement Torts second section 432 demonstrates how the 'substantial factor' test subsumes the traditional 'but for' test of causation. Subsection (1) of section 432 provides: 'Except as stated in Subsection (2), the actor's negligent conduct *is not a substantial factor* in bringing about harm to another *if the harm would have been sustained even if the actor had not been negligent*.' … Subsection (2) states that if 'two forces are actively operating … and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.' " (*Viner, supra,* 30 Cal.4th at p. 1240, original italics.)

- "Because the 'substantial factor' test of causation subsumes the 'but for' test, the 'but for' test has been phrased in terms of 'substantial factor,' as follows, in the context, as here, of a combination of causes dependent on one another: A defendant's negligent conduct may combine with another factor to cause harm; if a defendant's negligence was a substantial factor in causing the plaintiff's harm, then the defendant is responsible for the harm; a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff's harm; but conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)

- "A tort is a legal cause of injury only when it is a substantial factor in producing the injury. If the external force of a vehicle accident was so severe that it would have caused identical injuries notwithstanding an abstract 'defect' in the vehicle's collision safety, the defect cannot be considered a substantial factor in bringing them about. [¶] The general causation instruction given by the trial court correctly advised that plaintiff could not recover for a design defect unless it was a 'substantial factor' in producing plaintiff's 'enhanced' injuries. However, this instruction dealt only by 'negative implication' with [defendant]'s theory that any such defect was *not* a 'substantial factor' in this case because this particular accident would have broken plaintiff's ankles in any event. As we have seen, [defendant] presented substantial evidence to that effect. [Defendant] was therefore entitled to its special instruction, and the trial court's refusal to give it was error." (*Soule, supra,* 8 Cal.4th at p. 572–573, original italics, footnote and internal citations omitted.)

- "The first element of legal cause is cause in fact ... . The 'but for' rule has traditionally been applied to determine cause in fact. The Restatement formula uses the term *substantial factor* 'to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.' " (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1095 [44 Cal.Rptr.3d 14], internal citations omitted.)

- "If the accident would have happened anyway, whether the defendant was negligent or not, then his

or her negligence was not a cause in fact, and of course cannot be the legal or responsible cause." (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 370 [199 Cal.Rptr.3d 522].)

- "We have recognized that proximate cause has two aspects. ' "One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event." ' This is sometimes referred to as 'but-for' causation. In cases where concurrent independent causes contribute to an injury, we apply the 'substantial factor' test of the Restatement Second of Torts, section 423, which subsumes traditional 'but for' causation. This case does not involve concurrent independent causes, so the 'but for' test governs questions of factual causation." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 354 [188 Cal.Rptr.3d 308, 349 P.3d 1013], original italics, footnote omitted.)

- " 'Whether a defendant's conduct actually caused an injury is a question of fact … that is ordinarily for the jury … .' '[C]ausation in fact is ultimately a matter of probability and common sense: "[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable [persons] may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no [person] can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case." ' … ' "A mere possibility of … causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." ' " (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029–1030 [68 Cal.Rptr.3d 897], internal citations omitted.)

- "[E]vidence of causation 'must rise to the level of a reasonable probability based upon competent testimony. [Citations.] "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." [Citation.] The defendant's conduct is not the cause in fact of harm " 'where the evidence indicates that there is less than a probability, i.e., a 50–50 possibility or a mere chance,' " that the harm would have ensued.' " (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 312 [111 Cal.Rptr.3d 787].)

- "However the test is phrased, causation in fact is ultimately a matter of probability and common sense." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101], relying on Rest.2d Torts, § 433B, com. b.)

- "The Supreme Court … set forth explicit guidelines for plaintiffs attempting to allege injury resulting from exposure to toxic materials: A plaintiff must 'allege that he was exposed to each of the toxic materials claimed to have caused a specific illness'; 'identify each product that allegedly caused the injury'; allege 'the toxins entered his body' 'as a result of the exposure'; allege that 'he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness'; and, finally, allege that 'each toxin he absorbed was manufactured or supplied by a named defendant.' " (*Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1194 [130 Cal.Rptr.3d 571], quoting *Bockrath, supra,* 21 Cal.4th at p. 80, footnote

omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford*, *supra*, 16 Cal.4th at p. 969, internal citations omitted.)

- "[A] very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath*, *supra*, 21 Cal.4th at p. 79, internal citation omitted.)

- "[M]ultiple sufficient causes exist not only when there are two causes each of which is sufficient to cause the harm, but also when there are more than two causes, partial combinations of which are sufficient to cause the harm. As such, the trial court did not err in refusing to instruct the jury with the but-for test." (*Major*, *supra*, 14 Cal.App.5th at p. 1200.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ 1334–1341~~1185–1189, 1191~~

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.13–1.15

1 Levy et al., California Torts, Ch. 2, *Causation*, § 2.02 (Matthew Bender)

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

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.71 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.260–165.263 (Matthew Bender)

435. Causation for Asbestos-Related Cancer Claims

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

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

New September 2003; Revised December 2007, May 2018

Directions for Use

This instruction is to be given in a case in which the plaintiff's claim is that he or she contracted an asbestos-related disease from exposure to the defendant's asbestos-containing product. See the discussion in the Directions for Use to CACI No. 430, *Causation: Substantial Factor*, with regard to whether CACI No. 430 may also be given.

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

If necessary, CACI No. 431, *Causation: Multiple Causes*, may also be given.

Sources and Authority

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

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a

'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford, supra,* 16 Cal.4th at p. 969, internal citations omitted.)

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

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

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

- "Further, '[t]he mere "possibility" of exposure' is insufficient to establish causation. '[P]roof that raises mere speculation, suspicion, surmise, guess or conjecture is not enough to sustain [the plaintiff's] burden' of persuasion." (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 969 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "To support an allocation of liability to another party in an asbestos case, a defendant must 'present evidence that the aggregate dose of asbestos particles arising from' exposure to that party's asbestos

‘constituted a substantial factor in the causation of [the decedent's] cancer.’ ” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 205 [191 Cal.Rptr.3d 263].)

- “ ‘[G]iven the long latency period of asbestos-related disease, and the occupational settings that commonly exposed the worker to multiple forms and brands of asbestos products with varying degrees of toxicity,’ our Supreme Court has held that a plaintiff ‘need *not* prove with medical exactitude that fibers from a particular defendant's asbestos-containing products were those, or among those, that actually began the cellular process of malignancy.’ Rather, a ‘plaintiff may meet the burden of proving that exposure to defendant's product was a substantial factor causing the illness by showing that in reasonable medical probability it was a substantial factor contributing to the plaintiff's or decedent's *risk* of developing cancer.’ ” (*Izell, supra,* 231 Cal.App.4th at p. 975, original italics, internal citation omitted.)

- “Many factors are relevant in assessing the medical probability that an exposure contributed to plaintiff’s asbestos disease. Frequency of exposure, regularity of exposure, and proximity of the asbestos product to plaintiff are certainly relevant, although these considerations should not be determinative in every case. [Citation.] Additional factors may also be significant in individual cases, such as the type of asbestos product to which plaintiff was exposed, the type of injury suffered by plaintiff, and other possible sources of plaintiff’s injury. [Citations.] ‘Ultimately, the sufficiency of the evidence of causation will depend on the unique circumstances of each case.’ [Citation.] ” (*Paulus v. Crane Co.* (2014) 224 Cal.App.4th 1357, 1363−1364 [169 Cal.Rptr.3d 373].)

- “In this case, [defendant] argues the trial court's refusal to give its proposed instruction was error because the instruction set forth ‘the requirement in *Rutherford* that causation be decided by taking into account “the length, frequency, proximity and intensity of exposure, the peculiar properties of the individual product, [and] any other potential causes to which the disease could be attributed.” ’ But *Rutherford* does not require the jury to take these factors into account when deciding whether a plaintiff's exposure to an asbestos-containing product was a substantial factor in causing mesothelioma. Instead, those factors are ones that a medical expert may rely upon in forming his or her expert medical opinion.” (*Davis v. Honeywell Internat. Inc.* (2016) 245 Cal.App.4th 477, 495 [199 Cal.Rptr.3d 583], internal citation omitted.)

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

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

- "Nothing in *Rutherford* precludes a plaintiff from establishing legal causation through opinion testimony by a competent medical expert to the effect that every exposure to respirable asbestos contributes to the risk of developing mesothelioma. On the contrary, *Rutherford* acknowledges the scientific debate between the 'every exposure' and 'insignificant exposure' camps, and recognizes that the conflict is one for the jury to resolve." (*Izell, supra,* 231 Cal.App.4th at p. 977.)

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

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

- "We hold that the duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission. This duty also applies to premises owners who use asbestos on their property, subject to any exceptions and affirmative defenses generally applicable to premises owners, such as the rules of contractor liability. Importantly, we hold that this duty extends only to members of a worker's household. Because the duty is premised on the foreseeability of both the regularity and intensity of contact that occurs in a worker's home, it does not extend beyond this circumscribed category of potential plaintiffs." (*Kesner v. Superior Court* (2016) 1 Cal.5th 1132, 1140 [210 Cal.Rptr.3d 283, 384 P.3d 283].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 570

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, Theories of Recovery—Strict Liability For Defective Products, ¶ 2:1259 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-O, Theories of Recovery—Causation Issues, ¶ 2:2409 (The Rutter Group)

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

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

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

470. Primary Assumption of Risk—Exception to Nonliability─ Coparticipant in Sport or Other Recreational Activity

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[*Name of plaintiff***] claims [he/she] was harmed while participating in [***specify sport or other recreational activity, e.g., touch football***] and that [***name of defendant***] is responsible for that harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***] either intentionally injured [***name of plaintiff***] or acted so recklessly that [his/her] conduct was entirely outside the range of ordinary activity involved in [***e.g., touch football***];**

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

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

Conduct is entirely outside the range of ordinary activity involved in [*e.g., touch football***] if that conduct (1) increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., touch football***], and (2) it can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the [sport/activity].**

[*Name of defendant***] is not responsible for an injury resulting from conduct that was merely accidental, careless, or negligent.**

New September 2003; Revised April 2004, October 2008, April 2009, December 2011, December 2013; Revised and Renumbered From CACI No. 408 May 2017; Revised May 2018

Directions for Use

This instruction sets forth a plaintiff's response to the affirmative defense of primary assumption of risk asserted by a defendant who was a coparticipant in the sport or other recreational activity. For an instruction applicable to coaches, instructors, or trainers, see CACI No. 471, *Primary Assumption of Risk─Exception to Nonliability─Instructors, Trainers, or Coaches*. For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. 472, *Primary Assumption of Risk─Exception to Nonliability─ Facilities Owners and Operators and Event Sponsors*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk─Exception to Nonliability─Occupation Involving Inherent Risk.*

Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) Element 1 sets forth the exceptions in which there is a duty.

While duty is generally a question of law, some courts have held that whether the defendant has increased the risk beyond those inherent in the sport or activity is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] and cases cited therein, including cases *contra*.) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

Sources and Authority

- "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks." (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)

- "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury' … ." (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] ["These factors certainly apply to skateboarding"]; *Swigart v. Bruno* (2017) 13 Cal.App.5th 529, 540 [220 Cal.Rptr.3d 556] [horseback riding is an inherently dangerous sport]; *Foltz v. Johnson* (2017) 16 Cal.App.5th 647, 656–657 [224 Cal.Rptr.3d 506] [off-road dirt bike riding])

- "A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30, 834 P.2d 724].)

- "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight, supra*, 3 Cal.4th at p. 320.)

- "The *Knight* rule, however, 'does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that "it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." Thus, even though "defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself," they may not increase the likelihood of injury above that which is inherent.' " (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1261 [102 Cal.Rptr.2d 813], internal citations omitted.)

- "In *Freeman v. Hale*, the Court of Appeal advanced a test ... for determining what risks are inherent in a sport: '[C]onduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent to the sport) if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.' " (*Distefano, supra*, 85 Cal.App.4th at p. 1261.)

- "[G]olfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is 'so reckless as to be totally outside the range of the ordinary activity involved in the sport.' " (*Shin, supra*, 42 Cal.4th at p. 497.)

- "The [horseback] rider generally assumes the risk of injury inherent in the sport. Another person does not owe a duty to protect the rider from injury by discouraging the rider's vigorous participation in the sport or by requiring that an integral part of horseback riding be abandoned. And the person has no duty to protect the rider from the careless conduct of others participating in the sport. The person owes the horseback rider only two duties: (1) to not 'intentionally' injure the rider; and (2) to not 'increase the risk of harm beyond what is inherent in [horseback riding]' by 'engag[ing] in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport' " (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1545–1546 [98 Cal.Rptr.3d 779].)

- "[T]he general test is 'that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.' Although a defendant has no duty of care to a plaintiff with regard to inherent risks, a defendant still has a duty not to increase those risks." (*Swigart, supra*, 13 Cal.App.5th at p. 538, internal citations omitted.)

- "The question of which risks are inherent in a recreational activity is fact intensive but, on a sufficient record, may be resolved on summary judgment. Judges deciding inherent risk questions under this doctrine 'may consider not only their own or common experience with the recreational activity involved but may also consult case law, other published materials, and documentary evidence introduced by the parties on a motion for summary judgment.' " (*Foltz, supra*, 16 Cal.App.5th at p. 656, internal citations omitted.)

- "[W]hether defendant breached the limited duty of care he owed other golfers by engaging in conduct that was 'so reckless as to be totally outside the range of the ordinary activity involved in [golf]' depends on resolution of disputed material facts. Thus, defendant's summary judgment motion was properly denied." (*Shin, supra,* 42 Cal.4th at p. 486, internal citation omitted.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-

roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588].)

- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (~~(~~*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 501 [194 Cal.Rptr.3d 830].)

- "Admittedly, it is sometimes said that '[t]he existence and scope of a defendant's duty of care in the primary assumption of risk context "is a *legal* question which depends on the nature of the sport or activity … and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." ' This statement of the rule is correct where there is no dispute about the inherent risks, and such cases may be resolved on summary judgment. [¶] However this statement is overly broad. Although the risks inherent in *many* activities are not subject to reasonable dispute (e.g., being hit with a baseball during a game), the risks inherent in *some* activities are not commonly known. In such cases, expert testimony may be required ' "for purposes of weighing whether the inherent risks of the activity were increased by the defendant's conduct." ' Thus, it is not entirely accurate to say inherent risks of an activity always present purely legal questions, because sometimes the nature of an activity and its risks must be gleaned from the evidence." (*Jimenez, supra,* 247 Cal.App.4th at p. 608, original italics.)

- "[Plaintiff] has repeatedly argued that primary assumption of the risk does not apply because she did not impliedly consent to having a weight dropped on her head. However, a plaintiff's expectation does not define the limits of primary assumption of the risk. 'Primary assumption of risk focuses on the legal question of duty. It does not depend upon a plaintiff's implied consent to injury, nor is the plaintiff's subjective awareness or expectation relevant. … .' " (*Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 471 [158 Cal.Rptr.3d 474].)

- "Primary assumption of the risk does not depend on whether the plaintiff subjectively appreciated the risks involved in the activity; instead, the focus is an objective one that takes into consideration the risks that are ' "inherent" ' in the activity at issue." (*Swigart, supra*, 13 Cal.App.5th at p. 538.)

- "A jury could find that, by using a snowboard without the retention strap, in violation of the rules of the ski resort and a county ordinance, defendant unnecessarily increased the danger that his snowboard might escape his control and injure other participants such as plaintiff. The absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury." (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 829 [89 Cal.Rptr.2d 519].)

- “The existence and scope of a defendant's duty depends on the role that defendant played in the activity. Defendants were merely the hosts of a social gathering at their cattle ranch, where [plaintiff] asked to ride one of their horses; they were not instructors and did not assume any of the responsibilities of an instructor.” (*Levinson, supra, ~~v. Owens (2009)~~* 176 Cal.App.4th at pp. ~~1534,~~ 1550–1551 ~~[98 Cal.Rptr.3d 779]~~, internal citation omitted.)

- “[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities ‘involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity.’ ” (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

- “Whether a duty exists ‘does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on [(1)] the nature of the activity or sport in which the defendant is engaged and [(2)] the relationship of the defendant and the plaintiff to that activity or sport.’ It is the ‘nature of the activity’ and the parties' relationship to it that determines whether the doctrine applies—not its characterization as a sporting event.” (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 999–1000 [70 Cal.Rptr.3d 519], internal citations omitted.)

- “[T]o the extent that ‘ “ ‘a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence,’ ” ’ he or she is subject to the defense of comparative negligence but not to an absolute defense. This type of comparative negligence has been referred to as ‘ “secondary assumption of risk.” ’ Assumption of risk that is based upon the absence of a defendant’s duty of care is called ‘ “primary assumption of risk.” ’ ‘First, in “primary assumption of risk” cases—where the defendant owes no duty to protect the plaintiff from a particular risk of harm—a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was *reasonable* or unreasonable. Second, in “secondary assumption of risk” cases—involving instances in which the defendant has breached the duty of care owed to the plaintiff—the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff's conduct in encountering the risk of such an injury was reasonable rather than unreasonable.’ ” (*Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1259 [84 Cal.Rptr.3d 824], original italics, internal citations omitted.)

- “Even were we to conclude that [plaintiff]’s decision to jump off the boat was a voluntary one, and that therefore he assumed a risk inherent in doing so, this is not enough to provide a complete defense. Because voluntary assumption of risk as a complete defense in a negligence action was abandoned in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226], only the absence of duty owed a plaintiff under the doctrine of primary assumption of risk would provide such a defense. But that doctrine does not come into play except when a plaintiff and a defendant are engaged in certain types of activities, such as an ‘active sport.’ That was not the case here; plaintiff was merely the passenger on a boat. Under *Li*, he may have been contributorily negligent but this would only go to reduce the amount of damages to which he is entitled.” (*Kindrich, supra,* 167 Cal.App.4th at p. 1258.)

- “Though most cases in which the doctrine of primary assumption of risk exists involve recreational

sports, the doctrine has been applied to dangerous activities in other contexts (see, e.g., *Saville v. Sierra College* (2005) 133 Cal.App.4th 857 [36 Cal.Rptr.3d 515] [training in peace officer takedown maneuvers]; *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 [2 Cal.Rptr.3d 168] [training on physical restraint methods]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112 [75 Cal.Rptr.2d 801] [practice of cheerleader routines]; *Bushnell* [*v. Japanese-American Religious & Cultural Center*], 43 Cal.App.4th 525 [50 Cal.Rptr.2d 671] [practice of moves in judo class]; and *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 [53 Cal.Rptr.2d 713] [injury to nurse's aide by nursing home patient]).” (*McGarry, supra,* 158 Cal.App.4th at pp. 999–1000, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ ~~1339~~1496–1508~~, 1340, 1343–1350~~

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03, Ch. 15, *General Premises Liability*, § 15.21 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.30 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.172 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.401 (Matthew Bender)

1004. Obviously Unsafe Conditions

If an unsafe condition of the property is so obvious that a person could reasonably be expected to observe it, then the [owner/lessor/occupier/one who controls the property] does not have to warn others about the dangerous condition.

However, the [owner/lessor/occupier/one who controls the property] does still have to use reasonable care to protect against the risk of harm if it is foreseeable that the condition may cause injury to someone who because of necessity encounters the condition.

New September 2003; Revised May 2018

Directions for Use

Give this instruction with CACI No. 1001, *Basic Duty of Care*, if it is alleged that the condition causing injury was obvious. The first paragraph addresses the lack of a duty to warn of an obviously unsafe condition. (*Jacobs v. Coldwell Banker Residential Brokerage Co.* (2017) 14 Cal.App.5th 438, 447 [221 Cal.Rptr.3d 701].)

The second paragraph addresses when there may be a duty to take some remedial action. Landowners~~Defendants~~ may have a duty to take precautions to protect against the risk of harm from an obviously unsafe condition, even if they do not have a duty to warn. (*Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121-122 [273 Cal.Rptr. 457].)

Sources and Authority

- "Foreseeability of harm is typically absent when a dangerous condition is open and obvious. 'Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition.' In that situation, owners and possessors of land are entitled to assume others will 'perceive the obvious' and take action to avoid the dangerous condition." (*Jacobs, supra*, 14 Cal.App.5th at p. 447, internal citations omitted.)

- "An exception to this general rule exists when 'it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it).' In other words, while the obviousness of the condition and its dangerousness may obviate the landowner's duty to remedy or warn of the condition in some situations, such obviousness will not negate a duty of care when it is foreseeable that, because of necessity or other circumstances, a person may choose to encounter the condition." (*Jacobs, supra,* 14 Cal.App.5th at p. 447, internal citation omitted.)

- ~~Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition. (6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1126.) However, this is not true in all cases.~~ "[I]t is foreseeable that even an obvious danger may cause injury, if the practical

necessity of encountering the danger, when weighed against the apparent risk involved, is such that under the circumstances, a person might choose to encounter the danger. The foreseeability of injury, in turn, when considered along with various other policy considerations such as the extent of the burden to the defendant and consequences to the community of imposing a duty to remedy such danger may lead to the legal conclusion that the defendant 'owes a duty of due care "to all persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." '~~[to the person injured.]~~ " (*Osborn, supra,* 224 Cal.App.3d at p. 121, internal citation~~s~~ omitted.)

- "[W]hen a worker, whose work requires him or her to encounter a danger which is obvious or observable, is injured, '*[t]he jury [is] entitled to balance the [plaintiff's] necessity against the danger, even if it be assumed that it was an apparent one. This [is] a factual issue.* [Citations.]' In other words, under certain circumstances, an obvious or apparent risk of danger does not automatically absolve a defendant of liability for injury caused thereby." (*Osborn, supra,* 224 Cal.App.3d at p. 118, original italics, internal citations omitted.)

- "[T]he obvious nature of a danger is not, in and of itself, sufficient to establish that the owner of the premises on which the danger is located is not liable for injuries caused thereby, and that although obviousness of danger may negate any duty to warn, it does not necessarily negate the duty to remedy."~~It is incorrect to instruct a jury categorically that a business owner cannot be held liable for an injury resulting from an obvious danger.~~ (*Osborn, supra,* 224 Cal.App.3d at p. ~~116~~119.)~~ There may be a duty to remedy a dangerous condition, even though there is no duty to warn thereof, if the condition is foreseeable. (*Id.* at pp. 121-122.)~~

- "The issue is whether there is any evidence from which a trier of fact could find that, as a practical necessity, [plaintiff] was foreseeably required to expose himself to the danger of falling into the empty pool." (*Jacobs, supra,* 14 Cal.App.5th at p. 447.)

- In *Felmlee v. Falcon Cable TV* (1995) 36 Cal.App.4th 1032, 1039-1040 [43 Cal.Rptr.2d 158], the court found that an instruction stating that the defendant "owed no duty to warn plaintiff of a danger which was obvious or which should have been observed in the exercise of ordinary care" was proper: "The jury was free to consider whether Falcon was directly negligent in failing to correct any foreseeable, dangerous condition of the cables which may have contributed to the cause of Felmlee's injuries." (*Id.* at p. 1040.)

- ~~One court has observed:~~ "[T]he 'obvious danger' exception to a landowner's ordinary duty of care is in reality a recharacterization of the former assumption of the risk doctrine, i.e., where the condition is so apparent that the plaintiff must have realized the danger involved, he assumes the risk of injury even if the defendant was negligent. ... [T]his type of assumption of the risk has now been merged into comparative negligence." (*Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, 665 [20 Cal.Rptr.2d 148], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ 1267–1269~~1125–1127~~

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.04[4] (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, §§ 381.20, 381.32 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.14 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.25 et seq. (Matthew Bender)

1005. Business Proprietor's or Property Owner's Liability for the ~~Negligent/Intentional/~~Criminal Conduct of Others

[An owner of a business that is open to the public/A landlord] must use reasonable care to protect [patrons/guests/tenants] from another person's criminal~~harmful~~ conduct on [his/her/its] property if the [owner/landlord] can reasonably anticipate ~~such~~ that conduct.

You must decide whether the steps taken by [*name of defendant*] to protect persons such as [*name of plaintiff*] were adequate and reasonable under the circumstances.

New September 2003; Revised May 2018

Directions for Use

A business owner or a landlord has a duty to take affirmative steps to protect against the criminal acts of a third party if the conduct can be reasonably anticipated. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676 [25 Cal.Rptr.2d 137, 863 P.2d 207], disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, fn. 5 [113 Cal.Rptr.3d 327, 235 P.3d 988].) Whether there is a duty as defined in the first paragraph is a question of law for the court. The jury then decides whether the defendant's remedial measures were reasonable and adequate under the circumstances (second paragraph). (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 131 [211 Cal.Rptr. 356, 695 P.2d 653].)

Sources and Authority

- "A landlord generally owes a tenant the duty, arising out of their special relationship, to take reasonable measures to secure areas under the landlord's control against foreseeable criminal acts of third parties." (*Castaneda v. Olsher* (2007) 41 Cal.4th 1205, 1213 [63 Cal.Rptr.3d 99, 162 P.3d 610].)

- "[B]road language used in *Isaacs* has tended to confuse duty analysis generally in that the opinion can be read to hold that foreseeability in the context of determining duty is normally a question of fact reserved for the jury. Any such reading of *Isaacs* is in error. Foreseeability, when analyzed to determine the existence or scope of a duty, is a question of law to be decided by the court." (*Ann M., supra,* 6 Cal.4th at p. 678, internal citation omitted.)

- "[T]he decision to impose a duty of care to protect against criminal assaults requires 'balancing the foreseeability of the harm against the burden of the duty to be imposed. [Citation.] " '[I]n cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. [Citation.] On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required.' [Citation.]" [Citation.] Or, as one appellate court has accurately explained, duty in such circumstances is determined by a balancing of "foreseeability" of the criminal acts against the "burdensomeness, vagueness, and efficacy" of the proposed security measures.' " (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1146–1147 [12 Cal.Rptr.3d 615, 88 P.3d 517].)

- " 'A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.' " (*Taylor v. Centennial Bowl, Inc.* (1966), 65 Cal. 2d 114, 124 [52 Cal.Rptr. 561, 416 P.2d 793], quoting Restatement of Torts, § 344.)

- "[T]he property holder only 'has a duty to protect against types of crimes of which he has notice and which are likely to recur if the common areas are not secure.' The court's focus in determining duty ' " 'is not to decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.' [Citation.]" ' " (*Janice H. v. 696 North Robertson, LLC* (2016) 1 Cal.App.5th 586, 594 [205 Cal.Rptr.3d 103], internal citation omitted.)

- "[O]nly when 'heightened' foreseeability of third party criminal activity on the premises exists-shown by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location-does the scope of a business proprietor's special-relationship-based duty *include an obligation to provide guards* to protect the safety of patrons." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 240 [30 Cal.Rptr.3d 145, 113 P.3d 1159], internal citations and footnote omitted, original italics.)

- "[F]oreseeability, whether heightened or reduced, is tested by what the defendant knows, not what the defendant could have or should have learned." (*Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 158 [42 Cal.Rptr.3d 519].)

- "Here [defendant] argues it has no duty unless and until it experiences a similar criminal incident. We disagree. While a property holder generally has a duty to protect against types of crimes of which he is on notice, the absence of previous occurrences does not end the duty inquiry. We look to all of the factual circumstances to assess foreseeability." (*Janice H., supra*, 1 Cal.App.5th at p. 595, internal citation omitted.)

- "Even when proprietors ... have no duty ... to provide a security guard or undertake other similarly burdensome preventative measures, the proprietor is not necessarily insulated from liability under the special relationship doctrine. A proprietor that has no duty ... to hire a security guard or to undertake other similarly burdensome preventative measures still owes a duty of due care to a patron or invitee by virtue of the special relationship, and there are circumstances (apart from the failure to provide a security guard or undertake other similarly burdensome preventative measures) that may give rise to liability based upon the proprietor's special relationship." (*Delgado, supra,* 36 Cal.4th at pp. 240-241.)

- A business proprietor is not an insurer of the safety of his invitees, "but he is required to exercise reasonable care for their safety and is liable for injuries resulting from a breach of this duty. The general duty includes not only the duty to inspect the premises in order to uncover dangerous conditions, but, as well, the duty to take affirmative action to control the wrongful acts of third

persons which threaten invitees where the occupant has reasonable cause to anticipate such acts and the probability of injury resulting therefrom." (*Taylor*, *supra*, ~~*v. Centennial Bowl, Inc.* (1966)~~ 65 Cal.2d at p. ~~114,~~ 121 ~~[52 Cal.Rptr. 561, 416 P.2d 793]~~, internal citations omitted.)

- ~~"Once a court finds that the defendant was under a duty to protect the plaintiff, it is for the factfinder to decide whether the security measures were reasonable under the circumstances. The jury must decide whether the security was adequate." (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 131 [211 Cal.Rptr. 356, 695 P.2d 653], internal citation omitted.)~~

- ~~"[A]s frequently recognized, a duty to take affirmative action to control the wrongful acts of a third party will be imposed only where such conduct can be reasonably anticipated." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 676 [25 Cal.Rptr.2d 137, 863 P.2d 207], internal citations omitted.)~~

- "In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M., supra*, 6 Cal.4th at p. 674, internal citation omitted.)~~;~~ (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 499-501 [229 Cal.Rptr. 456, 723 P.2d 573].)

- "[Restatement Second of Torts] Section 314A identifies 'special relations' which give rise to a duty to protect another. Section 344 of the Restatement Second of Torts expands on that duty as it applies to business operators." (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 823 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)

Secondary Sources

6 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ 1271–1291~~1129–1149~~

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.06 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.05 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.21 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.12, 334.23, 334.57 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.30 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.60 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 16:5 (Thomson Reuters)

1500. Former Criminal Proceeding—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully caused a criminal proceeding to be brought against [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was actively involved in causing [***name of plaintiff***] to be arrested [and prosecuted] [or in causing the continuation of the prosecution];**

[2. That the criminal proceeding ended in [*name of plaintiff***]'s favor;]**

[3. That no reasonable person in [*name of defendant***]'s circumstances would have believed that there were grounds for causing [***name of plaintiff***] to be arrested ~~or~~ [and prosecuted];]**

4. **That [***name of defendant***] acted primarily for a purpose other than to bring [***name of plaintiff***] to justice;**

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

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

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 2 above, whether the criminal proceeding ended in [his/her/its] favor. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

[The law [also] requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 3 above, whether a reasonable person in [***name of defendant***]'s circumstances would have believed that there were grounds for causing [***name of plaintiff***] to be arrested [and ~~or~~ prosecuted]. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]**

The special [verdict/interrogatory] form will ask for your finding on [this/these] issue[s].]

New September 2003; Revised April 2008, October 2008, June 2015, May 2018

Directions for Use

Give this instruction in a malicious prosecution case based on an underlying criminal prosecution. If there is an issue as to what it means to be "actively involved" in element 1, also give CACI No. 1504, *Former Criminal Proceeding—"Actively Involved" Explained*.

In elements 1 and 3 and in the next-to-last paragraph, include the bracketed references to prosecution if the arrest was without a warrant. Whether prosecution is required in an arrest on a warrant has not definitively been resolved. (See *Van Audenhove v. Perry* (2017) 11 Cal.App.5th 915, 919–925 [217 Cal.Rptr.3d 843].)

Malicious prosecution requires that the criminal proceeding have ended in the plaintiff's favor (element 2) and that the defendant did not reasonably believe that there were any grounds (probable cause) to initiate the proceeding (element 3). Probable cause is to be decided by the court as a matter of law. However, it may require the jury to find some preliminary facts before the court can make its legal determination, including facts regarding what the defendant knew or did not know at the time. (See *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 881 [254 Cal.Rptr. 336, 765 P.2d 498].) If so, include element 3 and also the bracketed part of the instruction that refers to element 3.

Favorable termination is handled in much the same way. If a proceeding is terminated other than on the merits, there may be disputed facts that the jury must find in order to determine whether there has been a favorable termination. (See *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 [45 Cal.Rptr.2d 848].) If so, include element 2 and also the bracketed part of the instruction that refers to element 2. Once these facts are determined, the jury does not then make a second determination as to whether there has been a favorable termination. The matter is determined by the court based on the resolution of the disputed facts. (See *Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1159 [85 Cal.Rptr.2d 726] [element of favorable termination is for court to decide].)

Either or both of the elements of probable cause and favorable termination should be omitted if there are no disputed facts regarding that element for the jury.

Element 4 expresses the malice requirement.

Sources and Authority

- Public Employee Immunity. Government Code section 821.6.

- "Malicious prosecution consists of initiating or procuring the arrest and prosecution of another under lawful process, but from malicious motives and without probable cause." (*Cedars-Sinai Medical Center v. Superior Court* (1988) 206 Cal.App.3d 414, 417 [253 Cal.Rptr. 561], internal citation omitted.)

- "The remedy of a malicious prosecution action lies to recompense the defendant who has suffered out of pocket loss in the form of attorney fees and costs, as well as emotional distress and injury to reputation because of groundless allegations made in pleadings which are public records." (*Sagonowsky v. More* (1998) 64 Cal.App.4th 122, 132 [75 Cal.Rptr.2d 118], internal citations omitted.)

- "[A] cause of action for malicious prosecution cannot be premised on an arrest that does not result in formal charges (at least when the arrest is not pursuant to a warrant)." (*Van Audenhove, supra, ~~v. Perry (2017)~~* 11 Cal.App.5th at p.~~915,~~ 917 ~~[217 Cal.Rptr.3d 843]~~ [rejecting Rest.2d Torts, § 654. subd. (2)(c)].)

- "Cases dealing with actions for malicious prosecution against private persons require that the defendant has at least sought out the police or prosecutorial authorities and falsely reported facts to them indicating that plaintiff has committed a crime." (*Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 720 [117 Cal.Rptr. 241, 527 P.2d 865], internal citations omitted.)

- "[T]he effect of the approved instruction [in *Dreux v. Domec* (1861) 18 Cal. 83] was to impose liability upon one who had not taken part until after the commencement of the prosecution." (*Lujan v. Gordon* (1977) 70 Cal.App.3d 260, 263 [138 Cal.Rptr. 654].)

- "When, as here, the claim of malicious prosecution is based upon initiation of a criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant … to suspect the plaintiff … had committed a crime." (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 465 [156 Cal.Rptr.3d 901].)

- "When there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolution of that dispute, … the jury must resolve the threshold question of the defendant's factual knowledge or belief. Thus, when … there is evidence that the defendant may have known that the factual allegations on which his action depended were untrue, the jury must determine what facts the defendant knew before the trial court can determine the legal question whether such facts constituted probable cause to institute the challenged proceeding." (*Sheldon Appel Co., supra,* 47 Cal.3d at p. 881, internal citations omitted.)

- "Admittedly, the fact of the grand jury indictment gives rise to a prima facie case of probable cause, which the malicious prosecution plaintiff must rebut. However, as respondents' own authorities admit, that rebuttal may be by proof that the indictment was based on false or fraudulent testimony." (*Williams v. Hartford Ins. Co.* (1983) 147 Cal.App.3d 893, 900 [195 Cal.Rptr. 448].)

- "Acquittal of the criminal charge, in the criminal action, did not create a conflict of evidence on the issue of probable cause. [Citations.]" (*Verdier v. Verdier* (1957) 152 Cal.App.2d 348, 352, fn. 3 [313 P.2d 123].)

- " '[T]he plaintiff in a malicious prosecution action must plead and prove that the prior judicial proceeding of which he complains terminated in his favor.' Termination of the prior proceeding is not necessarily favorable simply because the party prevailed in the prior proceeding; the termination must relate to the merits of the action by reflecting either on the innocence of or lack of responsibility for the misconduct alleged against him." (*Sagonowsky, supra,* 64 Cal.App.4th at p. 128, internal citations omitted.)

- " 'The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice,

establishes the tort, that is, the malicious and unfounded charge of crime against an innocent person.' " (*Cote v. Henderson* (1990) 218 Cal.App.3d 796, 804 [267 Cal.Rptr. 274], quoting *Jaffe v. Stone* (1941) 18 Cal.2d 146, 150 [114 P.2d 335].)

- "Where a proceeding is terminated other than on the merits, the reasons underlying the termination must be examined to see if it reflects the opinion of the court or the prosecuting party that the action would not succeed. If a conflict arises as to the circumstances explaining a failure to prosecute an action further, the determination of the reasons underlying the dismissal is a question of fact." (*Fuentes, supra,* 38 Cal.App.4th at p. 1808, internal citations omitted.)

- "Generally, the requirements of the doctrine of collateral estoppel 'will be met when courts are asked to give preclusive effect to preliminary hearing probable cause findings in subsequent civil actions for false arrest and malicious prosecution. [Citation.]' 'A determination of probable cause at a preliminary hearing may preclude a suit for false arrest or for malicious prosecution'].) 'One notable exception to this rule would be in a situation where the plaintiff alleges that the arresting officer lied or fabricated evidence presented at the preliminary hearing. [Citation.] When the officer misrepresents the nature of the evidence supporting probable cause and that issue is not raised at the preliminary hearing, a finding of probable cause at the preliminary hearing would not preclude relitigation of the issue of integrity of the evidence.' Defendants argue, and we agree, that the stated exception itself contains an exception—i.e., if the plaintiff alleges that the arresting officer lied or fabricated evidence at the preliminary hearing, plaintiff challenges that evidence at the preliminary hearing as being false, and the magistrate decides the credibility issue in the arresting officer's favor, then collateral estoppel still may preclude relitigation of the issue in a subsequent civil proceeding involving probable cause." (*Greene v. Bank of America* (2015) 236 Cal.App.4th 922, 933 [186 Cal.Rptr.3d 887], internal citations omitted.)

- "The plea of nolo contendere is considered the same as a plea of guilty. Upon a plea of nolo contendere the court shall find the defendant guilty, and its legal effect is the same as a plea of guilty for all purposes. It negates the element of a favorable termination, which is a prerequisite to stating a cause of action for malicious prosecution." (*Cote, supra,* 218 Cal.App.3d at p. 803, internal citation omitted.)

- " '*Should a conflict arise as to the circumstances explaining the failure to prosecute, the trier of fact must exercise its traditional role in deciding the conflict.' "* (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185 [156 Cal.Rptr. 745], disapproved on other grounds in *Sheldon Appel Co., supra,* 47 Cal.3d at p. 882, original italics, internal citations omitted.)

- " 'For purposes of a malicious prosecution claim, malice "is not limited to actual hostility or ill will toward the plaintiff. …" [Citation.]' '[I]f the defendant had no substantial grounds for believing in the plaintiff's guilt, but, nevertheless, instigated proceedings against the plaintiff, it is logical to infer that the defendant's motive was improper.' " (*Greene, supra,* 216 Cal.App.4th at pp. 464-465, internal citation omitted.)

- "Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff." (*Verdier, supra,* 152 Cal.App.2d at p. 354.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 552–570, 605

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* §§ 43.01–43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, §§ 357.10–357.32 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process,* §§ 147.20–147.53 (Matthew Bender)

1503. Affirmative Defense—Proceeding Initiated by Public ~~Entities and~~ Employee Within Scope of Employments ~~(Gov. Code, § 821.6)~~

[*Name of public entity defendant*] claims that it~~[he/she]~~ cannot be held responsible for [*name of plaintiff*]'s harm, if any, because the [*specify proceeding, e.g., civil action*] was initiated by its~~[he/she] was a public~~ employee who was acting within the scope of [his/her] employment. To establish this defense, [*name of defendant*] must prove that [*name of employee~~he/she~~*] was acting within the scope of [his/her] employment.

New September 2003; Renumbered from CACI No. 1506 June 2013; Revised May 2018

Directions for Use

Give this instruction if there is an issue of fact as to whether the proceeding giving rise to the alleged malicious prosecution claim was initiated as a governmental action. Government Code section 821.6 provides immunity from liability for malicious prosecution for a public employee who is acting within the scope of employment, even if the employee acts maliciously and without probable cause. If the employee is immune, then there can be no vicarious liability on the entity. (Gov. Code, § 815.2.) This immunity is not unqualified, however; it applies only if the employee was acting within the scope of employment. (*Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 904 [59 Cal.Rptr.2d 470].)

For an instruction on scope of employment, see CACI No. 3720, *Scope of Employment*, in the Vicarious Responsibility series.

Sources and Authority

- Public Entity Vicarious Liability for Acts of Employee. Government Code section 815.2
- Public Employee Immunity. Government Code section 821.6.
- ~~In *Tur v. City of Los Angeles* (1996) 51 Cal.App.4th 897, 904 [59 Cal.Rptr.2d 470], the court concluded that "the failure to instruct under section 821.6 was prejudicial error." The court observed that~~ "The ~~[~~d~~]~~efendants did not enjoy an unqualified immunity from suit. Their immunity would have depended on their proving by a preponderance of the evidence [that] they were acting within the scope of their employment in doing the acts alleged to constitute malicious prosecution." (*Tur, supra*, 51 Cal.App.4th at p. 904 [failure to instruct jury under section 821.6 was prejudicial error]~~*Ibid.*~~)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, § 434 et seq.~~368~~

4 Levy et al., California Torts, Ch. 43, *Malicious Prosecution and Abuse of Process,* § 43.06 (Matthew Bender)

31 California Forms of Pleading and Practice, Ch. 357, *Malicious Prosecution and Abuse of Process*, §

357.23 (Matthew Bender)

14 California Points and Authorities, Ch. 147, *Malicious Prosecution and Abuse of Process,* § 147.31 (Matthew Bender)

VF-1500. Malicious Prosecution—Former Criminal Proceeding

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] actively involved in causing [***name of plaintiff***] to be arrested [and prosecuted] [or in causing the continuation of the prosecution]?**
____ Yes ____ No

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

2. Did [*name of defendant***] act primarily for a purpose other than that of bringing [***name of plaintiff***] to justice?**
____ Yes ____ No

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

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

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

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

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

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, April 2008, December 2010, December 2016, May 2018

Directions for Use

This verdict form is based on CACI No. 1500, *Former Criminal Proceeding.* This form can be adapted to include the affirmative defense of reliance on counsel. See VF-1502 for a form that includes this affirmative defense.

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

In question 1, include the bracketed reference to prosecution if the arrest was without a warrant.

If there are disputed issues of fact on the elements of probable cause or favorable termination that the jury must resolve, include additional questions or provide special interrogatories on these elements. (See CACI No. 1500, *Former Criminal Proceeding,* elements 2 and 3.)

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

If there are multiple causes of action, users may wish to combine the individual forms into one form. If

different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

1730. Slander of Title—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by [making a statement/taking an action] that cast doubts about [***name of plaintiff***]'s ownership of [***describe real or personal property, e.g., the residence located at [address]***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [made a statement/[***specify other act, e.g., recorded a deed***] that cast doubts about [***name of plaintiff***]'s ownership of the property;**

2. **That the [statement was made to a person other than [***name of plaintiff***]/[***specify other publication, e.g., deed became a public record***];**

3. **That [the statement was untrue and] [***name of plaintiff***] did in fact own the property;**

4. **That [***name of defendant***] [knew that/acted with reckless disregard of the truth or falsity as to whether] [***name of plaintiff***] owned the property;**

5. **That [***name of defendant***] knew or should have recognized that someone else might act in reliance on the [statement/***e.g., deed***], causing [***name of plaintiff***] financial loss;**

6. **That [***name of plaintiff***] did in fact suffer immediate and direct financial harm because someone else acted in reliance on the [statement/***e.g., deed***];**

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

New December 2012; Revised May 2018

Directions for Use

Slander of title may be either by words or an act that clouds title to the property. (See, e.g., *Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 661 [132 Cal.Rptr.3d 781] [filing of lis pendens].) If the slander is by means other than words, specify the means in element 1. If the slander is by words, select the first option in element 2.

An additional element of a slander of title claim is that the alleged slanderous statement was without privilege or justification. (*Schep v. Capital One, N.A.* (2017) 12 Cal.App.5th 1331, 1335 [220 Cal.Rptr.3d 408].) If this element presents an issue for the jury, an instruction on it must be given.~~The privileges of Civil Code section 47 apply to actions for slander of title. (*Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405].) The defendant has the burden of proving privilege as an affirmative defense. (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339].) If privilege is claimed, additional instructions will be necessary to state the affirmative defense~~

~~and frame the privilege.~~

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 alleged, 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.~~The privilege of Civil Code section 47(c), applicable to communications between "interested" persons (see CACI No. 1723, *Qualified Privilege*), requires an absence of malice. To defeat this privilege, the plaintiff must show malice defined as a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy, or injure another person. (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708, 771 P.2d 406].) While defendant has the burden of proving that an allegedly defamatory statement falls within the scope of the common-interest privilege, plaintiffs have the burden of proving that the statement was made with malice. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1203 [31 Cal.Rptr.2d 776, 875 P.2d 1279].) Give CACI No. 1723 if the defendant presents evidence to put the privilege of Civil Code section 47(c) at issue.~~

Beyond the privilege of Civil Code section 47(c), it would appear that actual malice in the sense of ill will toward and intent to harm the plaintiff is not required and that malice may be implied in law from absence of privilege (~~see~~ See *Gudger v. Manton* (1943) 21 Cal.2d 537, 543–544 [134 P.2d 217], disapproved on other grounds in *Albertson v. Raboff* (1956) 46 Cal.2d 375, 381 [295 P.2d 405]~~*Albertson, supra*, 46 Cal.2d at p. 381.~~) or from the attempt to secure property to which the defendant had no legitimate claim (see *Spencer v. Harmon Enterprises, Inc.* (1965) 234 Cal.App.2d 614, 623 [44 Cal.Rptr. 683]~~.~~) or from accusations made without foundation (element 4) (See *Contra Costa County Title Co. v. Waloff* (1960) 184 Cal.App.2d 59, 67 [7 Cal.Rptr. 358].)

Sources and Authority

- "[S]lander of title is not a form of deceit. It is a form of the separate common law tort of disparagement, also sometimes referred to as injurious falsehood." (*Finch Aerospace Corp. v. City of San Diego* (2017) 8 Cal.App.5th 1248, 1253 [214 Cal.Rptr.3d 628].)

- "The Supreme Court has recently determined a viable disparagement claim, which necessarily includes a slander of title claim, requires the existence of a 'misleading statement that (1) specifically refers to the plaintiff's product or business and (2) clearly derogates that product or business. Each requirement must be satisfied by express mention or by clear implication.' " (*Finch Aerospace Corp., supra,* 8 Cal.App.5th at p. 1253

- " 'Slander of title is effected by one who without privilege publishes untrue and disparaging statements with respect to the property of another under such circumstances as would lead a

reasonable person to foresee that a prospective purchaser or lessee thereof might abandon his intentions. It is an invasion of the interest in the vendibility of property. In order to commit the tort actual malice or ill will is unnecessary. Damages usually consist of loss of a prospective purchaser. To be disparaging a statement need not be a complete denial of title in others, but may be any unfounded claim of an interest in the property which throws doubt upon its ownership.' 'However, it is not necessary to show that a particular pending deal was hampered or prevented, since recovery may be had for the depreciation in the market value of the property.' " (*M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 198–199 [143 Cal.Rptr.3d 160], internal citations omitted.)

- "Slander of title 'occurs when a person, without a privilege to do so, publishes a false statement that disparages title to property and causes pecuniary loss. [Citation.]' The false statement must be ' "maliciously made with the intent to defame." ' " (*Cyr v. McGovran* (2012) 206 Cal.App.4th 645, 651 [142 Cal.Rptr.3d 34], internal citations omitted.)

- "One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity." (*Appel v. Burman* (1984) 159 Cal.App.3d 1209, 1214 [206 Cal.Rptr. 259], quoting Rest. 2d Torts § 623A.)

- "One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused." (*Chrysler Credit Corp. v. Ostly* (1974) 42 Cal.App.3d 663, 674 [117 Cal.Rptr. 167], quoting Rest. Torts, § 624 [motor vehicle case].)

- "Sections 623A, 624 and 633 of the Restatement Second of Torts further refine the definition so it is clear included elements of the tort are that there must be (a) a publication, (b) which is without privilege or justification and thus with malice, express or implied, and (c) is false, either knowingly so or made without regard to its truthfulness, and (d) causes direct and immediate pecuniary loss." (*Howard v. Schaniel* (1980) 113 Cal.App.3d 256, 263–264 [169 Cal.Rptr. 678], footnote and internal citations omitted.)

- "In an action for wrongful disparagement of title, a plaintiff may recover (1) the expense of legal proceedings necessary to remove the doubt cast by the disparagement, (2) financial loss resulting from the impairment of vendibility of the property, and (3) general damages for the time and inconvenience suffered by plaintiff in removing the doubt cast upon his property." (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 624 [225 Cal.Rptr.3d 711].)

- "Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, substantially the same privileges are recognized in relation to both torts in the absence of statute. Questions of privilege relating to both torts are now resolved in the light of section 47 of the Civil Code." (*Albertson, supra,* 46 Cal.2d at pp. 378–379, internal citations

omitted.)

- "[The privilege of Civil Code section 47(c)] is lost, however, where the person making the communication acts with malice. Malice exists where the person making the statement acts out of hatred or ill will, or has no reasonable grounds for believing the statement to be true, or makes the statement for any reason other than to protect the interest for the protection of which the privilege is given." (*Earp v. Nobmann* (1981) 122 Cal.App.3d 270, 285 [175 Cal.Rptr. 767], disapproved on other grounds in *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219 [266 Cal.Rptr. 638, 786 P.2d 365].)

- "The existence of privilege is a defense to an action for defamation. Therefore, the burden is on the defendant to plead and prove the challenged publication was made under circumstances that conferred the privilege." (*Palmer v. Zaklama* (2003) 109 Cal.App.4th 1367, 1380 [1 Cal.Rptr.3d 116] [applying rule to slander of title].)

- "The principal issue presented in this case is whether the trial court properly instructed the jury that, in the jury's determination whether the common-interest privilege set forth in section 47(c) has been established, defendants bore the burden of proving not only that the allegedly defamatory statement was made upon an occasion that falls within the common-interest privilege, but also that the statement was made without malice. Defendants contend that, in California and throughout the United States, the general rule is that, although a defendant bears the initial burden of establishing that the allegedly defamatory statement was made upon an occasion falling within the purview of the common-interest privilege, once it is established that the statement was made upon such a privileged occasion, the plaintiff may recover damages for defamation only if the plaintiff successfully meets the burden of proving that the statement was made with malice. As stated above, the Court of Appeal agreed with defendants on this point. Although, as we shall explain, there are a few (primarily early) California decisions that state a contrary rule, both the legislative history of section 47(c) and the overwhelming majority of recent California decisions support the Court of Appeal's conclusion. Accordingly, we agree with the Court of Appeal insofar as it concluded that the trial court erred in instructing the jury that defendants bore the burden of proof upon the issue of malice, for purposes of section 47(c)." (*Lundquist, supra,* 7 Cal.4th at pp. 1202–1203, internal citations omitted.)

- ~~" 'The burden is also upon the defendant to prove any affirmative defense upon which he relies, including . . . that the communication is privileged. But when the pleadings admit . . . such facts, manifestly the defendant is thereby relieved of this burden.' 'Normally, privilege is an affirmative defense which must be pleaded in the answer [citation]. However, if the complaint discloses existence of a qualified privilege, it must allege malice to state a cause of action [citation].' Finally, 'Ordinarily privilege must be specially pleaded by the defendant, and the burden of proving it is on him. [Citations.] But where the complaint shows that the communication or publication is one within the classes qualifiedly privileged, it is necessary for the plaintiff to go further and plead and prove that the privilege is not available as a defense in the particular case, e.g., because of malice.'" (*Smith, supra*, 177 Cal.App.3d at pp. 630–631, internal citations omitted.)~~

- "Civil Code section 47(b)(4) clearly describes the conditions for application of the [litigation]

privilege to a recorded lis pendens as follows: 'A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.' Those conditions are (1) the lis pendens must identify a previously filed action and (2) the previously filed action must be one that affects title or right of possession of real property. We decline to add a third requirement that there must also be evidentiary merit." (*La Jolla Group II v. Bruce* (2012) 211 Cal.App.4th 461, 476 [149 Cal.Rptr.3d 716], internal citation omitted.)

- "[T]he property owner may recover for the impairment of the vendibility 'of his property' without showing that the loss was caused by prevention of a particular sale. 'The most usual manner in which a third person's reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. . . . The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land or other thing might with reasonable certainty have found a purchaser.' " (*Glass v. Gulf Oil Corp.* (1970) 12 Cal.App.3d 412, 424 [96 Cal.Rptr. 902].)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts § ~~642~~747

6 Witkin, Summary of California Law (11th ed. 2017~~10th ed. 2005~~) Torts § ~~1703~~1886

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.80 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.90 (Matthew Bender)

1731. Trade Libel—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making a statement that disparaged [***name of plaintiff***]'s [***specify product***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made a statement that [would be clearly or necessarily understood to have] disparaged the quality of [***name of plaintiff***]'s [***product/service***];**

2. **That the statement was made to a person other than [***name of plaintiff***];**

3. **That the statement was untrue;**

4. **That [***name of defendant***] [knew that the statement was untrue/acted with reckless disregard of the truth or falsity of the statement];**

5. **That [***name of defendant***] knew or should have recognized that someone else might act in reliance on the statement, causing [***name of plaintiff***] financial loss;**

6. **That [***name of plaintiff***] suffered direct financial harm because someone else acted in reliance on the statement; and**

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

New December 2013; Revised June 2015, May 2018

Directions for Use

The tort of trade libel is a form of injurious falsehood similar to slander of title. (See *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 548 [216 Cal.Rptr. 252]; *Erlich v. Etner* (1964) 224 Cal.App.2d 69, 74 [36 Cal.Rptr. 256].) The tort has not often reached the attention of California's appellate courts (see *Polygram Records, Inc.*, *supra*, 170 Cal.App.3d at p. 548.), perhaps because of the difficulty in proving damages. (See *Erlich*, *supra*, 224 Cal.App.2d at pp. 73−74.)

Include the optional language in element 1 if the plaintiff alleges that disparagement may be reasonably implied from the defendant's words. Disparagement by reasonable implication requires more than a statement that may conceivably or plausibly be construed as derogatory. A "reasonable implication" means a clear or necessary inference. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

Elements 4 and 5 are supported by section 623A of the Restatement 2d of Torts, which has been accepted in California. (See *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1360−1361 [78 Cal.Rptr.2d 627].) There is some authority, however, for the proposition that no intent or reckless disregard is

required (element 4) if the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher. (See *Nichols v. Great Am. Ins. Cos.* (1985) 169 Cal.App.3d 766, 773 [215 Cal.Rptr. 416].)

The privileges of Civil Code section 47 almost certainly apply to actions for trade libel. (See *Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405] [slander-of-title case]; *117 Sales Corp. v. Olsen* (1978) 80 Cal.App.3d 645, 651 [145 Cal.Rptr. 778] [publication by filing small claims suit is absolutely privileged].) ~~The defendant has the burden of proving privilege as an affirmative defense. (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339].)~~ If a privilege is claimed, additional instructions will be necessary to ~~state the affirmative defense and~~ frame the privilege.

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. ~~For further discussion, see the Directions for Use to CACI No. 1730, *Slander of Title—Essential Factual Elements*. See also CACI No. 1723, *Common Interest Privilege—Malice*.~~

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.

Limitations on liability arising from the First Amendment apply. (*Hofmann Co. v. E. I. du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 397 [248 Cal.Rptr. 384]; see CACI Nos. 1700−1703, instructions on public figures and matters of public concern.) See also CACI No. 1707, *Fact Versus Opinion*.

Sources and Authority

- "Trade libel is the publication of matter disparaging the quality of another's property, which the publisher should recognize is likely to cause pecuniary loss to the owner. [Citation.] The tort encompasses 'all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so.' [Citation.] [¶] To constitute trade libel, a statement must be false." (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 376 [154 Cal.Rptr.3d 698].)

- "To constitute trade libel the statement must be made with actual malice, that is, with knowledge it was false or with reckless disregard for whether it was true or false." (*J-M Manufacturing Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 97 [201 Cal.Rptr.3d 782].)

- "The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods." (*Shores v. Chip Steak Co.* (1955) 130 Cal.App.2d 627, 630 [279 P.2d 595].)

- “[A]n action for ‘slander of title’ … is a form of action somewhat related to trade libel … .” (*Erlich, supra,* 224 Cal.App.2d at p. 74.)

- “Confusion surrounds the tort of ‘commercial disparagement’ because not only is its content blurred and uncertain, so also is its very name. The tort has received various labels, such as ‘commercial disparagement,’ ‘injurious falsehood,’ ‘product disparagement,’ ‘trade libel,’ ‘disparagement of property,’ and ‘slander of goods.’ These shifting names have led counsel and the courts into confusion, thinking that they were dealing with different bodies of law. In fact, all these labels denominate the same basic legal claim.” (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 289.)

- “The protection the common law provides statements which disparage products as opposed to reputations is set forth in the Restatement Second of Torts sections 623A and 626. Section 623A provides: ‘One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if [P] (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and [P]*(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity*.’ [¶] Section 626 of Restatement Second of Torts in turn states: ‘The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of matter disparaging the quality of another's land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other's interests in the property.’ ” (*Melaleuca, Inc., supra,* 66 Cal.App.4th at pp. 1360−1361, original italics.)

- “According to section 629 of the Restatement Second of Torts (1977), ‘[a] statement is disparaging if it is understood to cast doubt upon the quality of another's land, chattels or intangible things, or upon the existence or extent of his property in them, and [¶] (a) the publisher intends the statement to cast the doubt, or [¶] (b) the recipient's understanding of it as casting the doubt was reasonable.’ ” (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 288.)

- “What distinguishes a claim of disparagement is that an injurious falsehood has been directed *specifically* at the plaintiff's business or product, derogating that business or product and thereby causing that plaintiff special damages.” (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 294, original italics.)

- “The Restatement [2d Torts] view is that, like slander of title, what is commonly called ‘trade libel’ is a particular form of the tort of injurious falsehood and need not be in writing.” (*Polygram Records, Inc., supra,* 170 Cal.App.3d at p. 548.)

- “While … general damages are presumed in a libel of a businessman, this is not so in action for trade libel. Dean Prosser has discussed the problems in such actions as follows: ‘Injurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general, . . . The cause of action founded upon it resembles that for defamation, but differs from it materially in the greater burden of proof resting on the plaintiff, and the necessity for special damage in all cases. . . . [The]

plaintiff must prove in all cases that the publication has played a material and substantial part in inducing others not to deal with him, and that as a result he has suffered special damages. . . . Usually, . . . the damages claimed have consisted of loss of prospective contracts with the plaintiff's customers. Here the remedy has been so hedged about with limitations that its usefulness to the plaintiff has been seriously impaired. It is nearly always held that it is not enough to show a general decline in his business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.' " (*Erlich, supra,* 224 Cal.App. 2d at pp. 73−74.)

- "Because the gravamen of the complaint is the allegation that respondents made false statements of fact that injured appellant's business, the 'limitations that define the First Amendment's zone of protection' are applicable. '[It] is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property . . . .' " (*Hofmann Co., supra,* 202 Cal.App.3d at p. 397, internal citation omitted.)

- "If respondents' statements about appellant are opinions, the cause of action for trade libel must of course fail. 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.' Statements of fact can be true or false, but an opinion─'a view, judgment, or appraisal formed in the mind . . . [a] belief stronger than impression and less strong than positive knowledge'─is the result of a mental process and not capable of proof in terms of truth or falsity." (*Hofmann Co., supra,* 202 Cal.App.3d at p. 397, footnote and internal citation omitted.)

- "[I]t is not absolutely necessary that the disparaging publication be intentionally designed to injure. If the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher, it is not material that the publisher did not intend the disparaging statement to be so understood." (*Nichols, supra,* 169 Cal.App.3d at p. 773.)

- "Disparagement by 'reasonable implication' requires more than a statement that may conceivably or plausibly be construed as derogatory to a specific product or business. A 'reasonable implication' in this context means a clear or necessary inference." (*Hartford Casualty Ins. Co., supra,* 59 Cal.4th at p. 295, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Torts, §§ 747–750~~642-645~~

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.70 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander,* § 340.103 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 9, *Commercial Defamation*, 9.04

1802. False Light

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

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

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

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

   [*or*]

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

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

   [*or*]

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

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

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

New September 2003; Revised November 2017, May 2018

Directions for Use

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

False light claims are subject to the same constitutional protections that apply to defamation claims.

(*Briscoe v. Reader's Digest Assn.* (1971) 4 Cal.3d 529, 543 [93 Cal.Rptr. 866, 483 P.2d 34], overruled on other grounds in *Gates v. Discovery Communications, Inc.* (2004) 34 Cal.4th 679, 696, fn. 9 [21 Cal.Rptr.3d 663, 101 P.3d 552] [false light claim should meet the same requirements of a libel claim, including proof of malice when required].) Thus, a knowing violation of or reckless disregard for the plaintiff's rights is required if the plaintiff is a public figure ~~or the subject matter of the communication is a matter of public concern~~. (See *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 721–722 [257 Cal.Rptr. 708, 771 P.2d 406].) Give the first option for element 3 if the publication involves a public figure ~~or a matter of public concern~~. ~~Otherwise, g~~Give the second option for a private citizen, at least with regard to a matter of private concern. (See *id.* at p. 742 [private person need prove only negligence rather than malice to recover for defamation].)

There is perhaps some question as to which option for element 3 to give for a private person if the matter is one of public concern. For defamation, a private figure plaintiff must prove malice to recover presumed and punitive damages for a matter of public concern, but not to recover for damages to reputation. (*Khawar v. Globe Internat.* (1998) 19 Cal.4th 254, 273–274 [79 Cal.Rptr.2d 178, 965 P.2d 696].) No case has been found that provides for presumed damages for a false light violation. Therefore, the court will need to decide whether proof of malice is required from a private plaintiff even though the matter may be one of public concern.

If the jury will also be instructed on defamation, ~~the court should consider whether~~ an instruction on false light would be superfluous and therefore need not be given. (See *Eisenberg v. Alameda Newspapers* (1999) 74 Cal.App.4th 1359, 1385, fn. 13 [88 Cal.Rptr.2d 802]; ~~;~~ see also *Briscoe, supra,* 4 Cal.3d at p. 543.) For defamation, utterance of a defamatory statement to a single third person constitutes sufficient publication. (*Cunningham v. Simpson* (1969) 1 Cal.3d 301, 307 [81 Cal.Rptr. 855, 461 P.2d 39]; but see *Warfield v. Peninsula Golf & Country Club* (1989) 214 Cal.App.3d 646, 660 [262 Cal.Rptr. 890] [false light case holding that "account" published in defendant's membership newsletter does not meet threshold allegation of a general public disclosure].)

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

Sources and Authority

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

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

- "In order to be actionable, the false light in which the plaintiff is placed must be highly offensive to a

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

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

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

- "Because in this defamation action [plaintiff] is a private figure plaintiff, he was required to prove only negligence, and not actual malice, to recover damages for actual injury to his reputation. But [plaintiff] was required to prove actual malice to recover punitive or presumed damages … ." (*Khawar, supra,* 19 Cal.4th at p. 274.)

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

- "[T]he constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth." (~~In~~ *Time, Inc. v. Hill* (1967) 385 U.S. 374, 387–388 [87 S.Ct. 534, 17 L.Ed.2d 456].~~), the Court held that the *New York Times v. Sullivan* malice standard applied to a privacy action that was based on a "false light" statute where the matter involved a public figure. Given the similarities between defamation and false light actions, it appears likely that the negligence standard for private figure defamation plaintiffs announced in *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323 [94 S.Ct. 2997, 41 L.Ed.2d 789] should apply to private figure false light plaintiffs.~~

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

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 784–786

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

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

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

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

2021. Private Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] interfered with [***name of plaintiff***]'s use and enjoyment of [his/her] land. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**

2. **That [***name of defendant***], by acting or failing to act, created a condition or permitted a condition to exist that [***insert one or more of the following:***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;] [or]

   [was [a/an] [fire hazard/*specify other potentially dangerous condition***] to [***name of plaintiff***]'s property;]**

3. **That [[***name of defendant***]'s conduct in acting or failing to act was [intentional and unreasonable/unintentional, but negligent or reckless]/[the condition that [***name of defendant***] created or permitted to exist was the result of an abnormally dangerous activity]];**

~~3~~4. **That this condition substantially interfered with [***name of plaintiff***]'s use or enjoyment of [his/her] land;**

~~4~~5. **That an ordinary person would reasonably be annoyed or disturbed by** [*name of defendant*]**'s conduct;**

~~5~~6. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

~~6~~7. **That [***name of plaintiff***] was harmed;**

~~7~~8. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm; and**

~~8~~9. **That the seriousness of the harm outweighs the public benefit of [***name of defendant***]'s conduct.**

New September 2003; Revised February 2007, December 2011, December 2015, June 2016, May 2017, May 2018

Directions for Use

Private nuisance liability depends on some sort of conduct by the defendant that either directly and unreasonably interferes with the plaintiff's property or creates a condition that does so. (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 100 [253 Cal.Rptr. 470].) Element 2 requires that the defendant have acted to create a condition or allowed a condition to exist by failing to act.

The act that causes the interference may be intentional and unreasonable. Or it may be unintentional but caused by negligent or reckless conduct. Or it may result from an abnormally dangerous activity for which there is strict liability. However, if the act is intentional but reasonable, or if it is entirely accidental, there is generally no liability. (*Lussier*, *supra*, 206 Cal.App.3d at p. 100.)

The intent required is only to do the act that interferes, not an intent to cause harm. (*Lussier*, *supra*, 206 Cal.App.3d at pp. 100, 106; see Rest.2d Torts, § 822.) For example, it is sufficient that one intend to chop down a tree; it is not necessary to intend that it fall on a neighbor's property.

If the condition results from an abnormally dangerous activity, it must be one for which there is strict liability. (*Lussier*, *supra*, 206 Cal.App.3d at p. 100; see Rest.2d Torts, § 822).

There may be an exception to the scienter requirement of element 3 for at least some harm caused by trees. There are cases holding that a property owner is strictly liable for damage caused by tree branches and roots that encroach on neighboring property. (See *Lussier*, *supra*, 206 Cal.App.3d at p.106, fn. 5; see also *Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 43 [328 P.2d 269] [absolute liability of an owner to remove portions of his fallen trees that extend over and upon another's land]; cf. *City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422] [plaintiff must prove negligent maintenance of trees that fell onto plaintiff's property in a windstorm].) Do not give element 3 if the court decides that there is strict liability for damage caused by encroaching or falling trees.

If the claim is that the defendant failed to abate a nuisance, negligence must be proved. (*City of Pasadena*, *supra*, 228 Cal.App.4th at p. 1236.)

Element ~~8~~ 9 must be supplemented with CACI No. 2022, *Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit*. (See *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 160−165 [184 Cal.Rptr.3d 26].) For instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.

- Acts Done Under Express Authority of Statute. Civil Code section 3482.

- "A nuisance is considered a 'public nuisance' when it 'affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.' A 'private nuisance' is defined to include any nuisance not covered by the definition of a public nuisance, and also includes some public nuisances. 'In other words, it is possible for a nuisance to be public and, from the perspective of individuals who suffer an interference with their use and enjoyment of land, to be private as well.' " (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 261-262 [207 Cal.Rptr.3d 532], internal citations omitted.)

- "In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724, 920 P.2d 669].)

- "[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must 'disturb or prevent the comfortable enjoyment of property,' such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491], internal citations omitted.)

- "A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1178 [227 Cal.Rptr.3d 390].)

- "[T]o proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664], internal citation omitted.)

- "So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance; … ." (*Mendez, supra*, 3 Cal.App.5th at p. 262.)

- "The requirements of *substantial damage* and *unreasonableness* are not inconsequential. These requirements stem from the law's recognition that: ' "Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must

put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and *therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another*. Liability … is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation." ' " (*Mendez, supra,* 3 Cal.App.5th at p. 263, original italics.)

- "The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage.' The Restatement recognizes the same requirement as the need for proof of 'significant harm,' which it variously defines as 'harm of importance' and a 'real and appreciable invasion of the plaintiff's interests' and an invasion that is 'definitely offensive, seriously annoying or intolerable.' The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? 'If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.' This is, of course, a question of fact that turns on the circumstances of each case." (*San Diego Gas & Electric Co., supra,* 13 Cal.4th at p. 938, internal citations omitted.)

- "The second additional requirement for nuisance is superficially similar but analytically distinct: 'The interference with the protected interest must not only be substantial, but it must also be unreasonable', i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' "(*San Diego Gas & Electric Co., supra,* 13 Cal.4th at pp. 938-939, internal citations omitted.)

- "Appellant first argues that the judgment is erroneous because there is no showing that any act or conduct of his caused the damage. It is true that there is neither showing nor finding of any negligent or wrongful act or omission of defendant proximately causing the falling of the trees. But no such showing is required. If the trees remained upright, with some of their branches extending over or upon plaintiff's land, they clearly would constitute a nuisance, which defendant could be required to abate." (*Mattos*, *supra*, ~~*v. Mattos* (1958)~~ 162 Cal.App.2d at p.~~41,~~ 42 ~~[328 P.2d 269]~~.)

- "Although the central idea of nuisance is the unreasonable invasion of this interest and not

the particular type of conduct subjecting the actor to liability, liability nevertheless depends on some sort of conduct that either directly and unreasonably interferes with it or creates a condition that does so. 'The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability. On any of these bases the defendant may be liable. On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above. In these cases there is no liability.' " (*Lussier, supra*, 206 Cal.App.3d at p. 100, internal citations omitted.)

- "We do not intend to suggest, however, that one is strictly liable for damages that arise when a natural condition of one's land interferes with another's free use and enjoyment of his property. Such a rule would, quite anomalously, equate natural conditions with dangerous animals, ultrahazardous activities, or defective products, for which strict liability is reserved." (*Lussier, supra*, 206 Cal.App.3d at pp. 101–102.)

- "Clearly, a claim of nuisance based on our example is easier to prove than one based on negligent conduct, for in the former, a plaintiff need only show that the defendant committed the acts that caused injury, whereas in the latter, a plaintiff must establish a duty to act and prove that the defendant's failure to act reasonably in the face of a known danger breached that duty and caused damages." (*Lussier, supra*, 206 Cal.App.3d at p. 106.)

- "We note, however, a unique line of cases, starting with *Grandona v. Lovdal* (1886) 70 Cal. 161 [11 P. 623], which holds that to the extent that the branches and roots of trees encroach upon another's land and cause or threaten damage, they may constitute a nuisance. Superficially, these cases appear to impose nuisance liability in the absence of wrongful conduct." (*Lussier, supra*, 206 Cal.App.3d at p. 102, fn. 5[but questioning validity of such a rule], internal citations omitted.)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1552 [87 Cal.Rptr.3d 602], internal citations omitted.)

- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' " 'where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. …" [Citations.]' " (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422, internal citations omitted.)

- "We acknowledge that to recover on a nuisance claim the harm the plaintiff suffers need not be a physical injury. Thus, the absence of evidence in this case to establish that [plaintiff] 's physical injuries were caused by the stray voltage would not preclude recovery on her

nuisance claim." (*Wilson, supra,* 234 Cal.App.4th at p. 159, internal citations omitted.)

- "[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property… ." (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)

- "It is the general rule that the unreasonable, unwarrantable or unlawful use by a person of his own property so as to interfere with the rights of others is a nuisance [citation]. In fact, any unwarranted activity which causes substantial injury to the property of another or obstructs its reasonable use and enjoyment is a nuisance which may be abated. And, even a lawful use of one's property may constitute a nuisance if it is part of a general scheme to annoy a neighbor and if the main purpose of the use is to prevent the neighbor from reasonable enjoyment of his own property [citation]." (*McBride, supra*, 18 Cal.App.5th at p. 1180.)

- "A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated." (*People v. Oliver* (1948) 86 Cal.App.2d 885, 889 [195 P.2d 926].)

- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ... ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.' " " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)

Secondary Sources

13 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Equity, § 174~~153~~

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.05 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.13 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 (Matthew Bender)

California Civil Practice: Torts §§ 17:1, 17:2, 17:4 (Thomson Reuters)

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

[*Name of plaintiff***] claims that [he/she] was subjected to harassment based on [his/her] [***describe protected status, e.g., race, gender, or age***] at [***name of defendant***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

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

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

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

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

   [That a supervisor engaged in the conduct;]

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

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

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

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

Directions for Use

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

"Severe or Pervasive" Explained.

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

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

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "[A]n employer is strictly liable for all acts of sexual harassment by a supervisor." (*State Dep't of Health Servs.*, *supra*, ~~*v. Superior Court* (2003)~~ 31 Cal.4th at p.~~1026,~~ 1042 ~~[6 Cal.Rptr.3d 441, 79 P.3d 556]~~.)
- "The applicable language of the FEHA does not suggest that an employer's liability for sexual harassment by a supervisor is constrained by principles of agency law. Had the Legislature so intended, it would have used language in the FEHA imposing the negligence standard of liability on acts of harassment by an employee 'other than an agent,' 'not acting as the employer's agent,' or 'not acting within the scope of an agency for the employer.' By providing instead in section 12940, subdivision (j)(1), that the negligence standard applies to acts of harassment 'by an employee other

than an agent *or supervisor*' (italics added), the Legislature has indicated that all acts of harassment by a supervisor are to be exempted from the negligence standard, whether or not the supervisor was then acting as the employer's agent, and that agency principles come into play only when the harasser is not a supervisor. (*State Dept. of Health Services, supra*, 31 Cal.4th at p. 1041.)

- "When the harasser is a nonsupervisory employee, employer liability turns on a showing of negligence (that is, the employer knew or should have known of the harassment and failed to take appropriate corrective action)." (*Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 952 [139 Cal.Rptr.2d 464].)

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

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

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

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

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

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

- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an

abusive working environment,' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

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

- ~~Under federal Title VII, an employer's liability may be based on the conduct of an official "within the class of an employer organization's officials who may be treated as the organization's proxy." (*Faragher v. City of Boca Raton* (1998) 524 U.S. 775, 790 [118 S.Ct. 2275, 141 L.Ed.2d 662].)~~

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

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

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

- "[T]here is no requirement that the *motive* behind the sexual harassment must be sexual in nature. '[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination

on the basis of sex.' Sexual harassment occurs when, as is alleged in this case, sex is used as a weapon to create a hostile work environment." (*Singleton v. United States Gypsum Co.* (2006) 140 Cal.App.4th 1547, 1564 [45 Cal.Rptr.3d 597], original italics, internal citation omitted.)

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

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

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

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 363, 370~~340, 346~~

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

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

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

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

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

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

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

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

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of defendant***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

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

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

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

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

   [That a supervisor engaged in the conduct;]

   [*or***]**

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

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

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

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

Directions for Use

This instruction is for use in a hostile work environment case if the plaintiff was not the target of the harassing conduct and the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Individual*

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

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

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C),
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile

or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)

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

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

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

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

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

- "[N]ot every utterance of a racial slur in the workplace violates the FEHA or Title VII. As the United States Supreme Court has recognized in the context of sexual harassment: '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an

abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' . . . California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 129–130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)

- "[U]nder the FEHA, an employer is strictly liable for *all* acts of sexual harassment by a supervisor. (*State Dep't of Health Servs.*, *supra*, ~~*v. Superior Court* (2003)~~ 31 Cal.4th at p.~~1026,~~ 1041 ~~[6 Cal.Rptr.3d 441, 79 P.3d 556]~~, original italics.)

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

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

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

- "If an employee other than an agent or supervisor commits the harassment, and the employer takes immediate and appropriate corrective action when it becomes or reasonably should become aware of the conduct—for example, when the victim or someone else informs the employer—there simply is no 'unlawful employment practice' that the FEHA governs." (*Carrisales v. Dept. of Corrections*

(1999) 21 Cal.4th 1132, 1136 [90 Cal.Rptr.2d 804, 988 P.2d 1083], called into doubt on other grounds by statute.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 363, 370~~340, 346~~

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

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

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

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

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

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

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

[*Name of plaintiff***] claims that widespread sexual favoritism at [***name of defendant***] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant those preferences. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

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

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

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

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

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

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

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

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

Derived from former CACI No. 2521 December 2007; Revised December 2015, May 2018

Directions for Use

This instruction is for use in a hostile work environment case involving widespread sexual favoritism when the defendant is an employer or other entity covered by the FEHA. For an individual defendant, such as the alleged harasser or plaintiff's coworker, see CACI No. 2522C, *Hostile Work Environment Harassment—Widespread Sexual Favoritism—Essential Factual Elements—Individual Defendant.* For a case in which the plaintiff is the target of harassment based on a protected status such as gender, race, or

sexual orientation, see CACI No. 2521A, *Hostile Work Environment Harassment—Conduct Directed at Plaintiff—Essential Factual Elements—Employer or Entity Defendant.* For an instruction for use if the plaintiff is not the target of the harassment, see CACI No. 2521B, *Hostile Work Environment Harassment—Conduct Directed at Others—Essential Factual Elements—Employer or Entity Defendant.* Also read CACI No. 2523, *"Harassing Conduct" Explained*, and CACI No. 2524, *"Severe or Pervasive" Explained*.

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

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the

manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)

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

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

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

- " '[N]ot all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of [the victim's] employment and create an abusive working environment." ' . . . 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.' … [¶] California courts have adopted the same standard in evaluating claims under the FEHA." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

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

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

implication the FEHA makes the employer strictly liable for harassment by a supervisor." (*State Dep't of Health Servs.*, *supra*, ~~*v. Superior Court* (2003)~~ 31 Cal.4th at pp.~~1026,~~ 1040-1041 ~~[6 Cal.Rptr.3d 441, 79 P.3d 556]~~, original italics.)

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

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

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

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

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 363, 370~~340, 346~~

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

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

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

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

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

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

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

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to harassment based on [***describe protected status, e.g., race, gender, or age***], causing a hostile or abusive work environment. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

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

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

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

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

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

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

Derived from Former CACI No. 2522 December 2007; Revised June 2013, December 2015, May 2018

Directions for Use

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

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

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

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The elements [of a prima facie claim of hostile-environment sexual harassment] are: (1) plaintiff belongs to a protected group; (2) plaintiff was subject to unwelcome sexual harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment; and (5) respondeat superior." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 608 [262 Cal.Rptr. 842], footnote omitted.)
- "The *McDonnell Douglas* burden-shifting framework does not apply to [plaintiff]'s harassment claim either. Since 'there is no possible justification for harassment in the workplace,' an employer cannot offer a legitimate nondiscriminatory reason for it." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 927 [227 Cal.Rptr.3d 286].)
- "When the workplace is permeated with discriminatory intimidation, ridicule and insult that is ' "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," ' the law is violated." (*Kelly-Zurian v. Wohl Shoe Co., Inc.* (1994) 22 Cal.App.4th 397, 409 [27 Cal.Rptr.2d 457], internal citation omitted.)

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

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

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

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

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

- "Under … FEHA, sexual harassment can occur between members of the same gender as long as the plaintiff can establish the harassment amounted to discrimination *because of sex*." (*Lewis, supra,* 224 Cal.App.4th at p. 1525, original italics.)

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

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

- "[A] heterosexual male is subjected to harassment because of sex under the FEHA when attacks on his heterosexual identity are used as a tool of harassment in the workplace, irrespective of whether the

attacks are motivated by sexual desire or interest." (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1229 [166 Cal.Rptr.3d 676].) .)

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

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 363, 370~~340, 346~~

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

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

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

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

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

California Civil Practice: Employment Litigation §§ 2:56–2:56.1 (Thomson Reuters)

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

[*Name of plaintiff***] claims that [he/she] was subjected to a hostile or abusive work environment because coworkers at [***name of employer***] were subjected to harassment based on [***describe protected status, e.g., race, gender, or age***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

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

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

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

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

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

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

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

Directions for Use

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

or Pervasive" Explained.

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

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "The plaintiff's work environment is affected not only by conduct directed at herself but also by the treatment of others. A woman's perception that her work environment is hostile to women will obviously be reinforced if she witnesses the harassment of other female workers." (*Beyda v. City of Los Angeles* (1998) 65 Cal.App.4th 511, 519 [76 Cal.Rptr.2d 547], internal citations omitted.)
- "Harassment against others in the workplace is only relevant to the plaintiff's case if she has personal knowledge of it. Unless plaintiff witnesses the conduct against others, or is otherwise aware of it, that conduct cannot alter the conditions of her employment and create an abusive working environment. Stated another way, a reasonable person in plaintiff's position would not find the environment hostile or abusive unless that person had knowledge of the objectionable conduct toward others." (*Beyda, supra,* 65 Cal.App.4th at p. 520.)
- "To state that an employee must be the direct victim of the sexually harassing conduct is somewhat misleading as an employee who is subjected to a hostile work environment is a victim of sexual harassment even though no offensive remarks or touchings are directed to or perpetrated upon that

employee. Generally, however, sexual conduct that involves or is aimed at persons other than the plaintiff is considered less offensive and severe than conduct that is directed at the plaintiff. A hostile work environment sexual harassment claim by a plaintiff who was not personally subjected to offensive remarks and touchings requires 'an even higher showing' than a claim by one who had been sexually harassed without suffering tangible job detriment: such a plaintiff must 'establish that the sexually harassing conduct permeated [her] direct work environment.' [¶] To meet this burden, the plaintiff generally must show that the harassment directed at others was in her immediate work environment, and that she personally witnessed it. The reason for this is obvious: if the plaintiff does not witness the incidents involving others, 'those incidents cannot affect ... her perception of the hostility of the work environment.' " (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284–285 [42 Cal.Rptr.3d 2, 132 P.3d 211], internal citations omitted.)

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

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

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

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

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

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

- "To be actionable, 'a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' That means a plaintiff who subjectively perceives the workplace as hostile or

abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception. Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra,* 38 Cal.4th at p. 284, internal citations omitted.)

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

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 363, 370~~340, 346~~

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

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

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

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

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

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

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

[*Name of plaintiff***] claims that widespread sexual favoritism by [***name of defendant***] created a hostile or abusive work environment. "Sexual favoritism" means that another employee has received preferential treatment with regard to promotion, work hours, assignments, or other significant employment benefits or opportunities because of a sexual relationship with an individual representative of the employer who was in a position to grant these preferences. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

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

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

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

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

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

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

Derived from former CACI No. 2522 December 2007; Revised December 2015, May 2018

Directions for Use

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

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

Sources and Authority

- Harassment Prohibited Under Fair Employment and Housing Act. Government Code section 12940(j)(1).
- Personal Liability for Harassment. Government Code section 12940(j)(3).
- "Employer" Defined for Harassment. Government Code section 12940(j)(4)(A).
- Harassment Because of Sex. Government Code section 12940(j)(4)(C).
- Person Providing Services Under Contract. Government Code section 12940(j)(5).
- Aiding and Abetting Fair Employment and Housing Act Violations. Government Code section 12940(i).
- Perception and Association. Government Code section 12926(o).
- "Following the guidance of the EEOC, and also employing standards adopted in our prior cases, we believe that an employee may establish an actionable claim of sexual harassment under the FEHA by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment." (*Miller v. Dept. of Corrections* (2005) 36 Cal.4th 446, 466 [30 Cal.Rptr.3d 797, 115 P.3d 77], internal citations omitted.)
- "[S]exual favoritism by a manager may be actionable when it leads employees to believe that 'they [can] obtain favorable treatment from [the manager] if they became romantically involved with him', the affair is conducted in a manner 'so indiscreet as to create a hostile work environment,' or the manager has engaged in 'other pervasive conduct … which created a hostile work environment.' " (*Miller, supra,* 36 Cal.4th at p. 465, internal citations omitted.)
- "[A] romantic relationship between a supervisor and an employee does not, without more, give rise to a sexual discrimination or sexual harassment claim either under the FEHA or the public policy of the state." (*Proksel v. Gattis* (1996) 41 Cal.App.4th 1626, 1631 [49 Cal.Rptr.2d 322].)

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

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

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

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

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

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

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

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Agency and Employment, §§ 363, 370~~340, 346~~

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

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

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

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

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

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

2620. CFRA Rights Retaliation—Essential Factual Elements (Gov. Code, § 12945.2(*l*))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [[requesting/taking] [family care/medical] leave/[***other protected activity***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was eligible for [family care/medical] leave;**

2. **That [***name of plaintiff***] [[requested/took] [family care/medical] leave/[***other protected activity***]];**

3. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

4. **That [***name of plaintiff***]'s [[request for/taking of] [family care/medical] leave/[***other protected activity***]] was a substantial motivating reason for [discharging/[***other adverse employment action***]] [him/her];**

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

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

New September 2003; Revised December 2012, June 2013, May 2018

Directions for Use

Use this instruction in cases of alleged retaliation for an employee's exercise of rights granted by the California Family Rights Act (CFRA). (See Gov. Code, § 12945.2(*l*).) The instruction assumes that the defendant is plaintiff's present or former employer, and therefore it must be modified if the defendant is a prospective employer or other person.

This instruction may also be given for a claim of retaliation under the New Parent Leave Act. The "other protected activity" option of the opening paragraph and elements 2 and 4 may be used to assert what is protected from retaliation under this act. (See Gov. Code, § 12945.6(g), (h).) In element 1, use "new parent" leave instead of "family care" or "medical."

~~The~~ Both statute~~s~~ reach~~es~~ a broad range of adverse employment actions short of actual discharge. (See Gov. Code, §§ 12945.2(*l*), 12945.6(g).) Element 3 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, *"Adverse Employment Action" Explained*, and CACI No. 2510, *"Constructive Discharge" Explained*, for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 4 uses the term "substantial motivating reason" to express both intent and causation between the

employee's exercise of a CFRA right and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to CFRA retaliation cases has not been addressed by the courts.

Sources and Authority

- Retaliation Prohibited Under California Family Rights Act. Government Code section 12945.2(*l*), (t).
- Retaliation Prohibited Under New Parent Leave Act. Government Code section 12945.6(g), (h).
- Retaliation Prohibited Under Fair Employment and Housing Act. Government Code section 12940(h).
- "The elements of a cause of action for retaliation in violation of CFRA are " '(1) the defendant was an employer covered by CFRA; (2) the plaintiff was an employee eligible to take CFRA [leave]; (3) the plaintiff exercised her right to take leave for a qualifying CFRA purpose; and (4) the plaintiff suffered an adverse employment action, such as termination, fine, or suspension, because of her exercise of her right to CFRA [leave]." ' " (*Soria v. Univision Radio Los Angeles, Inc.* (2016) 5 Cal.App.5th 570, 604 [210 Cal.Rptr.3d 59].)
- "Similar to causes of action under FEHA, the *McDonnell Douglas* burden shifting analysis applies to retaliation claims under CFRA." (*Moore v. Regents of University of California* (2016) 248 Cal.App.4th 216, 248 [206 Cal.Rptr.3d 841].)
- " 'When an adverse employment action "follows hard on the heels of protected activity, the timing often is strongly suggestive of retaliation." ' " (*Bareno v. San Diego Community College Dist.* (2017) 7 Cal.App.5th 546, 571 [212 Cal.Rptr.3d 682].)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1058–1060

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA)*, ¶¶ 12:1300, 12:1301 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Other Employee Rights Statutes, §§ 4.18–4.20

1 Wilcox, California Employment Law, Ch. 8, *Leaves of Absence*, § 8.32 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.37[3][c] (Matthew Bender)

2630. Violation of New Parent Leave Act—Essential Factual Elements (Gov. Code, § 12945.6)

[*Name of plaintiff***] claims that [***name of defendant***] refused to [grant [him/her] parental leave/return [him/her] to the same or a comparable job when [his/her] parental leave ended]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] employs at least 20 employees within 75 miles of the site where [***name of plaintiff***] worked;**

2. **That [***name of plaintiff***] worked for [***name of defendant***] for more than a year, and for at least 1,250 hours during the previous 12 months;**

3. **That [***name of plaintiff***] requested leave to bond with a new child within one year of the child's [birth/adoption/foster care placement];**

4. **That [***name of defendant***] refused to [grant [***name of plaintiff***]'s request for parental leave/return [***name of plaintiff***] to the same or a comparable job when [his/her] parental leave ended];**

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

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

[If before the leave began, [*name of defendant***] did not guarantee [***name of plaintiff***] employment in the same or a comparable position on return from the leave, then [***name of defendant***] is considered to have refused to grant [***name of plaintiff***]'s request for parental leave.]**

New May 2018

Directions for Use

The New Parent Leave Act (Gov. Code, § 12945.6) extends some of the rights provided to employees by the California Family Rights Act (CFRA; Gov. Code, § 12945.2) to employees of employers with 20 or more employees. (See Gov. Code, § 12945.6(a)(1); cf. Gov. Code, § 12945.2(b) [CFRA applies to employers with 50 or more employees].). The New Parent Leave Act allows employees to take up to 12 weeks of parental leave to bond with a new child within one year of the child's birth, adoption, or foster care placement. The act also requires the employer, before the leave begins, to guarantee employment in the same or a comparable position on the termination of the leave. (Gov. Code, § 12945.6(a)(1).) The employer must maintain the employee's health care coverage during the leave. (Gov. Code, § 12945.6(a)(2).)

Elements 1 and 2 set forth the eligibility requirements for employer and employee under the act. (See Gov. Code, § 12945.6(a)(1).) These elements may be omitted if there are no disputed facts over the act's

applicability to the parties.

For an instruction that can be modified for use for a claim of retaliation under the New Parent Leave Act (see Gov. Code, § 12945.6(h)), see CACI No. 2620, *CFRA Rights Retaliation—Essential Factual Elements*.

Sources and Authority

- New Parent Leave Act. Government Code section 12945.6.

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1060, 1061

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-A, *Overview Of Key Statutes,* ¶ 12:32 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 12-B, *Family And Medical Leave Act (FMLA)/California Family Rights Act (CFRA),* ¶¶ 12:146, 12:390, 12:421, 12:852–12:857, 12:1201, 12:1300 (The Rutter Group)

California Civil Practice: Employment Litigation § 5:40 (Thomson Reuters)

2740. Violation of Equal Pay Act—Essential Factual Elements (Lab. Code, § 1197.5)

[*Name of plaintiff***] claims that [he/she] was paid at a wage rate that is less than the rate paid to employees of [the opposite sex/another race/another ethnicity]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of plaintiff***] was paid less than the rate paid to [a] person[s] of [the opposite sex/another race/another ethnicity] working for [***name of defendant***];**

2. That [*name of plaintiff***] was performing substantially similar work as the other person[s] with regard to skill, effort, and responsibility; and**

3. That [*name of plaintiff***] was working under similar working conditions as the other person[s].**

New May 2018

Directions for Use

The California Equal Pay Act prohibits paying employees at lower wage rates than rates paid to employees of the opposite sex or a different race or ethnicity for substantially similar work.. (Lab. Code, § 1197.5(a), (b).) An employee receiving less than the wage to which he or she is entitled may bring a civil action to recover the balance of the wages, including interest, and an equal amount as liquidated damages. Costs and attorney fees may also be awarded. (Lab. Code, § 1197.5(h).)

There are a number of defenses that the employer may assert to defend what appears to be an improper pay differential. (Lab. Code, § 1197.5(a), (b).) See CACI Nos. 2741, *Affirmative Defense—Different Pay Justified,* and 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity,* for instructions on the employer's affirmative defenses. (See Lab. Code, § 1197.5(a)(1), (b)(1).)

Sources and Authority

- Right to Equal Pay Based on Gender, Race, or Ethnicity. Labor Code section 1197.5(a), (b).
- Private Right of Action to Enforce Equal Pay Claim. Labor Code section 1197.5(h).
- "This section was intended to codify the principle that an employee is entitled to equal pay for equal work without regard to gender." (*Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 104 [165 Cal.Rptr. 100, 611 P.2d 441].)
- "[I]t is appropriate to apply the three-stage burden-shifting test which is used to establish sex discrimination under the federal Equal Pay Act to the trial of an action under section 1197.5 that alleges sexual discrimination by the payment of unequal wages. In the equal pay context, the burden-shifting test requires only that the plaintiff must show that the employer pays workers of one sex more than workers of the opposite sex for equal work [Citation]. If the plaintiff does so,

the employer then has the burden of showing that one of the exceptions listed in section 1197.5 is applicable [Citation]. If the employer does so, the employee may show that the employer's stated reasons are pretextual [Citation]." (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 626 [3 Cal.Rptr.3d 844].)

- "The California statute is nearly identical to the federal Equal Pay Act of 1963. (29 U.S.C. § 206(d)(1).) Accordingly, in the absence of California authority, it is appropriate to rely on federal authorities construing the federal statute: 'Although state and federal antidiscrimination laws "differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute." ' " (*Green, supra,* 111 Cal.App.4th at p. 623 [decided before passage of the Fair Pay Act of 2015, which introduced significant differences between federal and state law].)

- "To establish her prima facie case, [plaintiff] had to show not only that she is paid lower wages than a male comparator for equal work, but that she has selected the proper comparator. 'The EPA does not require perfect diversity between the comparison classes, but at a certain point, when the challenged policy effects [*sic*] both male and female employees equally, there can be no EPA violation. [Citation.] [A plaintiff] cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females.' " (*Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324–325 [55 Cal.Rptr.3d 732].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.02 (Matthew Bender)

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

2741. Affirmative Defense—Different Pay Justified

[*Name of defendant***] claims that [he/she/it] was justified in paying [***name of plaintiff***] a wage rate that was less than the rate paid to employees of [the opposite sex/another race/another ethnicity]. To establish this defense, [***name of defendant***] must prove all of the following:**

1. That the wage differential was based on one or more of the following factors:

[a. A seniority system;]

[b. A merit system;]

[c. A system that measures earnings by quantity or quality of production;]

[d. (*Specify alleged bona fide factor(s) other than sex, race, or ethnicity, such as education, training, or experience.***).]**

2. That each factor was applied reasonably; and

3. That the factor[s] that [*name of defendant***] relied on account[s] for the entire wage differential.**

Prior salary does not, by itself, justify any disparity in current compensation.

New May 2018

Directions for Use

The California Equal Pay Act presents four factors that an employer may offer to justify a pay differential that results in an apparent pay disparity based on gender, race, or ethnicity. Factors a, b, and c in element 1 are specific; factor d may perhaps be considered a "catchall" factor. (See *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196 [94 S.Ct. 2223, 2229, 41 L.Ed.2d 1, 10-11].) Choose the factor or factors that the employer asserts as justification.

If the catchall factor d is selected, the jury must also be instructed with CACI No. 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity*, which establishes what bona fide factors other than sex, race, or ethnicity may justify a pay differential. (See Lab. Code, § 1197.5(a)(1), (b)(1).)

Sources and Authority

- Factors Justifying Pay Differential. Labor Code section 1197.5(a)(1), (b)(1).
- "The California statute is nearly identical to the federal Equal Pay Act of 1963. (29 U.S.C. § 206(d)(1).) Accordingly, in the absence of California authority, it is appropriate to rely on federal authorities construing the federal statute: 'Although state and federal antidiscrimination laws

"differ in some particulars, their objectives are identical, and California courts have relied upon federal law to interpret analogous provisions of the state statute." ' " (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 623 [3 Cal.Rptr.3d 844] [decided before passage of the Fair Pay Act of 2015, which introduced significant differences between federal and state law].)

- "The [Federal Equal Pay] Act also establishes four exceptions -- three specific and one a general catchall provision -- where different payment to employees of opposite sexes 'is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.' " (*Corning Glass Works, supra,* 417 U.S. at p. 196.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.02 (Matthew Bender)

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

2742. Bona Fide Factor Other Than Sex, Race, or Ethnicity

[*Name of defendant***] claims that [***specify bona fide factor other than sex, race, or ethnicity***] is a legitimate factor other than [sex/race/ethnicity] that justifies paying [***name of plaintiff***] at a wage rate that is less than the rate paid to employees of [the opposite sex/another race/another ethnicity].**

[*Specify factor***] is a factor that justifies the pay differential only if [***name of defendant***] proves all of the following:**

1. That the factor is not based on or derived from a [sex/race/ethnicity]-based differential in compensation;

2. That the factor is job related with respect to [*name of plaintiff***]'s position; and**

3. That the factor is consistent with a business necessity.

A "business necessity" means an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve.

This defense does not apply, however, if [*name of plaintiff***] proves that an alternative business practice exists that would serve the same business purpose without producing the pay differential.**

New May 2018

Directions for Use

This instruction must be given along with CACI No. 2741, *Affirmative Defense—Different Pay Justified,* if factor 1 of element d of CACI No. 2741 is chosen: a bona fide factor other than sex, race, or ethnicity, such as education, training, or experience. This factor applies only if the employer demonstrates that the factor is not based on or derived from a sex, race, or ethnicity-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. "Business necessity" means an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve. This defense does not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. (See Lab. Code, § 1197.5(a)(1)(D), (b)(1)(D).)

Sources and Authority

- Bona Fide Factor Other Than Sex, Race, or Ethnicity. Labor Code section 1197.5(a)(1)(D), (b)(1)(D).
- "[D]efendant provided sufficient evidence to establish that [male employee]'s experience justified his employment at a substantially greater wage rate than [plaintiff]. Defendant therefore established that business reasons other than sex led to the wage differential." (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 632 [3 Cal.Rptr.3d 844].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination*, ¶ 11:1077.10 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

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

2743. Equal Pay Act—Retaliation—Essential Factual Elements (Lab. Code, § 1197.5(k))

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for [pursuing/assisting another in the enforcement of] [his/her] right to equal pay regardless of [sex/race/ethnicity]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***specify acts taken by plaintiff to enforce or assist in the enforcement of the right to equal pay***];**

2. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

3. **That [***name of plaintiff***]'s [pursuit of/assisting in the enforcement of another's right to] equal pay was a substantial motivating reason for [***name of defendant***]'s [discharging/[***other adverse employment action***]] [***name of plaintiff***];**

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

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

New May 2018

Directions for Use

Use this instruction in cases of alleged retaliation against an employee under the Equal Pay Act. The act prohibits adverse employment actions against an employee who has taken steps to enforce the equal pay requirements of the act. Also, the employer cannot prohibit an employee from disclosing his or her own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights. (Lab. Code, § 1197.5(k)(1).) An employee who has been retaliated against may bring a civil action for reinstatement, reimbursement for lost wages and work benefits, interest, and equitable relief. (Lab. Code, § 1197.5(k)(2).)

Note that there are two causation elements. First there must be a causal connection between the employee's pursuit of equal pay and the adverse employment action (element 3). Second, the employee must have suffered harm because of the employer's retaliatory acts (element 5).

Element 3 uses the term "substantial motivating reason" to express both intent and causation between the employee's pursuit of equal pay and the adverse employment action. "Substantial motivating reason" has been held to be the appropriate standard under the discrimination prohibitions of the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether this standard applies to the Equal Pay Act retaliation cases has not been addressed by the courts.

Sources and Authority

- Retaliation Prohibited Under Equal Pay Act. Labor Code section 1197.5(k).

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1077.20 (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.02 (Matthew Bender)

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

2800. Employer's Affirmative Defense—Injury Covered by Workers' Compensation

[*Name of defendant***] claims that ~~[he/she/it] is not responsible for any harm that [***~~*name of plaintiff*~~***] may have suffered because ~~[***name of plaintiff*~~**he/she]** was [***name of defendant***]'s employee and therefore can only recover under California's Workers' Compensation Act. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [***name of plaintiff***] was [***name of defendant***]'s employee;**

2. **That [***name of defendant***] [had workers' compensation insurance [covering [***name of plaintiff***] at the time of injury]/was self-insured for workers' compensation claims [at the time of [***name of plaintiff***]'s injury]];~~ and~~**

3. **That [***name of plaintiff***]'s injury occurred while [he/she] was working, or performing a task for or related to the work [***name of defendant***] hired [him/her] to do; and**

4. **That this [task/work] contributed to causing the injury.**

Any person performing services for another, other than as an independent contractor, is presumed to be an employee.

New September 2003; Revised October 2004, May 2018

Directions for Use

This instruction is intended for use if the plaintiff is suing a defendant claiming to be the plaintiff's employer. This instruction is not intended for use if the plaintiff is suing under an exception to the workers' compensation exclusivity rule.

Element 3 expresses the requirement that the employee be acting in the course of employment at the time of injury. Element 4 expresses what is referred to as "industrial causation;" that the work was a contributing cause of the injury. The two requirements are different, and both must be proved. (See *Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 625 [210 Cal.Rptr.3d 362].) For an instruction asserting that element 3 does not apply, see CACI No. 2805, *Employee Not Within Course of Employment—Employer Conduct Unrelated to Employment*.

For other instructions regarding employment status, such as special employment and independent contractors, see instructions in the Vicarious Responsibility series (CACI Nos. 3700–3726). These instructions may need to be modified to fit this context.

Labor Code section 3351 defines "employee" for purposes of workers' compensation. Labor Code section 3352 sets forth exceptions. ~~Note that t~~This instruction should not be given if the plaintiff/employee has been determined to fall within a statutory exception.~~ For exceptions to Labor Code section 3351, see Labor Code section 3352.~~

If appropriate to the facts of the case, see instructions on the going-and-coming rule in the Vicarious Responsibility series. These instructions may need to be modified to fit this context.

Sources and Authority

- Exclusive Remedy. Labor Code section 3602(a).
- Conditions of Compensation. Labor Code section 3600(a).
- If Conditions of Compensation Not Met. Labor Code section 3602(c).
- "Employee" Defined. Labor Code section 3351.
- Presumption of Employment Status. Labor Code section 3357.
- Failure to Secure Payment of Compensation. Labor Code section 3706.
- "[T]he basis for the exclusivity rule in workers' compensation law is the 'presumed "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort.' " (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 708 [30 Cal.Rptr.2d 18, 872 P.2d 559], internal citation omitted.)
- "Because an employer faced with a civil complaint seeking to enforce a common law remedy which does not state facts indicating coverage by the act bears the burden of pleading and proving 'that the (act) is a bar to the employee's ordinary remedy,' we believe that the burden includes a showing by the employer-defendant, through appropriate pleading and proof, that he had 'secured the payment of compensation' in accordance with the provisions of the act." (*Doney v. Tambouratgis* (1979) 23 Cal.3d 91, 98, fn. 8 [151 Cal.Rptr. 347, 587 P.2d 1160], internal citations omitted.)
- "A defendant need not plead and prove that it has purchased workers' compensation insurance where the plaintiff alleges facts that otherwise bring the case within the exclusive province of workers' compensation law, and no facts presented in the pleadings or at trial negate the workers' compensation law's application or the employer's insurance coverage." (*Gibbs v. American Airlines, Inc.* (1999) 74 Cal.App.4th 1, 14 [87 Cal.Rptr.2d 554], internal citations omitted.)
- "[T]he fact that an employee has received workers' compensation benefits from some source does not bar the employee's civil action against an uninsured employer. Instead, '[t]he price that must be paid by each employer for immunity from tort liability is the purchase of a workers' compensation policy [and where the employer chooses] not to pay that price ... it should not be immune from liability.' " (*Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 987 [101 Cal.Rptr.2d 325], internal citations omitted.)

- “Under the Workers’ Compensation Act, employees are automatically entitled to recover benefits for injuries ‘arising out of and in the course of the employment.’ ‘When the conditions of compensation exist, recovery under the workers’ compensation scheme “is the exclusive remedy against an employer for injury or death of an employee.” ’ ” (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 986 [105 Cal.Rptr.2d 88], internal citations omitted.)

- “Unlike many other states, in California workers’ compensation provides the exclusive remedy for at least some intentional torts committed by an employer. *Fermino* described a ‘tripartite system for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers’ compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under section 4553. Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought.’ ” (*Gunnell v. Metrocolor Laboratories, Inc.* (2001) 92 Cal.App.4th 710, 723 [112 Cal.Rptr.2d 195], internal citations omitted.)

- “It has long been established in this jurisdiction that, generally speaking, a defendant in a civil action who claims to be one of that class of persons protected from an action at law by the provisions of the Workers’ Compensation Act bears the burden of pleading and proving, as an affirmative defense to the action, the existence of the conditions of compensation set forth in the statute which are necessary to its application.” (*Doney, supra,* 23 Cal.3d at p. 96, internal citations and footnote omitted.)

- “California courts have held worker’s compensation proceedings to be the exclusive remedy for certain third party claims deemed collateral to or derivative of the employee’s injury. Courts have held that the exclusive jurisdiction provisions bar civil actions against employers by nondependent parents of an employee for the employee’s wrongful death, by an employee’s spouse for loss of the employee’s services or consortium, and for emotional distress suffered by a spouse in witnessing the employee’s injuries.” (*Snyder v. Michael’s Stores, Inc.* (1997) 16 Cal.4th 991, 997 [68 Cal.Rptr.2d 476, 945 P.2d 781], internal citations omitted.)

- “ ‘An employer-employee relationship must exist in order to bring the ... Act into effect. (§ 3600)’ However, the coverage of the Act extends beyond those who have entered into ‘traditional contract[s] of hire.’ ‘[S]ection 3351 provides broadly that for the purpose of the ... Act, “ ‘Employee’ means every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written ... .’ ” Given this ‘section’s explicit use of the disjunctive,’ a contract of hire is not ‘a prerequisite’ to the existence of an employment relationship. Moreover, under section 3357, ‘[a]ny person rendering service for another, other than as an independent contractor, or unless expressly excluded ... , is presumed to be an employee.’ ” (*Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, 1060−1061 [40 Cal.Rptr.2d 116, 892 P.2d 150], internal citations omitted.)

- “Given these broad statutory contours, we believe that an ‘employment’ relationship sufficient to bring the act into play cannot be determined simply from technical contractual or common law conceptions of employment but must instead be resolved by reference to the history and fundamental purposes underlying the Workmen’s Compensation Act.” (*Laeng v. Workmen’s Comp. Appeals Bd.*

(1972) 6 Cal.3d 771, 777 [100 Cal.Rptr. 377, 494 P.2d 1], internal citations omitted.)

- "[C]ourts generally are more exacting in requiring proof of an employment relationship when such a relationship is asserted as a defense by the employer to a common law action." (*Spradlin v. Cox* (1988) 201 Cal.App.3d 799, 808 [247 Cal.Rptr. 347], internal citation omitted.)

- "The question of whether a person is an employee may be one of fact, of mixed law and fact, or of law only. Where the facts are undisputed, the question is one of law, and the Court of Appeal may independently review those facts to determine the correct answer." (*Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 642 [240 Cal.Rptr. 811], internal citations omitted.)

- "An employee may have more than one employer for purposes of workers' compensation, and, in situations of dual employers, the second or 'special' employer may enjoy the same immunity from a common law negligence action on account of an industrial injury as does the first or 'general' employer. Identifying and analyzing such situations 'is one of the most ancient and complex questions of law in not only compensation but tort law.' " (*Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 578 [239 Cal.Rptr. 578], internal citation omitted.)

- "In determining whether an employee is covered within the compensation system and thus entitled to recover compensation benefits, the 'definitional reach of these covered employment relationships is very broad.' A covered employee is 'every person in the service of an employer under any appointment or contract of hire or apprenticeship, express or implied, oral or written.' 'Any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee.' ... [T]hese provisions mandate a broad and generous interpretation in favor of inclusion in the system. Necessarily the other side of that coin is a presumption against the availability of a tort action where an employment relation exists. One result cannot exist without the other. Further, this result does not depend upon 'informed consent,' but rather on the parties' legal status. ... [W]here the facts of employment are not disputed, the existence of a covered relationship is a question of law." (*Santa Cruz Poultry, Inc., supra*, 194 Cal.App.3d at pp. 583-584, internal citations omitted.)

- " 'The requirement of ... section 3600 is twofold. On the one hand, the injury must occur "in the course of the employment." This concept "ordinarily refers to the time, place, and circumstances under which the injury occurs." Thus " '[a]n employee is in the "course of his employment" when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do.' " And, ipso facto, an employee acts within the course of his employment when " 'performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied.' " ' [¶] 'On the other hand, the statute requires that an injury "arise out of" the employment. ... It has long been settled that for an injury to "arise out of the employment" it must "occur by reason of a condition or incident of [the] employment ... ." That is, the employment and the injury must be linked in some causal fashion.' " (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Cal.4th 644, 651 [72 Cal.Rptr.2d 217, 951 P.2d 1184], internal citations and footnote omitted.)

- "The requirements that an injury arise out of employment or be proximately caused by employment are sometimes referred to together as the requirement of industrial causation. It is a looser concept of

causation than the concept of proximate cause employed in tort law. In general, the industrial causation requirement is satisfied 'if the connection between work and the injury [is] a contributing cause of the injury … .' " (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 624 [210 Cal.Rptr.3d 362], internal citation omitted.)

- "For our purposes here, it is important that 'arising out of' and 'in the course of' are two separate requirements. Even if it is conceded that an employee was injured while performing job tasks in the workplace during working hours, the exclusivity rule applies only if it also is shown that the work was a contributing cause of the injury." (*Lee, supra,* 5 Cal.App.5th at p. 625.)

- "The jury could properly make this finding [that conduct was not within scope of employment] by applying special instruction No. 5, the instruction stating that an employer's conduct falls outside the workers' compensation scheme when an employer steps outside of its proper role or engages in conduct unrelated to the employment. This instruction stated the doctrine of *Fermino* correctly." (*Lee, supra,* 5 Cal.App.5th at pp. 628–629.)

- "The concept of 'scope of employment' in tort is more restrictive than the phrase 'arising out of and in the course of employment,' used in workers' compensation." (*Tognazzini v. San Luis Coastal Unified School Dist.* (2001) 86 Cal.App.4th 1053, 1057 [103 Cal.Rptr.2d 790], internal citations omitted.)

- "Whether an employee's injury arose out of and in the course of her employment is generally a question of fact to be determined in light of the circumstances of the particular case. However, where the facts are undisputed, resolution of the question becomes a matter of law." (*Wright v. Beverly Fabrics, Inc.* (2002) 95 Cal.App.4th 346, 353 [115 Cal.Rptr.2d 503], internal citations omitted.)

- "Injuries sustained while an employee is performing tasks within his or her employment contract but outside normal work hours are within the course of employment. The rationale is that the employee is still acting in furtherance of the employer's business." (*Wright, supra,* 95 Cal.App.4th at p. 354.)

Secondary Sources

2 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Workers' Compensation, §§ 23–49~~20, 24–26, 31, 34, 39–42~~

Chin, et al., California Practice Guide: Employment Litigation, Ch. 15-F, Preemption Defenses--California Workers' Compensation Act Preemption ¶¶ 15:520 et seq., 15:555 (The Rutter Group)~~Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 3:515, 12:192, 15:507, 15:509, 15:523.2, 15:523.10, 15:526.1, 15:556, 15:573, 15:580, 15:591~~

1 Hanna, California Law of Employee Injuries and Workers' Compensation (2d ed.) Ch. 4, §§ 4.03−4.06 (Matthew Bender)

1 Herlick, California Workers' Compensation Law (6th ed.), Ch. 10, *The Injury*, § 10.09 (Matthew Bender)

1 California Employment Law, Ch. 20, *Liability for Work-Related Injuries*, § 20.10 (Matthew Bender)

1 Levy et al., California Torts, Ch. 10, *Effect of Workers' Compensation Law*, §§ 10.02, 10.03[3], 10.10 (Matthew Bender)

51 California Forms of Pleading and Practice, Ch. 577, *Workers' Compensation*, §§ 577.310, 577.530 (Matthew Bender)

23 California Points and Authorities, Ch. 239, *Workers' Compensation Exclusive Remedy Doctrine* (Matthew Bender)

3244. Civil Penalty—Willful Violation (Civ. Code, § 1794(c))

[*Name of plaintiff***] claims that [***name of defendant***]'s failure to [***describe obligation under Song-Beverly Consumer Warranty Act, e.g., repurchase or replace the vehicle after a reasonable number of repair opportunities***] was willful and therefore asks that you impose a civil penalty against [***name of defendant***]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/it] from committing ~~such~~ violations in the future.**

If [*name of plaintiff***] has proved that [***name of defendant***]'s failure was willful, you may impose a civil penalty against [him/her/it]. The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [***name of plaintiff***]'s actual damages.**

"Willful" means that [*name of defendant***] knew of [his/her/its] legal obligations and intentionally declined to follow them~~what [he/she/it] was doing and intended to do it~~. However, a violation is not willful ~~you may not impose a civil penalty~~ if you find that [***name of defendant***] ~~believed~~ reasonably and in good faith believed that the facts did not require [***describe ~~facts negating~~ statutory obligation, e.g., repurchasing or replacing the vehicle***].**

~~**The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [***name of plaintiff***]'s actual damages.**~~

New September 2003; Revised February 2005, December 2005, December 2011, May 2018

Directions for Use

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). In the opening paragraph, set forth all claims for which a civil penalty is sought.

Depending on the nature of the claim at issue, factors that the jury may consider in determining willfulness may be added. (See, e.g., *Jensen v. BMW of North America, Inc.* (1995) 35 Cal.App.4th 112, 136 [41 Cal.Rptr.2d 295] [among factors to be considered by the jury are whether (1) the manufacturer knew the vehicle had not been repaired within a reasonable period or after a reasonable number of attempts, and (2) whether the manufacturer had a written policy on the requirement to repair or replace].)

Sources and Authority

- Civil Penalty for Willful Violation. Civil Code section 1794(c).
- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)

- "Whether a manufacturer willfully violated its obligation to repair the car or refund the purchase price is a factual question for the jury that will not be disturbed on appeal if supported by substantial evidence." (*Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1104 [109 Cal.Rptr.2d 583].

- " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.'" (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)

- "In regard to the *willful* requirement of Civil Code section 1794, subdivision (c), a civil penalty may be awarded if the jury determines that the manufacturer 'knew of its obligations but intentionally declined to fulfill them. There is no requirement of blame, malice or moral delinquency. However, '. . . a violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present.' " (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1249–1250 [40 Cal.Rptr.2d 576], original italics, internal citations omitted; see also *Bishop v. Hyundai Motor Am.* (1996) 44 Cal.App.4th 750, 759 [52 Cal.Rptr.2d 134] [defendant agreed that jury was properly instructed that it "acted 'willfully' if you determine that it knew of its obligations under the Song-Beverly Act but intentionally declined to fulfill them."].)

- "[A] violation … is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product *did* conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant *actually knew* of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations. Accordingly, '[a] decision made without the use of reasonably available information germane to that decision is not a reasonable, good faith decision.' " (*Lukather v. General Motors, LLC* (2010) 181 Cal.App.4th 1041, 1051 [104 Cal.Rptr.3d 853], original italics, internal citation omitted.)

- "[Defendant] was entitled to an instruction informing the jury its failure to refund or replace was not willful if it reasonably and in good faith believed the facts did not call for refund or replacement. Such an instruction would have given the jury legal guidance on the principal issue before it in determining whether a civil penalty could be awarded." (*Kwan v. Mercedes Benz of N. Am.* (1994) 23 Cal.App.4th 174, 186–187 [28 Cal.Rptr.2d 371], fn. omitted.)

- "There is evidence [defendant] was aware that numerous efforts to find and fix the oil leak had been unsuccessful, which is evidence a jury may consider on the question of willfulness. Additionally, the jury could conclude that [defendant]'s policy, which requires a part be replaced or adjusted before [defendant] deems it a repair attempt but excludes from repair attempts any visit during which a mechanic searches for but is unable to locate the source of the problem, is unreasonable and not a good faith effort to honor its statutory obligations to repurchase defective cars. Finally, there was evidence that [defendant] adopted internal policies that erected hidden obstacles to the ability of an unwary consumer to obtain redress under the Act. This latter evidence would permit a jury to infer that [defendant] impedes and resists efforts by a consumer to force [defendant] to repurchase a defective car, regardless of the presence of an unrepairable defect, and that [defendant]'s decision to reject [plaintiff]'s demand was made pursuant to [defendant]'s policies rather than to its good faith and reasonable belief the car did not have an unrepairable defect covered by the warranty or that a reasonable number of attempts to effect a repair had not yet occurred." (*Oregel, supra*, 90 Cal.App.4th at pp. 1104–1105, internal citations omitted.)

- "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages. Neither punishment nor deterrence is ordinarily called for if the defendant's actions proceeded from an honest mistake or a sincere and reasonable difference of factual evaluation. As our Supreme Court recently observed, '. . . courts refuse to impose civil penalties against a party who acted with a good faith and reasonable belief in the legality of his or her actions.' " (*Kwan, supra, ~~v. Mercedes Benz of N. Am.~~* (1994) 23 Cal.App.4th at pp.~~174,~~ 184–185 ~~[28 Cal.Rptr.2d 371]~~, internal citation omitted.)

Secondary Sources

4 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2005~~2017) Sales, §§ 321–324

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, § 3.90

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.30 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.53[1][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.129 (Matthew Bender)

5 California Civil Practice: Business Litigation § 53:32 (Thomson Reuters)

4010. Limiting Instruction—Expert Testimony

Revoked May 2018. See *People v. Sanchez* (2016) 63 Cal.4th 665, 684 [204 Cal.Rptr.3d 102, 374 P.3d 320] and *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1281 [221 Cal.Rptr.3d 622].

You have heard testimony by an expert witness regarding reports and statements from hospital staff and other persons who have come into contact with [*name of respondent*]. This testimony was admitted for the limited purpose of establishing the basis for the opinion expressed by the testifying expert. You may consider those reports and statements to help you examine the basis of the expert's opinion. You may not use the reports and statements as independent proof of respondent's mental condition or [his/her] ability to provide for food, clothing, or shelter.

New June 2005

Sources and Authority

- Limited Admissibility of Evidence. Evidence Code section 355.

- "A psychiatrist is permitted to testify on a person's mental capacities and can rely on hearsay including statements made by the patient or by third persons." (*Conservatorship of Torres* (1986) 180 Cal.App.3d 1159, 1163 [226 Cal.Rptr. 142].)

- "When records are admitted ... a limiting instruction need not be given, *sua sponte*, but must be given upon request of counsel." (*Conservatorship of Buchanan* (1978) 78 Cal.App.3d 281, 288 [144 Cal.Rptr. 241], internal citation omitted, disapproved on other grounds in *Conservatorship of Early* (1983) 35 Cal.3d 244, 255 [197 Cal.Rptr. 539, 673 P.2d 209].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 102

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.43 (Matthew Bender)

4208. Affirmative Defense—Statute of Limitations—Actual and Constructive Fraud (Civ. Code, § 3439.09(a), (b))

[*Name of defendant*] contends that [*name of plaintiff*]'s lawsuit was not filed within the time set by law.

[[With respect to [*name of plaintiff*]'s claim of actual intent to hinder, delay, or defraud,] [To/to] succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*] filed [his/her/its] lawsuit later than four years after the [transfer was made/obligation was incurred] [or, if later than four years, no later than one year after the [transfer/obligation] was or could reasonably have been discovered by [*name of plaintiff*]]. ~~But in any event, the lawsuit must have been filed within seven years after the [transfer was made/the obligation was incurred].]~~

[[With respect to [*name of plaintiff*]'s claim of constructive fraud,] [To/to] succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*] filed [his/her/its] lawsuit later than four years after the [transfer was made/obligation was incurred].]

New June 2006; Revised December 2007, June 2016, May 2018

Directions for Use

This instruction provides an affirmative defense for failure to file within the statute of limitations. (See Civ. Code, § 3439.09(a), (b).) Read the first bracketed paragraph regarding delayed discovery in cases involving actual intent to hinder, delay, or defraud. (See Civ. Code, § 3439.04(a)(1); CACI No. 4200.) Read the second in cases involving constructive fraud. (See Civ. Code, §§ 3439.04(a)(2), 3439.05; CACI Nos. 4202, 4203.) Read the first bracketed phrases in those paragraphs if the plaintiff has brought both actual and constructive fraud claims.

This instruction may not be modified to assert the seven-year period under Civil Code section 3439.09(c). (See *PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 178–185 [221 Cal.Rptr.3d 353] [Civil Code section 3439.09(c) is a statute of repose, not a statute of limitations].)

Sources and Authority

- Statute of Limitations. Civil Code section 3439.09.

- "[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked. They may also be attacked by, as it were, a common law action. If and as such an action is brought, the applicable statute of limitations is section 338 (d) and, more importantly, the cause of action accrues not when the fraudulent transfer occurs but when the judgment against the debtor is secured (or maybe even later, depending upon the belated discovery issue)." (*Macedo v. Bosio* (2001) 86 Cal.App.4th 1044, 1051 [104 Cal.Rptr.2d 1].)

- "In the context of the scheme of law of which section 3934.09 is a part, where an alleged fraudulent transfer occurs while an action seeking to establish the underlying liability is pending, and where a judgment establishing the liability later becomes final, we construe the four-year limitation period, i.e., the language, 'four years after the transfer was made or the obligation was incurred,' " to accommodate a tolling until the underlying liability becomes fixed by a final judgment." (*Cortez v. Vogt* (1997) 52 Cal.App.4th 917, 920 [60 Cal.Rptr.2d 841].)

- " 'Cal. Civ. Code § 3439.09(a) and (b) are statutes of limitation requiring a plaintiff to file a fraudulent transfer action within four years of the transfer or, for an intentional fraud, within one year after the transfer was or could reasonably have been discovered.' [Citation] " *(PGA West Residential Assn., Inc., supra,* 14 Cal.App.5th at p. 179.)

- "However, 'even *if* belated discovery can be pleaded and proven' with respect to the statute of limitations applicable to common law remedies for fraudulent transfers, 'in any event the maximum elapsed time for a suit *under either the UFTA or otherwise* is seven years after the transfer. [Citation.]' This conclusion logically follows from the language of section 3439.09(c). '[B]y its use of the term "[n]otwithstanding any other provision of law," the Legislature clearly meant to provide an overarching, all-embracing maximum time period to attack a fraudulent transfer, no matter whether brought under the UFTA or otherwise.' " (*PGA West Residential Assn., Inc., supra,* 14 Cal.App.5th at pp. 170–171, original italics, internal citation omitted.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:351 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.49, 270.50 (Matthew Bender)

4605. Whistleblower Protection—Health or Safety Complaint—Essential Factual Elements (Lab. Code, § 6310)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her] in retaliation for [his/her] [***specify, e.g., complaint to the Division of Occupational Safety and Health regarding unsafe working conditions***]. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was an employee of [***name of defendant***];**

2. **[That [***name of plaintiff***], on [his/her] own behalf or on behalf of others, [***select one or more of the following options:***]**

   [made [an oral/a written] complaint to [*specify to whom complaint was directed, e.g., the Division of Occupational Safety and Health***] regarding [unsafe/unhealthy] working conditions;]**

   [*or***]**

   [[initiated a proceeding/caused a proceeding to be initiated] relating to [his/her [or] another person's] rights to workplace health or safety;]

   [*or***]**

   [[testified/was about to testify] in a proceeding related to [his/her [or] another person's] rights to workplace health or safety;]

   [*or***]**

   [exercised [his/her [or] another person's] rights to workplace health or safety;]

   [*or***]**

   [participated in a workplace health and safety committee;]

   [*or***]**

   [reported a work-related fatality, injury, or illness;]

   [*or*]

   [requested access to occupational injury or illness reports and records;]

   [*or*]

   [exercised [*specify other right(s) protected by the federal Occupational Safety and Health*]

***Act*];]**

3. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

4. **That [***name of plaintiff***]'s [***specify***] was a substantial motivating reason for [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***];**

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

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

New December 2015; Revised December 2016, May 2018

Directions for Use

Use this instruction for a whistleblower claim under Labor Code section 6310 for employer retaliation for an employee's, or an employee's family member's, complaint or other protected activity about health or safety conditions. Select the appropriate statutorily protected activity in element 2 and summarize it in the introductory paragraph. (See Lab. Code, § 6310(a), (c).)

With regard to the first option in element 2, the complaint must have been made to (1) the Division of Occupational Safety and Health, (2) to another governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, (3) to the employer, or (4) to the employee's representative. (Lab. Code, § 6310(a)(1).)

The statute requires that the employee's complaint be "bona fide." (See Lab. Code, § 6310(b).) There appears to be a split of authority as to whether "bona fide" means that there must be an actual health or safety violation or only that the employee have a good-faith belief that there are violations. (See *Touchstone Television Productions v. Superior Court* (2012) 208 Cal.App.4th 676, 682, fn. 5 [145 Cal.Rptr.3d 766].) The instruction should be modified if the court decides to instruct one way or the other on the meaning of "bona fide."

Note that element 4 uses the term "substantial motivating reason" to express both intent and causation between the employee's protected conduct and the defendant's adverse action. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under Labor Code section 6310 has not been addressed by the courts. There is authority for a "but for" causation standard instead of "substantial motivating reason." (See *Touchstone Television Productions, supra,* 208 Cal.App.4th at pp. 681−682.)

Sources and Authority

- Whistleblower Protection for Report of Health or Safety Violation. Labor Code section 6310.

- "Division" Defined. Labor Code section 6302(d).

- "[Plaintiff]'s action is brought under section 6310, subdivision (a)(1), which prohibits an employer from discriminating against an employee who makes 'any oral or written complaint.' Subdivision (b) provides that '[a]ny employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to … his or her employer … of unsafe working conditions, or work practices … shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer.' " (*Sheridan v. Touchstone Television Productions, LLC* (2015) 241 Cal.App.4th 508, 512 [193 Cal.Rptr.3d 811].)

- "[T]he plaintiff did not lack a remedy: she could sue under section 6310, subdivision (b) which permits 'an action for damages if the employee is discharged, threatened with discharge, or discriminated against by his or her employer because of the employee's complaints about unsafe work conditions. Here, it is alleged that [the defendant] discriminated against [the plaintiff] by not renewing her employment contract. *To prevail on the claim, she must prove that, but for her complaints about unsafe work conditions, [the defendant] would have renewed the employment contract. Damages, however, are limited to "lost wages and work benefits caused by the acts of the employer." ' "* (*Touchstone Television Productions, supra,* 208 Cal.App.4th at pp. 681−682, original italics.)

- "The voicing of a fear about one's safety in the workplace does not necessarily constitute a complaint about unsafe working conditions under Labor Code section 6310. [Plaintiff]'s declaration shows only that she became frightened for her safety as a result of her unfortunate experience … and expressed her fear to [defendant]; it is not evidence that the … office where she worked was actually unsafe within the meaning of Labor Code sections 6310 and 6402. Hence, [plaintiff]'s declaration fails to raise a triable issue of fact as to whether she was terminated for complaining to [defendant] about unsafe working conditions in violation of Labor Code section 6310." (*Muller v. Auto. Club of So. Cal.* (1998) 61 Cal.App.4th 431, 452 [71 Cal.Rptr.2d 573], disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031, fn. 6 [130 Cal.Rptr.2d 662, 63 P.3d 220].)

- "Citing *Muller v. Automobile Club of So. California* (1998) 61 Cal.App.4th 431, 452 [71 Cal.Rptr.2d 573], defendants assert plaintiff's causes of action based on section 6310 must fail because an essential element of a section 6310 violation is that the workplace must actually be unsafe. We first note that the *Muller* court cites no authority for this assertion. It appears to contradict Justice Grodin's pronouncement that '. . . an employee is protected against discharge or discrimination for complaining in good faith about working conditions or practices which he reasonably believes to be unsafe, whether or not there exists at the time of the complaint an OSHA standard or order which is being violated.' We agree that an employee must be protected against discharge for a good faith complaint about working conditions which he believes to be unsafe." (*Cabesuela v. Browning-Ferris Indus.* (1998) 68 Cal.App.4th 101, 109 [80 Cal.Rptr.2d

60], internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (~~10th~~ 11th ed. ~~2010~~2017) Agency, § ~~370~~405

2 Wilcox, California Employment Law, Ch. 21, *Occupational Health and Safety Regulation*, § 21.20 (Matthew Bender)

3 California Torts, Ch. 40A, *Wrongful Termination*, § 40A.30 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 et seq. (Matthew Bender)

4800. False Claims Act—Essential Factual Elements (Gov. Code, § 12651)

The California False Claims Act allows a public entity to recover damages from any person or entity that knowingly presents a false claim for payment or approval. [[*Name of plaintiff***] is an individual who brings this action on behalf of [***name of public entity***].] [***Name of public entity***] is a public entity.**

[*Name of plaintiff***] claims that [***name of defendant***] presented a false claim to [it/**[*name of public entity*]**] for payment or approval. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***] knowingly presented or caused to be presented a false or fraudulent claim to [***name of public entity***] for payment or approval;**

2. That the claim was false or fraudulent in that [*specify reason, e.g., [name of defendant] did not actually perform the work for which payment or approval was sought***]; and**

3. That [*name of defendant***]'s false or fraudulent claim was material to [***name of public entity***]'s decision to pay out money to [***name of defendant***].**

"Knowingly" means that with respect to information about the claim, [*name of defendant***]**

1. had actual knowledge that the information was false; or

2. acted in deliberate ignorance of the truth or falsity of the information; or

3. acted in reckless disregard of the truth or falsity of the information.

Proof of specific intent to defraud is not required.

"Material" means that the claim had a natural tendency to influence, or was capable of influencing, the payment or receipt of [money/property/services] on the claim.

New May 2018

Directions for Use

An action under the False Claims Act (Gov. Code, § 12650 et seq.) may be brought by the attorney general if state funds are involved, the public entity that claims to have paid out money on a false claim, or by a private person acting as a "qui tam" plaintiff on behalf of the state or public entity. (Gov. Code, § 12650(a)–(c).) Give the optional next-to-last sentence of the opening paragraph if the plaintiff is an individual bringing the action qui tam.

The False Claims Act lists eight prohibited acts that violate the statute. (See Gov. Code, § 12651(a).) Element 1 sets out the first and most common of the prohibited acts—the knowing presentation of a false

claim. (See Gov. Code, § 12650(a)(1).) Modify element 1 if a different prohibited act is at issue.

For an instruction on retaliation against an employee for bringing a false claim action, see CACI No. 4600, *False Claims Act: Whistleblower Protection—Essential Factual Elements.*

Sources and Authority

- California False Claims Act. Government Code section 12650 et seq.

- "In 1987, the California Legislature enacted the False Claims Act, patterned on a similar federal statutory scheme, to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities. As relevant here, the False Claims Act permits the recovery of civil penalties and treble damages from any person who '[k]nowingly presents or causes to be presented [to the state or any political subdivision] . . . a false claim for payment or approval.' To be liable under the False Claims Act, a person must have actual knowledge of the information, act in deliberate ignorance of the truth or falsity of the information, and/or act in reckless disregard of the truth or falsity of the information." (*Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 494-495 [99 Cal.Rptr.2d 721], internal citations omitted.)

- "The Legislature designed the CFCA ' "to prevent fraud on the public treasury," ' and it ' "should be given the broadest possible construction consistent with that purpose." ' " (*San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 446 [106 Cal.Rptr.3d 84], internal citations omitted.)

- "Since there are no pattern instructions for CFCA claims, the trial court gave instructions taken from the language of the statute. Quoting Government Code section 12651, the trial court explained that a person would be liable for damages under the CFCA if the person '(1) Knowingly presents or causes to be presented to an officer or employee of the City, a false claim for payment or approval. [¶] (2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the City.' The instructions defined 'person,' 'knowingly,' and 'claim' using the language of Government Code section 12650, but did not define the word 'false.' Indeed, 'false' is not defined in the statute." (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 546 [66 Cal.Rptr.3d 175].)

- "We agree with City that the word 'false' has no special meaning and that [claimant]'s concern is really related to the mental state necessary for liability under the CFCA, an element that was adequately explained in the instructions that were given." (*Thompson Pacific, supra,* 155 Cal.App.4th at p. 547.)

- "[A]n alleged falsity satisfies the materiality requirement where it has the ' " 'natural tendency to influence agency action or is capable of influencing agency action.' " [Citation.]' " (*San Francisco Unified School Dist. ex rel. Contreras, supra,* 182 Cal.App.4th at p. 454.)

- "Our conclusion that the allegations in the Complaint are sufficient to withstand a demurrer does not mean that every breach of a contract term that is in some sense 'material' necessarily satisfies the materiality requirement for a CFCA claim. That is, a false implied certification relating to a

> ‘material’ contract term may not always be ‘material’ to the government’s decision to pay a contractor. Materiality is a mixed question of law and fact, and a showing in a motion for summary judgment or at trial that the alleged breach would not have affected the payment decision will defeat a CFCA claim.” (*San Francisco Unified School Dist. ex rel. Contreras*, *supra,* 182 Cal.App.4th at p. 456, internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 306, 307

5 Witkin, Summary of California Law (11th ed. 2017) Torts, § 884

Chin, et al., California Practice Guide: Employment Litigation, Ch. 5(II)-B, *Retaliation Claims—Retaliation Under Other Whistleblower Statutes,* ¶¶ 5:1770 et seq. (The Rutter Group)

6 Levy et al., California Torts, Ch. 91, *Contractual Arbitration,* § 91.08 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions,* § 468.21 (Matthew Bender)

4801. Implied Certification of Compliance With All Contractual Provisions—Essential Factual Elements

Under the California False Claims Act, when [a/an] [*specify defendant's status, e.g., vendor***] submits a claim to a public entity for payment on a contract, [he/she/it] impliedly certifies that [he/she/it] has complied with all of the requirements of the contract, not just those relevant to the claim presented. [[***Name of plaintiff***] is an individual who brings this action on behalf of [***name of public entity***].] [***Name of public entity***] is a public entity.**

[*Name of plaintiff***] claims that [***name of defendant***] presented a false claim to [it/[***name of public entity***]] for payment or approval by falsely certifying by implication that it had complied with the requirements of the contract. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***] had not complied with [***specify contractual terms alleged to have been breached***] when it presented a claim for payment to [***name of public entity***].**

2. That when [*name of defendant***] submitted its claims for payment, [he/she/it] knowingly failed to disclose that [he/she/it] had not complied with all of the terms of the contract; and**

3. That [*name of defendant***]'s failure to comply with all the terms of the contract was material to [***name of public entity***]'s decision to make the requested payment to [***name of defendant***].**

"Knowingly" means that with respect to the claim, [*name of defendant***]**

1. had actual knowledge that [he/she/it] had failed to disclose [his/her/its] noncompliance; or

2. acted in deliberate ignorance of the truth or falsity of whether [he/she/it] had failed to disclose [his/her/its] noncompliance; or

3. acted in reckless disregard of the truth or falsity of whether [he/she/it] had failed to disclose [his/her/its] noncompliance.

Proof of specific intent to defraud is not required.

A failure to comply with all the terms of the contract is "material" if it had a natural tendency to influence, or was capable of influencing, the payment or receipt of [money/property/services] on the claim.

New May 2018

Directions for Use

Under the California False Claims Act, a vendor impliedly certifies compliance with its express

contractual requirements when it bills a public agency for providing goods or services. A False Claims Act action may be based on allegations that the implied certification was false and had a natural tendency to influence the public agency's decision to pay for the goods or services. (*San Francisco Unified School Dist. ex rel. Contreras v. Laidlaw Transit, Inc.* (2010) 182 Cal.App.4th 438, 441 [106 Cal.Rptr.3d 84].)

The vendor must have made the claim knowing that it had failed to disclose noncompliance with all of the terms of the contract. (See *San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at pp. 452–453 [contractor must have the requisite knowledge, rendering the failure to disclose the contractual noncompliance fraudulent]; see also *Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 494–495 [99 Cal.Rptr.2d 721].) While the breach must be material as defined, it does not have to involve the particular contractual provision on which payment is sought. (See *San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at pp. 442–444 [bus company provided school district with student transportation, but did so with buses that did not meet the contractually and legally required safety requirements].)

Sources and Authority

- "Under the CFCA, a vendor impliedly certifies compliance with its express contractual requirements when it bills a public agency for providing goods or services. Allegations that the implied certification was false and had a natural tendency to influence the public agency's decision to pay for the goods or services are sufficient to survive a demurrer." (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 441.)

- "[Defendant] initially argues its claims for payment were not false, because there was no literally false information on the face of the invoices, which identify the routes driven and the charges arising from each route. However, [defendant] ultimately concedes that a section 12651, subdivision (a)(1) false claim need not contain an expressly false statement to be actionable." (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 448.)

- "[A]n alleged falsity satisfies the materiality requirement where it has the ' " 'natural tendency to influence agency action or is capable of influencing agency action.' " [Citation.]' " (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 454.)

- "Plaintiffs further allege that [defendant]'s invoices impliedly certified compliance with the material terms of the Contract, that the terms violated were material, and that the District was unaware of the falsity of [defendant]'s implied certification, resulting in a loss of District funds. Plaintiffs' allegations are adequate to survive a demurrer. Under the case law discussed above, [defendant]'s implied certification that it had satisfactorily performed its material obligations under the Contract, including provisions designed to protect the health and safety of the student population, had a ' " 'natural tendency' " ' to cause the District to make payments it would not have made had it been aware of [defendant]'s noncompliance." (*San Francisco Unified School Dist. ex rel. Contreras, supra*, 182 Cal.App.4th at p. 455, internal citation omitted.)

- "Our conclusion that the allegations in the Complaint are sufficient to withstand a demurrer does not mean that every breach of a contract term that is in some sense 'material' necessarily satisfies the materiality requirement for a CFCA claim. That is, a false implied certification relating to a

'material' contract term may not always be 'material' to the government's decision to pay a contractor. Materiality is a mixed question of law and fact, and a showing in a motion for summary judgment or at trial that the alleged breach would not have affected the payment decision will defeat a CFCA claim." (*San Francisco Unified School Dist. ex rel. Contreras, supra,* 182 Cal.App.4th at p. 456, internal citation omitted.)

- "The False Claims Act is not 'an all-purpose antifraud statute,' or a vehicle for punishing garden-variety breaches of contract or regulatory violations. A misrepresentation cannot be deemed material merely because the Government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment. Nor is it sufficient for a finding of materiality that the Government would have the option to decline to pay if it knew of the defendant's noncompliance. Materiality, in addition, cannot be found where noncompliance is minor or insubstantial." (*Universal Health Servs. v. United States ex rel. Escobar* (2016) ___U.S.___ [136 S.Ct. 1989, 2003, 195 L.Ed.2d 348, 365-366] [construing similar Federal False Claims Act].)

- What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision." (*Universal Health Servs. v. United States ex rel. Escobar, supra,* ___U.S. at p. ___ [136 S.Ct. at p. 1996] [construing similar Federal False Claims Act].)

Secondary Sources

5 Witkin Summary of California Law (11th ed. 2017) Torts, § 884

40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions,* § 468.21 (Matthew Bender)

5022. Introduction to General Verdict Form

I will give you [a] general verdict form[s]. The form[s] ask[s] you to find either in favor of [*name of plaintiff***] or [***name of defendant***]. [It also asks you to answer [an] additional question[s] regarding [***specify, e.g., the right to punitive damages***]. I have already instructed you on the law that you are to refer to in making your determination[s].**

At least nine of you must agree on your decision [and in answering the additional question[s]]. [If there is more than one question on the verdict form, as long as nine of you agree on your answers to each question, the same nine do not have to agree on each answer.]

In reaching your verdict [and answering the additional question[s]], you must decide whether the party with the burden of proof has proved all of the necessary facts in support of each required element of [his/her/its] claim or defense. You should review the elements addressed in the other instructions that I have given you and determine if at least nine of you agree that each element has been proven by the evidence received in the trial. The same nine do not have to agree on each element.

New May 2018

Directions for Use

If a general verdict will be used, this instruction may be given to guide the jury on how to go about reaching a verdict. With a general verdict, there is a danger that the jury will shortcut the deliberative process of carefully looking at each element of each claim or defense and simply vote for the plaintiff or for the defendant. This instruction directs the jury to approach its task as if a special verdict were being used and questions on each element of each claim or defense had to be answered. This instruction assumes that the rule applicable to special verdicts, that the same nine jurors do not need to agree on every element of a claim as long as there are nine in favor of each (see *Juarez v. Superior Court* (1982) 31 Cal.3d 759, 768–769 [183 Cal.Rptr. 852; 647 P.2d 128]; CACI No. 5012, *Introduction to Special Verdict Form*.), would apply to deliberations using a general verdict.

This purpose of this instruction is to lessen the possibility that the "paradox of shifting majorities" will happen. This paradox occurs when the same jury analyzing the same evidence would find liability with a special verdict, but not with a general verdict. The possibility arises because with a special verdict, a juror who votes no on one question but is in a minority of three or fewer must continue to deliberate and vote on all of the remaining questions.

If, for example, the vote on element 3 is 9-3 yes with jurors 10-12 voting no, and the vote on element 4 is 11-1 yes with juror 1 voting no, there will be liability with a special verdict because each element has received nine yes votes. But if a general verdict is used, there would be no liability because only eight jurors have found true every element of the claim. The California Supreme Court has found this result to be proper with regard to special verdicts. (See *Juarez, supra*, 31 Cal.3d at p. 768.) With a general verdict, if the jury votes on each element of each claim or defense, it is more likely to find nine votes for each element, even though it may be a different nine each time.

Sources and Authority

- "[I]f nine identical jurors agree that a party is negligent and that such negligence is the proximate cause of the other party's injuries, special verdicts apportioning damages are valid so long as they command the votes of *any* nine jurors. To hold otherwise would be to prohibit jurors who dissent on the question of a party's liability from participation in the important remaining issue of allocating responsibility among the parties, a result that would deny all parties the right to a jury of 12 persons deliberating on all issues." (*Juarez, supra,* 31 Cal.3d at p. 768, original italics.)

- "To determine whether a general verdict is supported by the evidence it is necessary to ascertain the issues embraced within the verdict and measure the sufficiency of the evidence as related to those issues. For this purpose reference may be had to the pleadings, the pretrial order and the charge to the jury. A general verdict implies a finding of every fact essential to its validity which is supported by the evidence. Where several issues responsive to different theories of law are presented to the jury and the evidence is sufficient to support facts sustaining the verdict under one of those theories, it will be upheld even though the evidence is insufficient to support facts sustaining it under any other theory." (*Owens v. Pyeatt* (1967) 248 Cal.App.2d 840, 844 [57 Cal.Rptr. 100], internal citations omitted.)

- "Implicit in [general] verdicts is the presumption that 'all material facts in issue as to which substantial evidence was received were determined in a manner consistent and in conformance with the verdict.' " (*Coorough v. De Lay* (1959) 171 Cal.App.2d 41, 45 [339 P.2d 963].)

- "A general verdict imports a finding in favor of the winning party on all the averments of his pleading material to his recovery." (*Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697, 712 [342 P.2d 987].)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 338

Wegner, et al., California Practice Guide: Civil Trials & Evidence, Ch. 17-A, *Verdicts,* ¶ 17:1 et seq. (The Rutter Group)

Haning, et al., California Practice Guide: Personal Injury Ch. 9-M, *Trial of a Personal Injury Case--Verdicts and Judgment* ¶ 9:645 et seq. (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict,* § 91.21 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts,* § 326A.11 et seq. (Matthew Bender)

Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts,* 18.03 et seq.

Item number: 02

RUPRO ACTION REQUEST FORM

RUPRO action requested: **Approve**

RUPRO Meeting: May 1, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Jury Instructions: Approve Publication of Minor Revisions (Action Required)

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

Staff contact (name, phone and e-mail): Bruce Greenlee, Attorney, Legal Services 415-865-7698 bruce.greenlee@jud.ca.gov

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

If requesting July 1 or out of cycle, explain:
Rules 2.1050(d) and 10.58(a) of the California Rules of Court require the advisory committee to update, amend, and add topics to CACI on a regular basis and to submit its recommendations to the council for approval. Jury instructions are currently revised twice a year, and more often if necessary. Release 32 is the second CACI release for 2018. Release 31A, an online-only release, was approved in January. Release 31 was approved by the Judicial Council November 2017.

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
In addition to recommending approval of 54 revised CACI instructions under the provisions of the guidelines adopted on December 19, 2006 regarding Jury Instructions Corrections and Technical and Minor Substantive Changes, the advisory committee also requests that RUPRO approve and submit to the Judicial Council new and revised CACI instructions and verdict forms.

JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
March 29, 2018

To
Members of the Rules and Projects Committee

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

Subject
Civil Jury Instructions: Instructions With Nonsubstantive Revisions

Action Requested
Review and Approve Nonsubstantive Additions to Instructions

Deadline
May 25, 2018

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

Executive Summary

The Advisory Committee on Civil Jury Instructions proposes additions to 54 *Judicial Council of California Civil Jury Instructions (CACI)* that have only the types of revisions that the Judicial Council has given the Rules and Projects Committee (RUPRO) final authority to approve—in this release instructions with only additions to the Sources and Authority.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that RUPRO give final approval for 54 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 May 25, 2018, these instructions will be published in the official LexisNexis midyear print supplement to the 2018 print edition of *CACI*.

The 54 instructions presented for final RUPRO approval are attached at pages 6–236.

Relevant Previous Council Action

At the October 20, 2006, Judicial Council meeting, the council approved authority for RUPRO to "[r]eview 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.

Analysis/Rationale

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]

Reduction in online-only releases

On October 24, 2017, RUPRO approved adding four additional annual *CACI* releases in January, March, July, and September. These releases were to be made available online only. Full substantive print releases remain to be presented to RUPRO for recommendation for Judicial

[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 has been revoked, or if subdivisions have been 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).

Council approval in May (Release 32; this release) and November (Release 33).[5] Originally, most of the affected instructions identified here were to be approved for the March online-only release.

However, official publisher LexisNexis has advised the committee that it is unable to process an online-only release in March and also a print supplement for May for reasons that the committee understands and accepts. Therefore, there was no March online-only release; and the instructions that would have been included in that release were deferred and are instead presented here to appear in the May print supplement. Also, for the same reasons, there will be no September online-only release.

Overview of updates

Of the 54 revised instructions that are presented here for final RUPRO approval, all have revisions only under category (a) above, additional cases added to Sources and Authority;

Standards for adding case excerpts to Sources and Authority

The standards approved by the advisory committee for adding case excerpts to the Sources and Authority are as follows:

1. *CACI* Sources and Authority are in the nature of a digest. Entries should be direct quotes from cases. However, all cases that may be relevant to the subject area of an instruction need not be included, particularly if they do not involve a jury matter.
2. Each legal component of the instruction should be supported by authority—either statutory or case law.
3. Authority addressing the burden of proof should be included.
4. Authority addressing the respective roles of judge and jury (questions of law and questions of fact) should be included.
5. Only one case excerpt should be included for each legal point.
6. California Supreme Court authority should always be included, if available.
7. If no Supreme Court authority is available, the most recent California appellate court authority for a point should be included.
8. A U.S. Supreme Court case should be included on any point for which it is the controlling authority.
9. A Ninth Circuit Court of Appeals case may be included if the case construes California law or federal law that is the subject of the *CACI* instruction.
10. Other cases may be included if deemed particularly useful to the users.
11. The fact that the committee chooses to include a case excerpt in the Sources and Authority does not mean that the committee necessarily believes that the language is binding precedent. The standard is simply whether the language would be useful or of interest to users.

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

[5] The new 2018 print edition, approved November 2017, was Release 31. The first online-only release, approved January 2018, was Release 31A.

Nonfinal cases and incomplete citations

All cases included in this release are final. A recent California Supreme Court case, *The Regents of the University of California v. Superior Court* (Mar. 22, 2018) 2018 Cal. Lexis 1971, has been added to the Sources and Authority for CACI No. 400, *Negligence—Essential Factual Elements*. Official and parallel citations are not yet available. They will be added before publication.

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 for the Sources and Authority orders statutes, rules, and regulations first; then case excerpts; and then any other authorities, such as a Restatement excerpt. Any entries that were out of order have been moved to the proper location.

Policy implications

Jury instructions are to reflect the law; there are no policy implications.

Comments

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.

Alternatives considered

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 additions to the instructions in this release are within the committee's charge; there are no alternatives to be considered.

Fiscal and Operational Impacts

There are no implementation costs. To the contrary, under its publication agreement with the Judicial Council, the official publisher, LexisNexis, 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 and Links

1. Full text of 54 instructions, at pages 6--236

and the public, the council will provide a broad public license for their noncommercial use and reproduction.

Attachments and Links

1. Full text of 54 instructions at pages x–xx

CIVIL JURY INSTRUCTIONS
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400. Negligence—Essential Factual Elements

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

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

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

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

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

Directions for Use

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

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

Sources and Authority

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

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

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

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

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

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

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

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

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

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

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

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

- "[P]ostsecondary schools do have a special relationship with students while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services." (*The Regents of the University of California v. Superior Court* -- Cal.5th --, -- [-- Cal.Rptr.3d --, -- P.3d --].) 2018 Cal. LEXIS 1971

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 956–964, 988–990, 993–996

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

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.02, 1.12, Ch. 2, *Causation*, § 2.02, Ch. 3, *Proof of Negligence*, § 3.01 (Matthew Bender)

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

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

450C. Negligent Undertaking

[*Name of plaintiff***] claims that [***name of defendant***] is responsible for [***name of plaintiff***]'s harm because [***name of defendant***] failed to exercise reasonable care to protect [***name of third person***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of defendant***], voluntarily or for a charge, rendered services for the protection of [***name of third person***];**

2. That these services were of a kind that [*name of defendant***] should have recognized as needed for the protection of [***name of plaintiff***];**

3. That [*name of defendant***] failed to exercise reasonable care in rendering these services;**

4. That [*name of defendant***]'s failure to exercise reasonable care was a substantial factor in causing harm to [***name of plaintiff***]; and**

5. [(a) That [*name of defendant***]'s failure to use reasonable care added to the risk of harm;]**

[or]

[(b) That [*name of defendant***]'s services were rendered to perform a duty that [***name of third person***] owed to third persons including [***name of plaintiff***];]**

[or]

[(c) That [*name of plaintiff***] suffered harm because [[***name of third person***]/ [or] [***name of plaintiff***]] relied on [***name of defendant***]'s services.]**

New June 2016

Directions for Use

This instruction presents the theory of liability known as the "negligent undertaking" rule. (See Restatement Second of Torts, section 324A.) The elements are stated in *Paz v. State of California* (2000) 22 Cal.4th 550, 553 [93 Cal.Rptr.2d 703, 994 P.2d 975].

In *Paz,* the court said that negligent undertaking is "sometimes referred to as the 'Good Samaritan' rule," by which a person generally has no duty to come to the aid of another and cannot be liable for doing so unless the person aiding's acts increased the risk to the person aided or the person aided relied on the person aiding's acts. (*Paz, supra,* 22 Cal.4th at p. 553; see CACI No. 450A, *Good Samaritan—Nonemergency.*) It is perhaps more accurate to say that negligent undertaking is another application of the Good Samaritan rule. CACI No. 450A is for use in a case in which the person aided is

the injured plaintiff. (See Restatement 2d of Torts, § 323.) This instruction is for use in a case in which the defendant's failure to exercise reasonable care in acting to aid one person has resulted in harm to another person.

Select one or more of the three options for element 5 depending on the facts.

Sources and Authority

- Negligent Undertaking. Restatement Second of Torts section 324A.

- ~~"Under well-established common law principles, a person has no duty to come to the aid of another. If, however, a person elects to come to someone's aid, he or she has a duty to exercise due care. Thus, a 'good Samaritan' who attempts to help someone might be liable if he or she does not exercise due care and ends up causing harm." (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 324 [86 Cal.Rptr.3d 350, 197 P.3d 164], internal citations omitted.)~~

- "[T]he [Restatement Second of Torts] section 324A theory of liability--sometimes referred to as the "Good Samaritan" rule--is a settled principle firmly rooted in the common law of negligence. Section 324A prescribes the conditions under which a person who undertakes to render services for another may be liable to third persons for physical harm resulting from a failure to act with reasonable care. Liability may exist *if* (a) the failure to exercise reasonable care increased the risk of harm, (b) the undertaking was to perform a duty the other person owed to the third persons, or (c) the harm was suffered because the other person or the third persons relied on the undertaking." (*Paz, supra,* 22 Cal.4th at p. 553, original italics.)

- "Thus, as the traditional theory is articulated in the Restatement, and as we have applied it in other contexts, a negligent undertaking claim of liability to third parties requires evidence that: (1) the actor undertook, gratuitously or for consideration, to render services to another; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons; (3) the actor failed to exercise reasonable care in the performance of the undertaking; (4) the actor's failure to exercise reasonable care resulted in physical harm to the third persons; and (5) *either* (a) the actor's carelessness increased the risk of such harm, or (b) the actor undertook to perform a duty that the other owed to the third persons, or (c) the harm was suffered because either the other or the third persons relied on the actor's undertaking. [¶] Section 324A's negligent undertaking theory of liability subsumes the well-known elements of any negligence action, viz., duty, breach of duty, proximate cause, and damages." (*Paz, supra,* 22 Cal.4th at p. 559, original italics, internal citation omitted; see also *Scott v. C. R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 775 [180 Cal.Rptr.3d 479] [jury properly instructed on elements as set forth above in *Paz*].)

- "Section 324A is applied to determine the 'duty element' in a negligence action where the defendant has ' "specifically … undertaken to perform the task that he is charged with having performed negligently, for without the actual assumption of the undertaking there can be no correlative duty to perform that undertaking carefully." ' The negligent undertaking theory of liability applies to personal injury and property damage claims, but not to claims seeking only economic loss." (*Lichtman v. Siemens Industry Inc.* (2017) 16 Cal.App.5th 914, 922 [224 Cal.Rptr.3d 725], internal citations omitted.)

- "To establish as a matter of law that defendant does not owe plaintiffs a duty under a negligent undertaking theory, defendant must negate all three alternative predicates of the fifth factor: '(a) the actor's carelessness increased the risk of such harm, or (b) the undertaking was to perform a duty owed by the other to the third persons, or (c) the harm was suffered because of the reliance of the other or the third persons upon the undertaking.' " (*Lichtman*, *supra*, 16 Cal.App.5th at p. 926.)

- "The undisputed facts here present a classic scenario for consideration of the negligent undertaking theory. This theory of liability is typically applied where the defendant has contractually agreed to provide services for the protection of others, but has negligently done so." (*Lichtman*, *supra*, 16 Cal.App.5th at p. 927.)

- "The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless they have some relationship that gives rise to a duty to act. However, one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking. Section 324A integrates these two basic principles in its rule." (*Paz. supra,* 22 Cal.4th at pp. 558−559.)

- "[T]he 'negligent undertaking' doctrine, like the special relationship doctrine, is an exception to the 'no duty to aid' rule." (*Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1231 [186 Cal.Rptr.3d 26].)

- "Under the good Samaritan doctrine, CHP may have a duty to members of the public to exercise due care when CHP voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member thereby inducing reliance, when an express promise to warn of a danger has induced reliance, or when the actions of CHP place a person in peril or increase the risk of harm. In other words, to create a special relationship and a duty of care, there must be evidence that CHP ' "made misrepresentations that induced a citizen's detrimental reliance [citation], placed a citizen in harm's way [citations], or lulled a citizen into a false sense of security and then withdrew essential safety precautions." ' Nonfeasance that leaves the citizen in exactly the same position that he or she already occupied cannot support a finding of duty of care. Affirmative conduct or misfeasance on the part of CHP that induces reliance or changes the risk of harm is required." (*Greyhound Lines, Inc. v. Department of the California Highway Patrol* (2013) 213 Cal.App.4th 1129, 1136 [152 Cal.Rptr.3d 492], internal citations omitted.)

- "A operates a grocery store. An electric light hanging over one of the aisles of the store becomes defective, and A calls B Electric Company to repair it. B Company sends a workman, who repairs the light, but leaves the fixture so insecurely attached that it falls upon and injures C, a customer in the store who is walking down the aisle. B Company is subject to liability to C." (Restat 2d of Torts, § 324A, Illustration 1.)

Secondary Sources

4 Witkin, California Procedure (4th ed. 1996) Pleadings, § 553

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1060–1065

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) ¶¶ 2:583.10–2:583.11, 2:876

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.11 (Matthew Bender)

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[2][d], [5][c] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.150, 165.241 (Matthew Bender)

454. Affirmative Defense—Statute of Limitations

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

New April 2007; Revised December 2007

Directions for Use

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

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

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

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

Sources and Authority

- Two-Year Statute of Limitations. Code of Civil Procedure section 335.1.
- Three-Year Statute of Limitations. Code of Civil Procedure section 338(c).
- One-Year Statute of Limitations. Code of Civil Procedure section 340.2(c).
- "A limitation period does not begin until a cause of action accrues, i.e., all essential elements are present and a claim becomes legally actionable." (*Glue-Fold, Inc., supra,* 82 Cal.App.4th at p. 1029, internal citations omitted.)
- " ' " ' "Ordinarily this is when the wrongful act is done and the obligation or the liability arises, but it does not 'accrue until the party owning it is entitled to begin and prosecute an action thereon.' " … In other words, "[a] cause of action accrues 'upon the occurrence of the

last element essential to the cause of action.' " ' " ' " (*Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 323 [226 Cal.Rptr.3d 267].)

- "Where, as here, 'damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. … "Mere threat of future harm, not yet realized, is not enough." … "Basic public policy is best served by recognizing that damage is necessary to mature such a cause of action." … Therefore, when the wrongful act does not result in immediate damage, "the cause of action does not accrue prior to the maturation of perceptible harm." ' " (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604 [129 Cal.Rptr.3d 525].)

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

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

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

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

Secondary Sources

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

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

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

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

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

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

472. Primary Assumption of Risk—Exception to Nonliability─ Facilities Owners and Operators and Event Sponsors

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[*Name of plaintiff***] claims [he/she] was harmed while [participating in/watching] [***sport or other recreational activity e.g., snowboarding***] at [***name of defendant***]'s [***specify facility or event where plaintiff was injured, e.g., ski resort***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [owner/operator/sponsor/***other***] of [***e.g., a ski resort***];**

2. **That [***name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., snowboarding***];**

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

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

New December 2013; Revised and Renumbered From CACI No. 410 May 2017

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) There is, however, a duty applicable to facilities owners and operators and to event sponsors not to unreasonably increase the risks of injury to participants and spectators beyond those inherent in the activity. (See *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1162 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [participants]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [spectators].)

While duty is a question of law, courts have held that whether the defendant has increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 470, *Primary Assumption of Risk—Exception to Nonliability─Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to instructors, trainers, and coaches, see CACI No. 471, *Primary Assumption of Risk—Exception to Nonliability─Instructors, Trainers, or Coaches*. For an instruction applicable to occupations with inherent risk, see CACI No. 473, *Primary Assumption of Risk─Exception to Nonliability─Occupation With Inherent Risk.*

Sources and Authority

- "[U]nder the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity." (*Nalwa, supra,* 55 Cal.4th at p. 1162.)

- "The doctrine applies to recreational activities ' "involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity." ' " (*Griffin v. The Haunted Hotel, Inc.* (2015) 242 Cal.App.4th 490, 500 [194 Cal.Rptr.3d 830].)

- "Although the doctrine is often applied as between sports coparticipants, it defines the duty owed as between persons engaged in any activity involving inherent risks. The doctrine applies to activity 'done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury' … ." (*Jimenez v. Roseville City School Dist.* (2016) 247 Cal.App.4th 594, 601 [202 Cal.Rptr.3d 536], internal citations omitted; see also *Bertsch v. Mammoth Community Water Dist.* (2016) 247 Cal.App.4th 1201, 1208 [202 Cal.Rptr.3d 757] ["These factors certainly apply to skateboarding"], internal citations omitted.)

- "What the primary assumption of risk doctrine does not do, however, is absolve operators of *any obligation* to protect the safety of their customers. As a general rule, where an operator can take a measure that would increase safety and minimize the risks of the activity *without also altering the nature of the activity*, the operator is required to do so. As the court explained in *Knight*, 'in the sports setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue in a given case.' When the defendant is the operator of an inherently risky sport or activity (as opposed to a coparticipant), there are 'steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport [or activity].' " (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1300 [222 Cal.Rptr.3d 633], original italics, internal citations omitted.)

- "The determinant of duty, 'inherent risk,' is to be decided solely as a question of law and based on the general characteristics of the sport activity and the parties' relationship to it." (*Griffin, supra,* 242 Cal.App.4th at p. 501.)

- "Admittedly, it is sometimes said that '[t]he existence and scope of a defendant's duty of care in the primary assumption of risk context "is a *legal* question which depends on the nature of the sport or activity … and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." ' This statement of the rule is correct where there is no dispute about the inherent risks, and such cases may be resolved on summary judgment. [¶] However this statement is overly broad. Although the risks inherent in *many* activities are not subject to reasonable dispute (e.g., being hit with a baseball during a game), the risks inherent in *some* activities are not commonly known. In such cases, expert testimony may be required ' "for purposes of weighing whether the inherent risks of the activity were increased by the defendant's conduct." ' … Thus, it is not entirely accurate to say inherent risks of an activity always present purely legal questions, because sometimes

the nature of an activity and its risks must be gleaned from the evidence." (*Jimenez, supra,* 247 Cal.App.4th at p. 608, original italics, internal citations omitted.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra,* 169 Cal.App.4th at pp. 112–113.)

- "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant." (*Knight, supra,* 3 Cal.4th at pp. 315−316.)

- "Under *Knight*, defendants had a duty *not to increase* the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume. As a result, a triable issue of fact remained, namely whether the [defendants]' mascot cavorting in the stands and distracting plaintiff's attention, *while the game was in progress,* constituted a breach of that duty, i.e., constituted negligence in the form of increasing the inherent risk to plaintiff of being struck by a foul ball." (*Lowe, supra,* 56 Cal.App.4th at p. 114, original italics.)

- "[T]hose responsible for maintaining athletic facilities have a … duty not to increase the inherent

risks, albeit in the context of businesses selling recreational opportunities." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162 [41 Cal.Rptr.3d 299, 131 P.3d 383], internal citation omitted.)

- "*Knight,* consistently with established case law, simply requires courts in each instance to examine the question of duty in light of the nature of the defendant's activities and the relationship of the parties to that activity." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482 [63 Cal.Rptr.2d 291, 936 P.2d 70].)

- "Because primary assumption of risk focuses on the question of duty, it is *not* dependent on either the plaintiff's implied consent to, or subjective appreciation of, the potential risk." (*Griffin, supra,* 242 Cal.App.4th at p. 502, original italics.)

- "Defendants' obligation not to increase the risks inherent in the activity included a duty to provide safe equipment for the trip, such as a safe and sound craft." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 255 [38 Cal.Rptr.2d 65].)

- "[A duty not to increase the risk] arises only if there is an ' "organized relationship" ' between the defendants and the participant in relation to the sporting activity, such as exists between a recreational business operator and its patrons … . [I]mposing such a duty in the context of these types of relationships is justified because the defendants are 'responsible for, or in control of, the conditions under which the [participant] engaged in the sport.' " However, '[t]his policy justification does not extend to a defendant wholly uninvolved with and unconnected to the sport,' … who neither 'held out their driveway as an appropriate place to skateboard or in any other way represented that the driveway was a safe place for skateboarding.' " (*Bertsch, supra,* 247 Cal.App.4th at pp. 1208−1209, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1339, 1340, 1343–1350

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages,* ¶¶ 3:234–3:254.30 (The Rutter Group)

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

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.31 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* § 165.401 et seq. (Matthew Bender)

530A. Medical Battery

[*Name of plaintiff***] claims that [***name of defendant***] committed a medical battery. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of defendant***] performed a medical procedure without [***name of plaintiff***]'s consent; [or]]**

   [That [*name of plaintiff***] consented to one medical procedure, but [***name of defendant***] performed a substantially different medical procedure;]**

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

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

A patient can consent to a medical procedure by words or conduct.

Derived from former CACI No. 530 April 2007; Revised October 2008

Directions for Use

Select either or both of the two bracketed options in the first element depending on the nature of the case. In a case of a conditional consent in which it is alleged that the defendant proceeded without the condition having occurred, give CACI No. 530B, *Medical Battery—Conditional Consent*.

Sources and Authority

- "The California Supreme Court has described the right to consent to medical treatment as ' "basic and fundamental," ' 'intensely individual,' and 'broadly based.' The same court has also emphasized that excusing the patient from a judicial proceeding regarding a surgery to be performed over his objection 'denie[s] fundamental due process.' It is immaterial that a doctor has said the treatment is required to save the patient's life. Rather, ' "A doctor might well believe that an operation or form of treatment is desirable or necessary, but the law does not permit him to substitute his own judgment for that of the patient by any form of artifice or deception." ' Finally, the patient's reasons for refusing are irrelevant. 'For self-determination to have any meaning, it cannot be subject to the scrutiny of anyone else's conscience or sensibilities.' " (*Stewart v. Superior Court* (2017) 16 Cal.App.5th 87, 105 [224 Cal.Rptr.3d 219], internal citations omitted.)

- Battery may also be found if a substantially different procedure is performed: "Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially different treatment for which consent was not obtained, there is a clear case of battery." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 239 [104 Cal.Rptr. 505, 502 P.2d 1].)

- "The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present. However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent given appears; rather, the doctor in obtaining consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence." (*Cobbs, supra,* 8 Cal.3d at p. 240.)

- "Our high court has made it clear that battery and lack of informed consent are separate causes of action. A claim based on lack of informed consent—which sounds in negligence—arises when the doctor performs a procedure without first adequately disclosing the risks and alternatives. In contrast, a battery is an intentional tort that occurs when a doctor performs a procedure without obtaining any consent." (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 324 [71 Cal.Rptr.3d 469].)

- "Confusion may arise in the area of 'exceeding a patient's consent.' In cases where a doctor exceeds the consent and such excess surgery is found necessary due to conditions arising during an operation which endanger the patient's health or life, the consent is presumed. The surgery necessitated is proper (though exceeding specific consent) on the theory of assumed consent, were the patient made aware of the additional need." (*Pedesky v. Bleiberg* (1967) 251 Cal.App.2d 119, 123 [59 Cal.Rptr. 294].)

- "Consent to medical care, including surgery, may be express or may be implied from the circumstances." (*Bradford v. Winter* (1963) 215 Cal.App.2d 448, 454 [30 Cal.Rptr. 243].)

- "It is elemental that consent may be manifested by acts or conduct and need not necessarily be shown by a writing or by express words." (*Kritzer v. Citron* (1950) 101 Cal.App.2d 33, 38–39 [224 P.2d 808].)

- "[T]he reason why CACI No. 530B has an explicit intent and knowledge requirement and CACI No. 530A does not is clear. The law presumes that '[w]hen the patient gives permission to perform one type of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present.' That situation is covered by CACI No. 530A." (*Dennis v. Southard* (2009) 174 Cal.App.4th 540, 544 [94 Cal.Rptr.3d 559], internal citation omitted.)

- "In the absence of any definitive case law establishing whether operating on the wrong disk within inches of the correct disk is a 'substantially different procedure,' we conclude the matter is a factual question for a finder of fact to decide and at least in this instance, not one capable of being decided on demurrer." (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 647 [75 Cal.Rptr.3d 861.)

- "Although … consent to surgery necessarily encompasses consent to postoperative care, not all postoperative *contact* between doctor and patient constitutes *care*. The question of the nature of the contact between plaintiff and [defendant], and whether that contact was within the scope of plaintiff's consent, is a factual question for a finder of fact to decide." (*So v. Shin* (2013) 212 Cal.App.4th 652, 669 [151 Cal.Rptr.3d 257], original italics.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 388–635

Haning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages,* ¶ 3:255.4l (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 3-F, *MICRA Provisions Affecting Damages,* ¶ 3:282.12a (The Rutter Group)

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 9.11–9.16

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners,* § 31.41, Ch. 41, *Assault and Battery,* § 41.01 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery,* § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice,* §§ 415.13, 415.20 (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery,* § 21.20 et seq. (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice,* § 175.28 et seq. (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives,* § 104.11 (Matthew Bender)

555. Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit (Code Civ. Proc., § 340.5)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that before [***insert date one year before date of filing***], [***name of plaintiff***] discovered, or knew of facts that would have caused a reasonable person to suspect, that [he/she] had suffered harm that was caused by someone's wrongful conduct.**

[If, however, [*name of plaintiff***] proves [***insert tolling provision(s) of general applicability, e.g., Code Civ. Proc., §§ 351 [absence from California], 352 [insanity], 352.1 [prisoners], 352.5 [restitution orders], 353.1 [court's assumption of attorney's practice], 354 [war], 356 [injunction]***], the period within which [***name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] was absent from California***].]**

New April 2009

Directions for Use

Use CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit,* if the three-year limitation provision is at issue.

If the notice of intent to sue required by Code of Civil Procedure section 364 is served within 90 days of the date on which the statute of limitations will run, the statute of limitations is tolled for 90 days beyond the end of the limitations period. (See Code Civ. Proc., § 364; *Woods v. Young* (1991) 53 Cal.3d 315, 325–326 [279 Cal.Rptr. 613, 807 P.2d 455].) Adjust the "date one year before the date of filing" in the instruction accordingly. If there is an issue of fact with regard to compliance with the requirements of section 364, the instruction may need to be modified accordingly.

Give the optional last paragraph if there is a question of fact concerning a tolling provision from the Code of Civil Procedure. If so, the verdict form should ask the jury to find (1) the "discovery" date (the date on which the plaintiff discovered or knew of facts that would have caused a reasonable person to suspect that he or she had suffered harm that was caused by someone's wrongful conduct); (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the discovery date and determine whether the action is timely.

Contrary to the otherwise applicable rule (see CACI No. 455, *Statute of Limitations—Delayed Discovery*), the defendant has been given the burden of proving that the plaintiff discovered or should have discovered the facts alleged to constitute the defendant's wrongdoing more than one year before filing the action. (See *Samuels v. Mix* (1999) 22 Cal.4th 1, 8–10 [91 Cal.Rptr.2d 273, 989 P.2d 701] [construing structurally similar Code Civ. Proc., § 340.6, on legal malpractice, to place burden regarding delayed discovery on the defendant and disapproving *Burgon v. Kaiser Foundation Hospitals* (1979) 93 Cal.App.3d 813 [155 Cal.Rptr. 763], which had reached the opposite result under Code Civ. Proc., §

340.5].) See also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit.*

Sources and Authority

- Statutes of Limitation for Medical Malpractice. Code of Civil Procedure section 340.5.
- Notice of Intent to Commence Action. Code of Civil Procedure section 364(a).
- 90-Day Extension of Limitation Period. Code of Civil Procedure section 364(d).
- "The one-year limitation period of section 340.5 is a codification of the discovery rule, under which a cause of action accrues when the plaintiff is aware, or reasonably should be aware, of 'injury,' a term of art which means 'both the negligent cause and the damaging effect of the alleged wrongful act.' " (*Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 290 [170 Cal.Rptr.3d 125].)
- "When a plaintiff has information which would put a reasonable person on inquiry, when a plaintiff's "reasonably founded suspicions [have been] aroused" and the plaintiff has "become alerted to the necessity for investigation and pursuit of her remedies," the one-year period commences. "Possession of 'presumptive' as well as 'actual' knowledge will commence the running of the statute." ' " (*Dolan v. Borelli* (1993) 13 Cal.App.4th 816, 823 [16 Cal.Rptr.2d 714], internal citations omitted.)
- "[W]hen the plaintiff in a medical malpractice action alleges the defendant health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the misdiagnosis, which is when the plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one." (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184 [209 Cal.Rtpr.3d 332].)
- "The fact that [plaintiff] contemplated suing [defendants] is strong evidence that [plaintiff] suspected the doctors had not properly diagnosed or treated his headaches. Even with the presence of such suspicions, however, the one-year and three-year limitations periods did not begin to run until [plaintiff] discovered his injury—that is, became aware of additional, appreciable harm from his preexisting condition—and, with respect to the one-year limitations period, also had reason to believe that injury was caused by the wrongdoing of [defendants]." (*Drexler, supra,* 4 Cal.App.5th at p. 1190, internal citation omitted.)
- "We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language." (*Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [Code Civ. Proc., § 352.1, which tolls statutes of limitation for prisoners, applies to extend one-year period of Code Civ. Proc., § 340.5].)
- "The implications of *Belton's* analysis for our case here is inescapable. Like tolling the statute of limitations for confined prisoners under section 352.1, tolling under section 351 for a defendant's absence from California is of general applicability [and therefore extends the one-year period of Code

of Civil Procedure section 340.5]. (For other general tolling provisions, see § 352 [minors or insanity]; § 352.5 [restitution orders]; § 353.1 [court's assumption of attorney's practice]; § 354 [war]; § 356 [injunction].)" (*Kaplan v. Mamelak* (2008) 162 Cal.App.4th 637, 643 [75 Cal.Rptr.3d 861].)

- "[A] plaintiff's minority as such does not toll the limitations period of section 340.5. When the Legislature added the separate statute of limitations for minors to section 340.5 in 1975, it clearly intended that the general provision for tolling of statutes of limitation during a person's minority (§ 352, subd. (a)(1)) should no longer apply to medical malpractice actions." (*Steketee v. Lintz* (1985) 38 Cal.3d 46, 53 [210 Cal.Rptr 781, 694 P.2d 1153], internal citations omitted.)

- "Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first 'discovers' the injury *and the negligent cause* of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not 'discover' the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury." (*Ashworth v. Mem'l Hosp.* (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104], original italics.)

- "That legislative purpose [re: Code Civ. Proc., § 364] is best effectuated by construing section 364(d) as tolling the one-year statute of limitations when section 364(a)'s ninety-day notice of intent to sue is served during, but not before, the last ninety days of the one-year limitations period. Because the statute of limitations is tolled for 90 days and not merely extended by 90 days from the date of service of the notice, this construction results in a period of 1 year and 90 days in which to file the lawsuit. In providing for a waiting period of at least 90 days before suit can be brought, this construction achieves the legislative objective of encouraging negotiated resolutions of disputes." (*Woods, supra,* 53 Cal.3d at p. 325.)

- "[I]f the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under section 340.5. But section 340.5 does not extend to negligence in the maintenance of equipment and premises that are merely convenient for, or incidental to, the provision of medical care to a patient." (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 88 [201 Cal.Rptr.3d 449, 369 P.3d 229]; see *Johnson v. Open Door Community Health Centers* (2017) 15 Cal.App.5th 153, 157–162 [222 Cal.Rptr.3d 838] [tripping over scale does not involve provision of medical care].)

- "[W]hile MICRA is not limited to suits by patients, it 'applies only to actions alleging injury suffered as a result of negligence in … the provision of medical care to patients.' Driving to an accident victim is not the same as providing medical care to the victim. A paramedic's exercise of due care while driving is not 'necessary or otherwise integrally related to the medical treatment and diagnosis of the patient", at least when the patient is not in the vehicle.' " (*Aldana v. Stillwagon* (2016) 2 Cal.App.5th 1, 8 [205 Cal.Rptr.3d 719], internal citations omitted.)

- ~~"[W]hen the plaintiff in a medical malpractice action alleges the defendant health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the misdiagnosis, which is when the plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one." (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184 [209 Cal.Rptr.3d 332].)~~

Secondary Sources

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

Haning, et al., California Practice Guide: Personal Injury, Ch. 5-B, *When To Sue—Statute Of Limitations*, ¶ 5:109 (The Rutter Group)

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

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Professionals*, § 31.60 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.47 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice*, § 175.45 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions*, 4.27

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

556. Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit (Code Civ. Proc., § 340.5)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s alleged injury occurred before [***insert date three years before date of filing***].**

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

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

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

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

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

the period within which [*name of plaintiff***] had to file the lawsuit is extended for the amount of time that [***insert tolling provision, e.g., [name of defendant] intentionally concealed the facts***].]**

New April 2009; Revised November 2017

Directions for Use

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

If no tolling provision from Code of Civil Procedure section 340.5 is at issue, read only the first paragraph. Read the rest of the instruction if there is a question of fact concerning a tolling provision. If so, the verdict form should ask the jury to find (1) the date on which the alleged injury occurred; (2) whether the tolling provision applies; and (3) if so, for what period of time. The court can then add the additional time to the date of injury and determine whether the action is timely.

If the notice of intent to sue required by Code of Civil Procedure section 364 is served within 90 days of the date on which the statute of limitations will run, the statute of limitations is tolled for 90 days beyond the end of the limitation period. (See Code Civ. Proc., § 364; *Russell v. Stanford Univ. Hosp.* (1997) 15 Cal.4th 783, 789–790 [64 Cal.Rptr.2d 97, 937 P.2d 640].) If there is an issue of fact with regard to compliance with the requirements of section 364, the instruction may need to be modified accordingly.

If the claim involves a diagnosis error, the cause of action accrues when the plaintiff first experiences "appreciable harm" as a result of the defendant's diagnosis error. Appreciable harm occurs when the plaintiff first becomes aware, or reasonably should have become aware, that a preexisting disease or

condition has developed into a more serious one. (*Drexler v. Petersen* (2016) 4 Cal.App.5th 1181, 1183–1184, 1194 [209 Cal.Rptr.3d 332].) When this has occurred is a question of fact for the jury unless the facts are undisputed. (*Id.* at p. 1197.) Appreciable harm determines when the injury occurred to complete the cause of action; it is not a question of delayed discovery. Therefore, appreciable harm is required to trigger the three-year limitation period of Code of Civil Procedure section 340.5. (*Steingart v. White* (1988) 198 Cal.App.3d 406, 414–417 [243 Cal.Rptr. 678].)

Sources and Authority

- Three-Year Limitation Period for Medical Malpractice. Code of Civil Procedure section 340.5.

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

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

- "The fact that [plaintiff] contemplated suing [defendants] is strong evidence that [plaintiff] suspected the doctors had not properly diagnosed or treated his headaches. Even with the presence of such suspicions, however, the one-year and three-year limitations periods did not begin to run until [plaintiff] discovered his injury—that is, became aware of additional, appreciable harm from his preexisting condition—and, with respect to the one-year limitations period, also had reason to believe that injury was caused by the wrongdoing of [defendants]." (*Drexler, supra,* 4 Cal.App.5th at p. 1190, internal citation omitted.)

- "Section 340.5 creates two separate statutes of limitations, both of which must be satisfied if a plaintiff is to timely file a medical malpractice action. First, the plaintiff must file within one year after she first 'discovers' the injury *and the negligent cause* of that injury. Secondly, she must file within three years after she first experiences harm from the injury. This means that if a plaintiff does not 'discover' the negligent cause of her injury until more than three years after she first experiences harm from the injury, she will not be able to bring a malpractice action against the medical practitioner or hospital whose malpractice caused her injury." (*Ashworth v. Mem'l Hosp.* (1988) 206 Cal.App.3d 1046, 1054 [254 Cal.Rptr. 104], original italics.)

- "The same considerations of legislative intent that compelled us, in [*Woods v. Young* (1991) 53 Cal.3d 315, 325–326 [279 Cal.Rptr. 613, 807 P.2d 455]], to construe Code of Civil Procedure section 364, subdivision (d), as 'tolling' the one-year limitations period also apply to the three-year limitation. Unless the limitations period is so construed, the legislative purpose of reducing the cost and increasing the efficiency of medical malpractice litigation by, among other things, encouraging negotiated resolution of disputes will be frustrated. Moreover, a plaintiff's attorney who gives notice within the last 90 days of the 3-year limitations period will confront the dilemma we addressed in *Woods,* i.e., a choice between preserving the plaintiff's cause of action by violating the 90-day notice

period under Code of Civil Procedure section 364, subdivision (d)--thereby invoking potential disciplinary proceedings by the State Bar--and forfeiting the client's cause of action. In the absence of tolling, the practical effect of the statute would be to shorten the statutory limitations period from three years to two years and nine months. As in the case of the one-year limitation, we discern no legislative intent to do so." (*Russell, supra,* 15 Cal.4th at pp. 789–790.)

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

- "[I]f the act or omission that led to the plaintiff's injuries was negligence in the maintenance of equipment that, under the prevailing standard of care, was reasonably required to treat or accommodate a physical or mental condition of the patient, the plaintiff's claim is one of professional negligence under section 340.5. But section 340.5 does not extend to negligence in the maintenance of equipment and premises that are merely convenient for, or incidental to, the provision of medical care to a patient." (*Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, 88 [201 Cal.Rptr.3d 449, 369 P.3d 229]; see *Johnson v. Open Door Community Health Centers* (2017) 15 Cal.App.5th 153, 157–162 [222 Cal.Rptr.3d 838] [tripping over scale does not involve provision of medical care].)

- "[W]hile MICRA is not limited to suits by patients, it 'applies only to actions alleging injury suffered as a result of negligence in … the provision of medical care to patients.' Driving to an accident victim is not the same as providing medical care to the victim. A paramedic's exercise of due care while driving is not 'necessary or otherwise integrally related to the medical treatment and diagnosis of the patient", at least when the patient is not in the vehicle. …' " (*Aldana v. Stillwagon* (2016) 2 Cal.App.5th 1, 8 [205 Cal.Rptr.3d 719], internal citations omitted.)

- "[W]hen the plaintiff in a medical malpractice action alleges the defendant health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no injury for purposes of section 340.5 until the plaintiff first experiences appreciable harm as a result of the misdiagnosis, which is when the plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one." (*Drexler, supra,* 4 Cal.App.5th at pp. 1183–1184.)

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

Secondary Sources

Haning et al., California Practice Guide: Personal Injury, Ch. 1-B, *First Steps in Handling a Personal Injury Case—Initial Evaluation of Case: Decision to Accept or Reject Employment or Undertake Further Evaluation of Claim,* ¶ 1:67.1 (The Rutter Group)

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

4 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Professionals,* § 31.60 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice,* § 415.47 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons: Medical Malpractice,* § 175.45 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions,* 4.27

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

901. Status of Common Carrier Disputed

To prove that [*name of defendant***] was a common carrier, [***name of plaintiff***] must prove that it was in the business of transporting [the property of] the general public.**

In deciding this issue, you may consider whether any of the following factors apply. These factors suggest that a carrier is a common carrier:

(a) The carrier maintains a regular place of business for the purpose of transporting passengers [or property].

(b) The carrier advertises its services to the general public.

(c) The carrier charges standard fees for its services.

(d) [*Insert other applicable factor(s).***]**

A carrier can be a common carrier even if it does not have a regular schedule of departures, a fixed route, or a transportation license.

If you find that [*name of defendant***] was not a common carrier, then [***name of defendant***] did not have the duty of a common carrier, only a duty of ordinary care.**

New September 2003

Directions for Use

The court should give the ordinary negligence instructions in conjunction with this one. Ordinary negligence is the standard applicable to private carriers.

Sources and Authority

- "Common Carrier" Defined. Civil Code section 2168.
- Contract of Carriage. Civil Code section 2085.
- "[A] common carrier within the meaning of Civil Code section 2168 is any entity which holds itself out to the public generally and indifferently to transport goods or persons from place to place for profit." (*Squaw Valley Ski Corp. v. Superior Court* (1992) 2 Cal.App.4th 1499, 1508 [3 Cal.Rptr.2d 897], internal citations omitted.)
- "Whether a party is a common carrier for reward may be decided as a matter of law when the material facts are not in dispute. When the material facts are disputed, it is a question of fact for the jury." (*Huang v. The Bicycle Casino, Inc.* (2016) 4 Cal.App.5th 329, 339 [208 Cal.Rptr.3d 591 [citing this

instruction].)

- "Factors bearing on a party's common carrier status include (1) whether the party maintained an established place of business for the purpose of transporting passengers; (2) whether the party engaged in transportation as a regular business and not as a casual or occasional undertaking; (3) whether the party advertised its transportation services to the general public; and (4) whether the party charged standard rates for its service. The party need not have a regular schedule or a fixed route to be a common carrier, nor need the party have a transportation license. [¶] Not all these factors need be present for the party to be a common carrier subject to the heightened duty of care." (*Huang, supra,* 4 Cal.App.5th at p. 339, internal citations omitted; see also *Gradus v. Hanson Aviation, Inc.* (1984) 158 Cal.App.3d 1038, 1047–1048 [205 Cal.Rptr. 211] [approving jury instruction].)

- "Common carrier status emerged in California in the mid-19th century as a narrow concept involving stagecoaches hired purely for transportation. Over time, however, the concept expanded to include a wide array of recreational transport like scenic airplane and railway tours, ski lifts, and roller coasters. This expansion reflects the policy determination that a passenger's purpose, be it recreation, thrill-seeking, or simply conveyance from point A to B, should not control whether the operator should bear a higher duty to protect the passenger." (*Grotheer v. Escape Adventures, Inc.* (2017) 14 Cal.App.5th 1283, 1294 [222 Cal.Rptr.3d 633], internal citations omitted.)

- "[T]he key inquiry in the common carrier analysis is whether passengers expect the transportation to be safe because the operator is reasonably capable of controlling the risk of injury." (*Grotheer, supra,* 14 Cal.App.5th at p. 1295 [hot air balloon is not a common carrier].)

- "A private carrier ... is bound only to accept carriage pursuant to special agreement." (*Webster v. Ebright* (1992) 3 Cal.App.4th 784, 787 [4 Cal.Rptr.2d 714].) Private carriers " 'make no public profession that they will carry for all who apply, but ... occasionally or upon the particular occasion undertake for compensation to carry the goods of others upon such terms as may be agreed upon.' " (*Id.* at p. 788, internal citations omitted.)

- " '[T]he law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it.' " (*Samuelson v. Public Utilities Com.* (1951) 36 Cal.2d 722, 730 [227 P.2d 256], internal citation omitted.)

- "To be a common carrier, the entity merely must be of the character that members of the general public may, if they choose, avail themselves of it." (*Squaw Valley Ski Corp., supra,* 2 Cal.App.4th at pp. 1509-1510, internal citation omitted.)

- "Given the fact [defendant] indiscriminately offers its Shirley Lake chair lift to the public to carry skiers at a fixed rate from the bottom to the top of the Shirley Lake run, it logically comes within the Civil Code section 2168 definition of a common carrier." (*Squaw Valley Ski Corp., supra,* 2 Cal.App.4th at p. 1508.)

- "[T]he 'reward' contemplated by the statutory scheme need not be a fee charged for the transportation

service. The reward may be the profit generated indirectly by easing customers' way through the carriers' premises." (*Huang, supra*, 4 Cal.App.5th at p. 339, internal citation omitted.)

- " '[T]he "public" does not mean everyone all of the time; naturally, passengers are restricted by the type of transportation the carrier affords. [Citations.] "One may be a common carrier though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population." … To be a common carrier, the entity merely must be of the character that members of the general public may, if they choose, avail themselves of it.' " (*Huang, supra*, 4 Cal.App.5th at p. 339, internal citation omitted.)

- "Plaintiff also argues the public policy of protecting passengers of a common carrier for reward, as expressed in Civil Code section 2100, precludes limiting defendant's duty to riders on [bumper cars]. In *Gomez v. Superior Court* [(2005) 35 Cal.4th 1125, 1136, fn. 5 [29 Cal. Rptr. 3d 352, 113 P.3d 41]], we held that an operator of a 'roller coaster or similar amusement park ride can be a carrier of persons for reward' for purposes of Civil Code section 2100. At the same time, however, we expressed no opinion 'whether other, dissimilar, amusement rides or attractions can be carriers of persons for reward.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1160 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [bumper car ride is not common carrier].)

- "In the situation at bar, [defendant]'s motor cars were customarily and daily cruising the streets for patronage or awaiting calls of the public. It was a common carrier in transporting such patrons. But when it agreed to act as carrier of handicapped school children under agreement for its operators to escort the pupils to and from their schools and homes to the cab and to render such service exclusively for them at designated hours, the company ceased to be a common carrier while transporting the specified children during such hours." (*Hopkins v. Yellow Cab Co.* (1952) 114 Cal.App.2d 394, 398 [250 P.2d 330].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 924

2 Levy et al., California Torts, Ch. 23, *Carriers*, § 23.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 109, *Carriers*, § 109.14 (Matthew Bender)

3 California Points and Authorities, Ch. 33, *Carriers*, § 33.29 (Matthew Bender)

2 California Civil Practice: Torts §§ 28:1–28:2 (Thomson Reuters)

1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control

[*Name of plaintiff***] claims that [he/she] was harmed by an unsafe condition while employed by [***name of plaintiff's employer***] and working on [***name of defendant***]'s property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [owned/leased/occupied/controlled] the property;**

2. **That [***name of defendant***] retained control over safety conditions at the worksite;**

3. **That [***name of defendant***] negligently exercised [his/her/its] retained control over safety conditions by [***specify alleged negligent acts or omissions***];**

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

5. **That [***name of defendant***]'s negligent exercise of [his/her/its] retained control over safety conditions was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2010, December 2011, May 2017

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant retained control over the safety conditions at the worksite. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.

The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 [115 Cal.Rptr.2d 853, 38 P.3d 1081].) However, the affirmative contribution need not be active conduct but may be a failure to act. (*Id.* at p. 212, fn. 3.) "Affirmative contribution" means that there must be causation between the hirer's retained control and the plaintiff's injury. But "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act. Element 5, the standard "substantial factor" element, expresses the "affirmative contribution." requirement. (See *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594−595 [207 Cal.Rptr.3d 712] [agreeing with committee's position that "affirmatively contributed" need

not be specifically stated in instruction].)

Sources and Authority

- "We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker, supra,* 27 Cal.4th at p. 202, original italics.)

- "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette, Toland* and *Camargo* because the liability of the hirer in such a case is not ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." ' To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker, supra,* 27 Cal.4th at pp. 211–212, original italics, internal citations and footnote omitted.)

- "Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker, supra,* 27 Cal.4th at p. 212, fn. 3.)

- "If a hirer entrusts work to an independent contractor, but retains control over safety conditions at a jobsite and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries, based on its own negligent exercise of that retained control." (*Tverberg v. Fillner Constr., Inc.* (2012) 202 Cal.App.4th 1439, 1446 [136 Cal.Rptr.3d 521].)

- "A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution." (*Khosh v. Staples Construction Co., Inc.* (2016) 4 Cal.App.5th 712, 718 [208 Cal.Rptr.3d 699].)

- "Although drawn directly from case law, [plaintiff]'s proposed Special Instructions Nos. 2 and 8 are somewhat misleading in that they suggest that in order for the hirer to 'affirmatively contribute' to the plaintiff's injuries, the hirer must have engaged in some form of active direction or conduct. However, 'affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions.' The Advisory Committee on Civil Jury Instructions recognized the potential to confuse the jury by including 'affirmative contribution' language in CACI No. 1009B. The committee's Directions for Use states: 'The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. [Citation.] However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. [Citation.] The advisory committee believes that the "affirmative contribution" requirement simply means that there must be

causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.' (Directions for Use for CACI No. 1009B.) [¶] We agree with the Advisory Committee on Civil Jury Instructions that CACI No. 1009B adequately covers the 'affirmative contribution' requirement set forth in *Hooker*." (*Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 594−595 [207 Cal.Rptr.3d 712].)

- "When the employer directs that work be done by use of a particular mode or otherwise interferes with the means and methods of accomplishing the work, an affirmative contribution occurs. When the hirer does not fully delegate the task of providing a safe working environment but in some manner actively participates in how the job is done, the hirer may be held liable to the employee if its participation affirmatively contributed to the employee's injury. [¶] By contrast, passively permitting an unsafe condition to occur rather than directing it to occur does not constitute affirmative contribution. The failure to institute specific safety measures is not actionable unless there is some evidence that the hirer or the contractor had agreed to implement these measures. Thus, the failure to exercise retained control does not constitute an affirmative contribution to an injury. Such affirmative contribution must be based on a negligent exercise of control. In order for a worker to recover on a retained control theory, the hirer must engage in some active participation." (*Tverberg, supra,* 202 Cal.App.4th at p. 1446, internal citations omitted.)

- "[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must *negligently* exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor." (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777], original italics.)

- "The *Privette* line of decisions establishes a presumption that an independent contractor's hirer 'delegates to that contractor its tort law duty to provide a safe workplace for the contractor's employees.'… [T]he *Privette* presumption affects the burden of producing evidence." (*Alvarez v. Seaside Transportation Services LLC* (2017) 13 Cal.App.5th 635, 642 [221 Cal.Rptr.3d 119], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1117

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

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.12 (Matthew Bender)

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

1110. Affirmative Defense—Natural Conditions (Gov. Code, § 831.2)

A public entity is not responsible for harm caused by a natural condition of an unimproved public property. If [*name of defendant*] proves that [*name of plaintiff*]'s injury was caused by such a condition, then it is not responsible for the injury.

New September 2003

Sources and Authority

- Natural Condition of Unimproved Public Property. Government Code section 831.2.
- Public Beaches. Government Code section 831.21.
- "The immunity provided by section 831.2 is absolute and applies regardless of whether the public entity had knowledge of the dangerous condition or failed to give warning. The legislative purpose in enacting section 831.2 was to ensure that public entities will not prohibit public access to recreational areas due to the burden and expense of defending against personal injury suits and of placing such land in a safe condition." (*Goddard v. Department of Fish & Wildlife* (2015) 243 Cal.App.4th 350, 360 [196 Cal.Rptr.3d 625], internal citations omitted.)
- "The natural condition immunity applies even 'where the public entity had knowledge of a dangerous condition which amounted to a hidden trap.' As a consequence, courts have held there is no liability for failure to warn of a known dangerous condition when the danger is a natural condition of unimproved public property." (*Alana M. v. State of California* (2016) 245 Cal.App.4th 1482, 1488 [200 Cal.Rptr.3d 410], internal citation omitted.)
- "The statutory immunity extends to 'an injury *caused* by a natural condition of any unimproved public property.' The use of the term 'caused' is significant. Here, although the injury *occurred* on improved property, that is, the paved parking lot, it was *caused* by the trees, native flora located near—and perhaps superadjacent to—the improved parking lot, but themselves on unimproved property." (*Meddock v. County of Yolo* (2013) 220 Cal.App.4th 170, 177 [162 Cal.Rptr.3d 796], original italics, footnote and internal citations omitted.)
- "[T]he statute presents two fact questions: whether a condition is 'natural' and whether the property is 'unimproved' public property." (*County of San Mateo v. Superior Court* (2017) 13 Cal.App.5th 724, 731 [221 Cal.Rptr.3d 138].)
- "[T]o qualify public property as *improved* so as to take it outside the immunity statute 'some form of physical change in the condition of the property *at the location of the injury*, which justifies the conclusion that the public entity is responsible for reasonable risk management in that area, [is] required to preclude application of the immunity.' " (*Meddock, supra*, 220 Cal.App.4th at p. 178 [162 Cal.Rptr.3d 796], original italics.)

- "It is also the rule that 'improvement of a portion of a park area does not remove the immunity from the unimproved areas.' 'The reasonableness of this rule is apparent. Otherwise, the immunity as to an entire park area improved in any way would be demolished. [Citation.] This would, in turn, seriously thwart accessibility and enjoyment of public lands by discouraging the construction of such improvements as restrooms, fire rings, campsites, entrance gates, parking areas and maintenance buildings.' " (*Alana M., supra,* 245 Cal.App.4th at pp. 1488−1489.)

- "We express no opinion, however, as to whether proof of a causal link is merely sufficient to defeat immunity or, as *Alana M.* held, necessary. [Plaintiff] contends proof of a causal connection between improvements and the accident is necessary to establish that property is improved and thus accepts the burden of having to prove this. Therefore, for purposes here, we will assume without deciding that proof that human conduct or improvements created, contributed to, or exacerbated the dangerousness of a natural condition is not only a sufficient but necessary, additional element of establishing that property is 'improved.' " (*County of San Mateo, supra,* 13 Cal.App.5th at p. 740.)

- "It is now generally settled that human-altered conditions, especially those that have existed for some years, which merely duplicate models common to nature are still 'natural conditions' as a matter of law for the purposes of Government Code section 831.2." (*Tessier v. City of Newport Beach* (1990) 219 Cal.App.3d 310, 314 [268 Cal.Rptr. 233].)

- "Immunity under section 831.2 exists even where the public entity's nearby improvements together with natural forces add to the buildup of sand on a public beach." (*Morin v. County of Los Angeles* (1989) 215 Cal.App.3d 184, 188 [263 Cal.Rptr. 479].)

- "The statutory immunity is fully applicable to manmade lakes and reservoirs. Moreover, section 831.2 has been broadly construed to provide immunity even where a natural condition has been affected in some manner by human activity or nearby improvements." (*Goddard, supra,* 243 Cal.App.4th at p. 361, internal citations omitted.)

- "The mere attachment of a rope on defendant's undeveloped land by an unknown third party did not change the 'natural condition' of the land." (*Kuykendall v. State of California* (1986) 178 Cal.App.3d 563, 566 [223 Cal.Rptr. 763].)

- "Essentially, [plaintiff]'s position is she was entitled to a campsite in the forest safe from falling trees, but this 'is exactly the type of complaint section 831.2 was designed to protect public entities against.' " (*Alana M., supra,* 245 Cal.App.4th at p. 1493.)

- "The courts have generally understood campsites with amenities to be improved, including the court in *Alana M.*" (*County of San Mateo, supra,* 13 Cal.App.5th at p. 736.)

- "Given the intent of the Legislature in enacting section 831.2, we hold that wild animals are a natural part of the condition of unimproved public property within the meaning of the statute." (*Arroyo, supra,* 34 Cal.App.4th at p. 762.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 250, 256

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, *Liability For "Dangerous Conditions" Of Public Property*, ¶ 2:2825 et seq. (The Rutter Group)

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) §§ 12.82–12.87

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

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

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.214 (Matthew Bender)

1120. Failure to Provide Traffic Control Signals (Gov. Code, § 830.4)

You may not find that [*name of defendant***]'s property was in a dangerous condition just because it did not provide a [***insert device or marking***]. However, you may consider the lack of a [***insert device or marking***], along with other circumstances shown by the evidence, in determining whether [***name of defendant***]'s property was dangerous.**

New September 2003

Sources and Authority

- No Liability for Failure to Provide Traffic Controls. Government Code section 830.4.

- " '[T]he statutory scheme precludes a plaintiff from imposing liability on a public entity for creating a dangerous condition merely because it did not install the described traffic control devices.' In short, '[t]he lack of a traffic signal at the intersection does not constitute proof of a dangerous condition.' " (*Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 135 [142 Cal.Rptr.3d 633], internal citation omitted.)

- "Cases interpreting this statute have held that it provides a shield against liability only in those situations where the alleged dangerous condition exists solely as a result of the public entity's failure to provide a regulatory traffic device or street marking. If a traffic intersection is dangerous for reasons other than the failure to provide regulatory signals or street markings, the statute provides no immunity." (*Washington v. City and County of San Francisco* (1990) 219 Cal.App.3d 1531, 1534-1535 [269 Cal.Rptr. 58].)

- "A public entity does not create a dangerous condition on its property 'merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs ... .' (§ 830.4.) If, on the other hand, the government installs traffic signals and invites the public to justifiably rely on them, liability will attach if the signals malfunction, confusing or misleading motorists, and causing an accident to occur. The reasoning behind this rule is that the government creates a dangerous condition and a trap when it operates traffic signals that, for example, direct motorists to 'go' in all four directions of an intersection simultaneously, with predictable results." (*Chowdhury v. City of Los Angeles* (1995) 38 Cal.App.4th 1187, 1194-1195 [45 Cal.Rptr.2d 657], internal citations omitted.)

- "If the government turns off traffic signals entirely to avoid confusion, liability does not attach. 'When the [traffic] lights were turned off, their defective condition could no longer mislead or misdirect the injured party.' The same result obtains whether the traffic signals are extinguished by design or by accident." (*Chowdhury, supra,* 38 Cal.App.4th at p. 1195, internal citations omitted.)

- "Although section 830.4 ... provides that a condition of public property is not a dangerous one merely because of the failure to provide regulatory traffic control signals, the absence of such signals for the protection of pedestrians must be taken into consideration, together with other factors. ... [T]he lack

of crosswalk markings, better illumination and warning signs became important factors in the case when the [pedestrian] subway itself was in a dangerous condition." (*Gardner v. City of San Jose* (1967) 248 Cal.App.2d 798, 803 [57 Cal.Rptr. 176].)

- "In short, a dangerous condition proven to exist, for reasons other than or in addition to the mere failure to provide the controls or markings described in section 830.4, may constitute a proximate cause of injury without regard to whether such condition also constitutes a 'trap,' as described by section 830.8, to one using the public improvement with due care because of the failure to post signs different from those dealt with by section 830.4 warning of that dangerous condition." (*Washington, supra,* 219 Cal.App.3d at p. 1537.)

- "[D]efendant did not cite, nor have we located, any authority to extend this statutory immunity to a private entity alleged to have been negligent. To the contrary, a defendant that 'is not a "public entity" … is not entitled to claim the immunity set forth in the Tort Claims Act.' " (*Lichtman v. Siemens Industry Inc.* (2017) 16 Cal.App.5th 914, 930 [224 Cal.Rptr.3d 725].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 264

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) § 12.75

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[4] (Matthew Bender)

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

19A California Points and Authorities, Ch. 196, *Public Entities*, §§ 196.12, 196.210 (Matthew Bender)

1205. Strict Liability—Failure to Warn—Essential Factual Elements

[*Name of plaintiff***] claims that the [***product***] lacked sufficient [instructions] [or] [warning of potential [risks/side effects/allergic reactions]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That the [***product***] had potential [risks/side effects/allergic reactions] that were [known/ [or] knowable in light of the [scientific/ [and] medical] knowledge that was generally accepted in the scientific community] at the time of [manufacture/distribution/sale];**

3. **That the potential [risks/side effects/allergic reactions] presented a substantial danger when the [***product***] is used or misused in an intended or reasonably foreseeable way;**

4. **That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];**

5. **That [***name of defendant***] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];**

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

7. **That the lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [***name of plaintiff***]'s harm.**

[The warning must be given to the prescribing physician and must include the potential risks, side effects, or allergic reactions that may follow the foreseeable use of the product. [*Name of defendant***] had a continuing duty to warn physicians as long as the product was in use.]**

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

Directions for Use

With regard to element 2, it has been often stated in the case law that a manufacturer is liable for failure to warn of a risk that is "knowable in light of generally recognized and prevailing best scientific and medical knowledge available." (See, e.g., *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002 [281 Cal.Rptr. 528, 810 P.2d 549]; *Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347]; *Saller v. Crown Cork & Seal Company* (2010) 187 Cal.App.4th 1220, 1239 [115 Cal.Rptr.3d 151]; *Rosa v. City of Seaside* (N.D. Cal. 2009) 675 F.Supp.2d 1006, 1012.) The advisory committee believes that this standard is captured by the phrase "generally accepted in the scientific community." A risk may be "generally recognized" as a view (knowledge) advanced by one

body of scientific thought and experiment, but it may not be the "prevailing" or "best" scientific view; that is, it may be a minority view. The committee believes that when a risk is (1) generally recognized (2) as prevailing in the relevant scientific community, and (3) represents the best scholarship available, it is sufficient to say that the risk is knowable in light of "the generally accepted" scientific knowledge.

The last bracketed paragraph should be read only in prescription product cases: In the case of *prescription drugs* and *implants*, the physician stands in the shoes of the ordinary user because it is through the physician that a patient learns of the properties and proper use of the drug or implant. Thus, the duty to warn in these cases runs to the physician, not the patient. (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App 5th 276, 319 [213 Cal.Rptr.3d 82], original italics.)

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

Sources and Authority

- "Our law recognizes that even ' "a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes 'defective' simply by the absence of a warning." …' Thus, manufacturers have a duty to warn consumers about the hazards inherent in their products. The purpose of requiring adequate warnings is to inform consumers about a product's hazards and faults of which they are unaware, so that the consumer may then either refrain from using the product altogether or avoid the danger by careful use." (*Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 577 [90 Cal.Rptr.3d 414], internal citations and footnote omitted.)

- "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299].)

- "The 'known or knowable' standard arguably derives from negligence principles, and failure to warn claims are generally ' "rooted in negligence" to a greater extent than' manufacturing or design defect claims. Unlike those other defects, a ' "warning defect" relates to a failure extraneous to the product itself' and can only be assessed by examining the manufacturer's conduct. These principles notwithstanding, California law recognizes separate failure to warn claims under both strict liability and negligence theories. In general, a product seller will be *strictly liable* for failure to warn if a

warning was feasible and the absence of a warning caused the plaintiff's injury. Reasonableness of the seller's failure to warn is immaterial in the strict liability context. Conversely, to prevail on a claim for *negligent* failure to warn, the plaintiff must prove that the seller's conduct fell below the standard of care. If a prudent seller would have acted reasonably in not giving a warning, the seller will not have been negligent." (*Webb v. Special Electric Co., Inc.* (2016) 63 Cal.4th 167, 181 [202 Cal.Rptr.3d 460, 370 P.3d 1022], original italics, footnote and internal citations omitted.)

- "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. … [¶] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418].)

- "The actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue. We view the standard to require that the manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances." (*Carlin, supra,* 13 Cal.4th at p. 1113, fn. 3.)

- "[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution." (*Anderson, supra,* 53 Cal.3d at p. 1004.)

- "[T]here can be no liability for failure to warn where the instructions or warnings sufficiently alert the user to the possibility of danger." (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1042 [228 Cal.Rptr. 768], internal citation omitted.)

- "A duty to warn or disclose danger arises when an article is or should be known to be dangerous for its intended use, either inherently or because of defects." (*DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 343 [195 Cal.Rptr. 867], internal citation omitted.)

- " California is well settled into the majority view that knowledge, actual or constructive, is a requisite for strict liability for failure to warn ... ." (*Anderson, supra*, 53 Cal.3d at p. 1000.)

- "[T]he duty to warn is not conditioned upon [actual or constructive] knowledge [of a danger] where the defectiveness of a product depends on the adequacy of instructions furnished by the supplier which are essential to the assembly and use of its product." (*Midgley v. S. S. Kresge Co.* (1976) 55 Cal.App.3d 67, 74 [127 Cal.Rptr. 217].)

- Under *Cronin,* plaintiffs in cases involving manufacturing and design defects do not have to prove that a defect made a product unreasonably dangerous; however, that case "did not preclude weighing the degree of dangerousness in the failure to warn cases." (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 343 [157 Cal.Rptr. 142].)

- "Two types of warnings may be given. If the product's dangers may be avoided or mitigated by proper use of the product, 'the manufacturer may be required adequately to instruct the consumer as to how the product should be used.' If the risks involved in the use of the product are unavoidable, as in the case of potential side effects of prescription drugs, the supplier must give an adequate warning to enable the potential user to make an informed choice whether to use the product or abstain." (*Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522, 532 [166 Cal.Rptr.3d 202], internal citation omitted.)

- "[T]he warning requirement is not limited to unreasonably or unavoidably dangerous products. Rather, directions or warnings are in order where reasonably required *to prevent the use of a product from becoming unreasonably dangerous*. It is the lack of such a warning which renders a product unreasonably dangerous and therefore defective." (*Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143, 1151 [238 Cal.Rptr. 18], original italics.)

- "In most cases, ... the adequacy of a warning is a question of fact for the jury." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320 [273 Cal.Rptr. 214].)

- "There is no duty to warn of known risks or obvious dangers." (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1304 [144 Cal.Rptr.3d 326].)

- "In the context of prescription drugs, a manufacturer's duty is to warn physicians about the risks known or reasonably known to the manufacturer. The manufacturer has no duty to warn of risks that are 'merely speculative or conjectural, or so remote and insignificant as to be negligible.' " (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 164 [226 Cal.Rptr.3d 336, 407 P.3d 18], internal citations omitted.)

- "[A] pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community." (*Carlin, supra,* 13 Cal.4th at p. 1116.)

- "To be liable in California, even under a strict liability theory, the plaintiff must prove that the defendant's failure to warn was a substantial factor in causing his or her injury. (CACI No. 1205.) The natural corollary to this requirement is that a defendant is not liable to a plaintiff if the injury would have occurred even if the defendant had issued adequate warnings." (*Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1604 [116 Cal.Rptr.3d 453].)

- "When a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning. 'Modern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so.' " (*Persons v. Salomon N. Am.* (1990) 217 Cal.App.3d 168, 178 [265 Cal.Rptr. 773], internal citation omitted.)

- "[A] manufacturer's liability to the ultimate consumer may be extinguished by 'intervening cause' where the manufacturer either provides adequate warnings to a middleman or the middleman alters the product before passing it to the final consumer." (*Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 661 [74 Cal.Rptr.3d 359].)

- " 'A manufacturer's duty to warn is a continuous duty which lasts as long as the product is in use.' [¶] ... [T]he manufacturer must continue to provide physicians with warnings, at least so long as it is manufacturing and distributing the product." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1482 [81 Cal.Rptr.2d 252].)

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

- "California law does not impose a duty to warn about dangers arising entirely from another manufacturer's product, even if it is foreseeable that the products will be used together." (*O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 361 [135 Cal.Rptr.3d 288, 266 P.3d 987].)

- "The *O'Neil* [*supra*] court concluded that *Tellez-Cordova* [*Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal.App.4th 577] marked an exception to the general rule barring imposition of strict liability on a manufacturer for harm caused by another manufacturer's product. That exception is applicable when 'the defendant's own product contributed substantially to the harm … .' In expounding the exception, the court rejected the notion that imposition of strict liability on manufacturers is appropriate when it is merely foreseeable that their products will be used in conjunction with products made or sold by others. The *O'Neil* court further explained: 'Recognizing a duty to warn was appropriate in *Tellez-Cordova* because there the defendant's product was intended to be used with another product *for the very activity that created a hazardous situation.* Where the intended use of a product inevitably creates a hazardous situation, it is reasonable to expect the manufacturer to give warnings. Conversely, where the hazard arises entirely from another product, and the defendant's product does not create or contribute to that hazard, liability is not appropriate.' " (*Sherman v. Hennessy Industries, Inc.* (2015) 237 Cal.App.4th 1133, 1142 [188 Cal.Rptr.3d 769], original italics, internal citations omitted ; see also *Hetzel v. Hennessy Industries, Inc.* (2016) 247 Cal.App.4th 521, 529 [202 Cal.Rptr.3d 310] [*O'Neil* does not require evidence of exclusive use, but rather requires a showing of inevitable use]; *Rondon v. Hennessy Industries, Inc.* (2016) 247 Cal.App.4th 1367, 1379 [202 Cal.Rptr.3d 773] [same].)

- "[L]ike a manufacturer, a raw material supplier has a duty to warn about product risks that are known or knowable in light of available medical and scientific knowledge." (*Webb, supra*, 63 Cal.4th at p. 181.)

- [T]he duty of a component manufacturer or supplier to warn about the hazards of its products is not unlimited. … 'Making suppliers of inherently safe raw materials and component parts pay for the mistakes of the finished product manufacturer would not only be unfair, but it also would impose and intolerable burden on the business world . . . . Suppliers of versatile materials like chains, valves, sand gravel, etc., cannot be expected to become experts in the infinite number of finished products that might conceivably incorporate their multi-use raw materials or components.' Thus, cases have subjected claims made against component suppliers to two related doctrines, the 'raw material

supplier defense' and 'the bulk sales/sophisticated purchaser rule.' Although the doctrines are distinct, their application oftentimes overlaps and together they present factors which should be carefully considered in evaluating the liability of component suppliers. Those factors include whether the raw materials or components are inherently dangerous, whether the materials are significantly altered before integration into an end product, whether the supplier was involved in designing the end-product and whether the manufacturer of the end product was in a position to discover and disclose hazards." (*Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 837 [71 Cal.Rptr.2d 817].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1631–1643

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability for Defective Products*, ¶¶ 2:1275–2:1276 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.05 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.164 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.194 (Matthew Bender)

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.)

- "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].)

- "In the context of prescription drugs, a manufacturer's duty is to warn physicians about the risks known or reasonably known to the manufacturer. The manufacturer has no duty to warn of risks that are 'merely speculative or conjectural, or so remote and insignificant as to be negligible.' If the manufacturer provides an adequate warning to the prescribing physician, the manufacturer need not communicate a warning directly to the patient who uses the drug." (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 164 [226 Cal.Rptr.3d 336, 407 P.3d 18], internal citations omitted.)

- "Because the same warning label must appear on the brand-name drug as well as its generic bioequivalent, a brand-name drug manufacturer owes a duty of reasonable care in ensuring that the label includes appropriate warnings, regardless of whether the end user has been dispensed the brand-name drug or its generic bioequivalent. If the person exposed to the generic drug can reasonably allege that the brand-name drug manufacturer's failure to update its warning label foreseeably and proximately caused physical injury, then the brand-name manufacturer's liability for its own negligence does not automatically terminate merely because the brand-name manufacturer transferred its rights in the brand-name drug to a successor manufacturer." (*T.H.*, *supra*, 4 Cal.5th at p. 156.)

Secondary Sources

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

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)

1402. False Arrest Without Warrant—Affirmative Defense—Peace Officer—Probable Cause to Arrest

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[*Name of defendant***] claims the arrest was not wrongful because [he/she] had the authority to arrest [***name of plaintiff***] without a warrant.**

[If [*name of defendant***] proves that [***insert facts that, if proved, would constitute reasonable cause to believe that plaintiff had committed a crime in defendant's presence***], then [***name of defendant***] had the authority to arrest [***name of plaintiff***] without a warrant.]**

[*or***]**

[If [*name of defendant***] proves that [***insert facts that, if proved, would establish that defendant had reasonable cause to believe that plaintiff had committed a felony, whether or not a felony had actually been committed***], then [***name of defendant***] had the authority to arrest [***name of plaintiff***] without a warrant.]**

New September 2003

Directions for Use

In the brackets, the judge must insert the fact or facts that are actually controverted and that may be necessary to arrive at the probable cause determination. There may be one or more facts or combinations of facts that are necessary to make this determination, in which case they can be phrased in the alternative.

If a criminal act is alleged as justification, it may be necessary to instruct whether the crime is a felony, misdemeanor, or public offense.

Penal Code section 836 provides, in part, that a warrantless arrest may be made if a person has committed a felony, although not in the officer's presence. While the requirement of probable cause is not explicitly stated, it would seem that the officer must always have probable cause at the time of the arrest and that subsequent conviction of a felony does not sanitize an improper arrest.

If the first bracketed paragraph is used, the judge should include "in the officer's presence" as part of the facts that the jury needs to find if there is a factual dispute on this point.

Sources and Authority

- Arrest Without a Warrant. Penal Code section 836(a).
- Felonies and Misdemeanors. Penal Code section 17(a).
- "Peace Officers" Defined. Penal Code section 830 et seq.

- "An officer is not liable for false imprisonment for the arrest without a warrant of a person whom he has reasonable grounds to believe is guilty of a crime. ~~The question of the existence of probable cause to believe that one is guilty of a crime must be determined as a matter of law from the facts and circumstances of the case.~~" (*Allen v. McCoy* (1933) 135 Cal.App. 500, 507–508 [27 P.2d 423].)

- "It has long been the law that a cause of action for false imprisonment is stated where it is alleged that there was an arrest without process, followed by imprisonment and damages. Upon proof of those facts the burden is on the defendant to prove justification for the arrest. Considerations of both a practical and policy nature underlie this rule. The existence of justification is a matter which ordinarily lies peculiarly within the knowledge of the defendant. The plaintiff would encounter almost insurmountable practical problems in attempting to prove the negative proposition of the nonexistence of any justification. This rule also serves to assure that official intermeddling is justified, for it is a serious matter to accuse someone of committing a crime and to arrest him without the protection of the warrant process." (*Cervantez v. J. C. Penney Co.* (1979) 24 Cal.3d 579, 592 [156 Cal.Rptr. 198, 595 P.2d 975], footnote and internal citations omitted.)

- "We look to whether facts known to the arresting officer 'at the moment the arrest was made' ' "would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime." ' " (*Cornell v. City & County of San Francisco* (2017) 17 Cal.App.5th 766, 779 [225 Cal.Rptr.3d 356~~The existence of probable cause depends upon facts known by the arresting officer at the time of the arrest." (*Hamilton v. City of San Diego* (1990) 217 Cal.App.3d 838, 844 [266 Cal.Rptr. 215~~], internal citations omitted.)

- "If the facts that gave rise to the arrest are undisputed, the issue of probable cause is a question of law for the trial court. When, however, the facts that gave rise to the arrest are controverted, the trial court must instruct the jury as to what facts, if established, would constitute probable cause. 'The trier of fact's function in false arrest cases is to resolve conflicts in the evidence. Accordingly, where the evidence is conflicting with respect to probable cause, " 'it [is] the duty of the court to instruct the jury as to what facts, if established, would constitute probable cause.' " … The jury then decides whether the evidence supports the necessary factual findings.' " (*Levin v. United Air Lines, Inc.* (2008) 158 Cal.App.4th 1002, 1018–1019 [70 Cal.Rptr.3d 535], internal citations omitted.)

- "The legal standard we apply to assess probable cause is an objective one in which the subjective motivations of the arresting officers have no role. But it is an overstatement to say that what is in the mind of an arresting officer is wholly irrelevant, for the objective test of reasonableness is simply a measure by which we assess whether the circumstances as subjectively perceived by the officer provide a reasonable basis for the seizure." (*Cornell*, *supra*, 17 Cal.App.5th at p. 779, internal citations omitted.)

- " 'Presence' is not mere physical proximity but is determined by whether the offense is apparent to the officer's senses." (*People v. Sjosten* (1968) 262 Cal.App.2d 539, 543–544 [68 Cal.Rptr. 832], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 436, 438

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, § 42.23 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.20 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.65 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 13:22–13:24 (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].)

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].)

- " 'The purpose of the rule requiring proof of special damages when the defamatory meaning does not appear on the face of the language used is to protect publishers who make statements innocent in themselves that are defamatory only because of extrinsic facts known to the reader.' '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')." [Citation.] "The office of an innuendo is to declare what the words *meant* to those to whom they were published." "In order to plead … ambiguous language into an actionable libel … it is incumbent upon the plaintiff also to plead an inducement, that is to say, circumstances which would indicate that the words *were understood* in a defamatory sense *showing that the situation or opinion of the readers was such that they derived a defamatory meaning* from them. [Citation.]" ' " (*Bartholomew v. YouTube, LLC.* (2017) 17 Cal.App.5th 1217, 1227 [225 Cal.Rptr.3d 917~~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~~], original italics, internal citations omitted.)

- "For libel per quod, which [plaintiff] herself emphasizes is the cause of action at issue here, it is 'necessary that the words should have been published concerning the plaintiff and should have been understood by at least one third person to have concerned him [or her]. [Citations.] "Defamatory words to be actionable must refer to some ascertained or ascertainable person, and that person must be plaintiff [citations]. If the words used really contain no reflection upon any particular individual, no averment can make them defamatory. It is not necessary that plaintiff should be mentioned by name if the words used in describing the person meant, can be shown to have referred to him and to have been so understood [citation]." [Citation].' ' "It is the office of the inducement to narrate the extrinsic circumstances which, coupled with the language published, affect its construction and render it actionable, where, standing alone and not thus explained, the language would appear either not to concern the plaintiff, or, if concerning him, not to affect him injuriously. [Citation.]" ' " (Bartholomew, supra, 17 Cal.App.5th at p. 1231, internal citation 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 (11th ed. 2017) Torts, §§ 623–654, 705–718

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].)

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.)

- "Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehood on a less demanding showing than that required by *New York Times*. This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."~~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~~–~~349 [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 v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 74~~2~~7 [257 Cal.Rptr. 708, 771 P.2d 406]~~*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 (10th ed. 2005) Torts, §§ 529–555, 613–615

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)

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).**

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." [Citations.]' " (*Hui v. Sturbaum* (2014) 222 Cal.App.4th 1109, 1118−1119 [166 Cal.Rptr.3d 569].)

- "This definition is not exclusive, however, and the cases have taken an 'eclectic approach' toward

interpreting the statute." (*Klem v. Access Ins. Co.* (2017) 17 Cal.App.5th 595, 617 [225 Cal.Rptr.3d 711].)

- "Communications made in a commercial setting relating to the conduct of an employee have been held to fall squarely within the qualified privilege for communications to interested persons." (*Cornell v. Berkeley Tennis Club* (2017) 18 Cal.App.5th 908, 949 [227 Cal.Rptr.3d 286].)

- "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].)

- "[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 focuses upon the defendant's state of mind, not his [or her] conduct." (*Cornell, supra*, 18 Cal.App.5th at p. 951.)

- "[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) Torts, §§ 92, 655, 690–704

Chin, et al., California Practice Guide: Employment Litigation, Ch. 5(I)-D, *Employment Torts And Related Claims—Defamation*, ¶ 5:471 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)

1803. Appropriation of Name or Likeness—Essential Factual Elements

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

1. **That [***name of defendant***] used [***name of plaintiff***]'s name, likeness, or identity;**
2. **That [***name of plaintiff***] did not consent to this use;**

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

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

New September 2003; Revised December 2014, November 2017

Directions for Use

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

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

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

Even if the elements are established, the First Amendment may require that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information. (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409 [114 Cal.Rptr.2d 307].) In a closely related right-of-publicity claim, the California Supreme Court has held that an artist who is faced with a challenge to his or her work may raise as affirmative defense that the work is protected by the First Amendment because it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; see CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III)*.) Therefore, if there is an issue of fact regarding a First Amendment balancing test, it most probably should be considered to be an affirmative defense. (Cf. *Gionfriddo, supra,* 94 Cal.App.4th at p. 414 ["Given the significant public interest in this sport, plaintiffs can only prevail if they demonstrate a substantial competing interest."].)

Sources and Authority

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

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

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

- "[B]oth the statutory and common law versions of a right of publicity claim require that the defendant actually use the plaintiff's likeness … ." (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 210 [222 Cal.Rptr.3d 250].)

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

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

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

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

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

- "Even if each of these elements is established, however, the common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409-410, internal citations and footnote omitted.)

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

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

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 784–786

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

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

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

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

1804A. Use of Name or Likeness (Civ. Code, § 3344)

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

1. **That [***name of defendant***] knowingly used [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] [on merchandise/ [or] to advertise or sell [***describe what is being advertised or sold***]];**

2. **That the use did not occur in connection with a news, public affairs, or sports broadcast or account, or with a political campaign;**

3. **That [***name of defendant***] did not have [***name of plaintiff***]'s consent;**

4. **That [***name of defendant***]'s use of [***name of plaintiff***]'s [name/voice/signature/photograph/likeness] was directly connected to [***name of defendant***]'s commercial purpose;**

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

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

Derived from former CACI No. 1804 April 2008; Revised April 2009

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing. One's name and likeness are protected under both the common law and under Civil Code section 3344. As the statutory remedy is cumulative (Civ. Code, § 3344(g)), both this instruction and CACI No. 1803, *Appropriation of Name or Likeness*, which sets forth the common-law cause of action, will normally be given.

Different standards apply if the use is in connection with a news, public affairs, or sports broadcast or account, or with a political campaign. (See Civ. Code, § 3344(d); *Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 421–426 [198 Cal.Rptr. 342].) The plaintiff bears the burden of proving the nonapplicability of these exceptions. (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 416–417 [114 Cal.Rptr.2d 307].) Element 2 may be omitted if there is no question of fact with regard to this issue. See CACI No. 1804B, *Use of Name or Likeness—Use in Connection With News, Public Affairs, or Sports Broadcast or Account, or Political Campaign*, for an instruction to use if one of the exceptions of Civil Code section 3344(d) applies.

If plaintiff alleges that the use was not covered by Civil Code section 3344(d) (e.g., not a "news"

account) but that even if it were covered it is not protected under the standards of *Eastwood*, then both this instruction and CACI No. 1804B should be given in the alternative. In that case, it should be made clear to the jury that if the plaintiff fails to prove the inapplicability of Civil Code section 3344(d) as set forth in element 2, the claim is still viable if the plaintiff proves all the elements of CACI No. 1804B.

Note that a plaintiff is entitled to the sum of $750 under Civil Code section 3344(a) even if actual damages are not proven. (See *Miller v. Collectors Universe, Inc.* (2008) 159 Cal.App.4th 988, 1008 [72 Cal.Rptr.3d 194] [claim for 14,060 misappropriations of plaintiff's name under section 3344(a) constitutes single cause of action for which statutory damages are $750].)

Sources and Authority

- Liability for Use of Name or Likeness. Civil Code section 3344.

- "Civil Code section 3344 provides a statutory cause of action for commercial misappropriation that complements, rather than codifies, the common law misappropriation cause of action." (*Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 13 [206 Cal.Rptr.3d 884].)

- "[C]alifornia's appropriation statute is not limited to celebrity plaintiffs." (*KNB Enters v. Matthews* (2000)78 Cal.App.4th 362, 367 [92 Cal.Rptr.2d 713].)

- "There are two vehicles a plaintiff can use to protect this right: a common law cause of action for commercial misappropriation and a section 3344 claim. To prove the common law cause of action, the plaintiff must establish: ' "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." [Citation.]' To prove the statutory remedy, a plaintiff must present evidence of 'all the elements of the common law cause of action' and must also prove 'a knowing use by the defendant as well as a direct connection between the alleged use and the commercial purpose.' " (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 544 [135 Cal.Rptr.3d 200], internal citations omitted.)

- "The differences between the common law and statutory actions are: (1) Section 3344, subdivision (a) requires a knowing use whereas under case law, mistake and inadvertence are not a defense against commercial appropriation; and (2) Section 3344, subdivision (g) expressly provides that its remedies are cumulative and in addition to any provided for by law." (*Eastwood, supra,* 149 Cal.App.3d at p. 417, fn. 6, internal citation omitted.)

- "[B]oth the statutory and common law versions of a right of publicity claim require that the defendant actually use the plaintiff's likeness … ." (*Cross v. Facebook, Inc.* (2017) 14 Cal.App.5th 190, 210 [222 Cal.Rptr.3d 250].)

- "Plaintiffs assert that Civil Code section 3344's 'commercial use' requirement does not need to 'involve some form of advertising or endorsement.' This is simply incorrect, as Civil Code section 3344, subdivision (a) explicitly provides for possible liability on '[a]ny person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner … for purposes of advertising … without such person's prior consent.' The statute requires some 'use' by the advertiser

aimed at obtaining a commercial advantage for the advertiser." (*Cross, supra*, 14 Cal.App.5th at p. 210.)

- "[T]he single-publication rule as codified in [Civil Code] section 3425.3 applies, in general, to a cause of action for unauthorized commercial use of likeness." (*Christoff v. Nestle USA, Inc.* (2009) 47 Cal.4th 468, 476 [97 Cal.Rptr.3d 798, 213 P.3d 132].)

- "Any facts which tend to disprove one of the allegations raised in a complaint may be offered in the defendant's answer based upon a general denial and need not be raised by affirmative defense. ... Throughout this litigation plaintiffs have borne the burden of establishing that their names and likenesses were used in violation of section 3344, and this burden has always required proof that the disputed uses fell outside the exemptions granted by subdivision (d)." (*Gionfriddo, supra*, 94 Cal.App.4th at pp. 416–417, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 681–683

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-K, *Invasion Of Privacy*, ¶¶ 5:710–5:891 (The Rutter Group)

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

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

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, §§ 184.22–184.24 (Matthew Bender)

1 California Civil Practice: Torts § 20:17 (Thomson Reuters)

1900. Intentional Misrepresentation

[*Name of plaintiff***] claims that [***name of defendant***] made a false representation that harmed [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] represented to [***name of plaintiff***] that a fact was true;**

2. **That [***name of defendant***]'s representation was false;**

3. **That [***name of defendant***] knew that the representation was false when [he/she] made it, or that [he/she] made the representation recklessly and without regard for its truth;**

4. **That [***name of defendant***] intended that [***name of plaintiff***] rely on the representation;**

5. **That [***name of plaintiff***] reasonably relied on [***name of defendant***]'s representation;**

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

7. **That [***name of plaintiff***]'s reliance on [***name of defendant***]'s representation was a substantial factor in causing [his/her/its] harm.**

New September 2003; Revised December 2012, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made an intentional misrepresentation of fact. (See Civ. Code, § 1710(1).) If element 5 is contested, give CACI No. 1907, *Reliance*, and CACI No. 1908, *Reasonable Reliance*. If it is disputed that a representation was made, the jury should be instructed that "a representation may be made orally, in writing, or by nonverbal conduct." (See *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567 [54 Cal.Rptr.2d 468].)

The representation must ordinarily be an affirmation of fact, as opposed to an opinion. (See *Cohen v. S&S Construction Co.* (1983) 151 Cal.App.3d 941, 946 [201 Cal.Rptr. 173].) Opinions are addressed in CACI No. 1904, *Opinions as Statements of Fact.*

Sources and Authority

- Actionable Deceit. Civil Code section 1709.
- Intentional Misrepresentation. Civil Code section 1710(1).

- Fraud in Contract Formation. Civil Code section 1572.

- "The elements of fraud that will give rise to a tort action for deceit are: '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal quotation marks omitted.)

- "A complaint for fraud must allege the following elements: (1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816 [52 Cal.Rptr.2d 650] [combining misrepresentation and scienter as a single element].)

- "Puffing," or sales talk, is generally considered opinion, unless it involves a representation of product safety. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 112 [120 Cal.Rptr. 681, 534 P.2d 377].)

- "Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 482 [80 Cal.Rptr.2d 329], internal citations omitted.)

- "[F]raudulent intent is an issue for the trier of fact to decide." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1061 [141 Cal.Rptr.3d 142].)

- "[T]he trial court failed to consider that a cause of action based in fraud may arise from conduct that is designed to mislead, and not only from verbal or written statements." (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 839 [199 Cal.Rptr.3d 901].)

- "[A] cause of action for misrepresentation requires an affirmative statement, not an implied assertion." (*RSB Vineyards, LLC v. Orsi* (2017) 15 Cal.App.5th 1089, 1102 [223 Cal.Rptr.3d 458].)

- " '[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.' " (*Engalla, supra,* 15 Cal.4th at p. 974, quoting *Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 55 [30 Cal.Rptr. 629].)

- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith, supra,* 205 Cal.App.4th at p. 1062.)

- "A 'complete causal relationship' between the fraud or deceit and the plaintiff's damages is required. ... Causation requires proof that the defendant's conduct was a ' "substantial factor" ' in bringing about the harm to the plaintiff." (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132 [39 Cal.Rptr.2d

658], internal citations omitted.)

- " ' " ' "Misrepresentation, even maliciously committed, does not support a cause of action unless the plaintiff suffered consequential damages." ' " [Citation.]' [Citation.] Indeed, ' " '[a]ssuming … a claimant's reliance on the actionable misrepresentation, no liability attaches if the damages sustained were otherwise inevitable or due to unrelated causes.' [Citation.]" [Citation.] [If the defrauded plaintiff would have suffered the alleged damage even in the absence of the fraudulent inducement, causation cannot be alleged and a fraud cause of action cannot be sustained.' " (*Orcilla v. Big Sur, Inc.* (2016) 244 Cal.App.4th 982, 1008 [198 Cal.Rptr.3d 715].)

- "The law is well established that actionable misrepresentations must pertain to past or existing material facts. Statements or predictions regarding future events are deemed to be mere opinions which are not actionable." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469 [169 Cal.Rptr.3d 619], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 243, 767–817, 821, 822, 826

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.02, 40.05 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.19 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.80 et seq. (Matthew Bender)

2 California Civil Practice: Torts, § 22:12 (Thomson Reuters)

1903. Negligent Misrepresentation

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of defendant***] negligently misrepresented a fact. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] represented to [***name of plaintiff***] that a fact was true;**

2. **That [***name of defendant***]'s representation was not true;**

3. **That [although [***name of defendant***] may have honestly believed that the representation was true,] [[***name of defendant***]/he/she] had no reasonable grounds for believing the representation was true when [he/she] made it;**

4. **That [***name of defendant***] intended that [***name of plaintiff***] rely on this representation;**

5. **That [***name of plaintiff***] reasonably relied on [***name of defendant***]'s representation;**

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

7. **That [***name of plaintiff***]'s reliance on [***name of defendant***]'s representation was a substantial factor in causing [his/her/its] harm.**

New September 2003; Revised December 2009, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made certain representations with no reason to believe that they were true. (See Civ. Code, § 1710(2).) If element 5 is contested, give CACI No. 1907, *Reliance,* and CACI No. 1908, *Reasonable Reliance.*

If both negligent misrepresentation and intentional misrepresentation are alleged in the alternative, give both this instruction and CACI No.1900, *Intentional Misrepresentation.* If only negligent misrepresentation is alleged, the bracketed reference to the defendant's honest belief in the truth of the representation in element 3 may be omitted. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

Sources and Authority

- Negligent Misrepresentation. Civil Code section 1710.

- "Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit. 'Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit.' " (*Bily, supra,* 3 Cal.4th at pp. 407, internal citations omitted.)

- "This is not merely a case where the defendants made false representations of matters within their personal knowledge which they had *no reasonable grounds for believing to be true*. Such acts clearly would constitute actual fraud under California law. In such situations the defendant *believes* the representations to be true but is without reasonable grounds for such belief. His liability is based on negligent misrepresentation which has been made a form of actionable deceit. On the contrary, in the instant case, the court found that the defendants *did not believe* in the truth of the statements. Where a person makes statements which he does not believe to be true, in a reckless manner without knowing whether they are true or false, the element of scienter is satisfied and he is liable for intentional misrepresentation." (*Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 57 [30 Cal.Rptr. 629], original italics, internal citations omitted.)

- "The elements of negligent misrepresentation are (1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196 [147 Cal.Rptr.3d 41].)

- " 'To be actionable deceit, the representation need not be made with knowledge of actual falsity, but need only be an "assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true" and made "with intent to induce [the recipient] to alter his position to his injury or his risk. ..." ' The elements of negligent misrepresentation also include justifiable reliance on the representation, and resulting damage." (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 834 [64 Cal.Rptr.2d 335], internal citations omitted.)

- "[Plaintiffs] do not allege negligence. They allege negligent misrepresentation. They are different torts, as the Supreme Court expressly observed in [*Bily, supra,* 3 Cal.4th at p. 407]: '[N]either the courts (ourselves included), the commentators, nor the authors of the Restatement Second of Torts have made clear or careful distinctions between the tort of negligence and the separate tort of negligent misrepresentation. The distinction is important not only because of the different statutory bases of the two torts, but also because it has practical implications for the trial of cases in complex areas … . [¶] Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit.' In short, the elements of each tort are different. Perhaps more importantly, the policies behind each tort sometimes call for different results even when applied to the same conduct." (*Bock v. Hansen* (2014) 225 Cal.App.4th 215, 227−228 [170 Cal.Rptr.3d 293].)

- "As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise, owed by a defendant to the injured person. The determination of whether a duty exists is primarily a question of law." (*Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864 [245 Cal.Rptr. 211], internal citations omitted.)

- "The tort of negligent misrepresentation is similar to fraud, except that it does not require scienter or an intent to defraud. … [T]he same elements of intentional fraud also comprise a cause of action for negligent misrepresentation, with the exception that there is no requirement of intent to induce reliance … ." (*Tenet Healthsystem Desert, Inc. v. Blue Cross of California* (2016) 245 Cal.App.4th 821, 845 [199 Cal.Rptr.3d 901], internal citation omitted.)

- " ' "Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit." ' If defendant's belief 'is both honest and reasonable, the misrepresentation is innocent and there is no tort liability.' " (*Diediker v. Peelle Financial Corp.* (1997) 60 Cal.App.4th 288, 297 [70 Cal.Rptr.2d 442], internal citations omitted.)

- "[A] cause of action for misrepresentation requires an affirmative statement, not an implied assertion." (*RSB Vineyards, LLC v. Orsi* (2017) 15 Cal.App.5th 1089, 1102 [223 Cal.Rptr.3d 458~~Parties cannot read something into a neutral statement in order to justify a claim for negligent misrepresentation. The tort requires a 'positive assertion.' 'An "implied" assertion or representation is not enough.' " (*Diediker*, *supra*, 60 Cal.App.4th at pp. 297-298, internal citations omitted~~.)

- "Whether a defendant had reasonable ground for believing his or her false statement to be true is ordinarily a question of fact." (*Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal.App.4th 1687, 1696 [58 Cal.Rptr.2d 592], internal citations omitted.)

- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062 [141 Cal.Rptr.3d 142].)

- "The law is well established that actionable misrepresentations must pertain to past or existing material facts. Statements or predictions regarding future events are deemed to be mere opinions which are not actionable." (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1469 [169 Cal.Rptr.3d 619], internal citation omitted.)

- "Where, as here, a negligent misrepresentation claim is brought against the provider of a professional opinion based on special knowledge, information or expertise regarding a company's value, the California Supreme Court requires the following: 'The representation must have been made with the intent to induce plaintiff, or a particular class of persons to which plaintiff belongs, to act in reliance upon the representation in a specific transaction, or a specific type of transaction, that defendant intended to influence. Defendant is deemed to have intended to influence [its client's] transaction with plaintiff whenever defendant knows with substantial certainty that plaintiff, or the particular class of persons to which plaintiff belongs, will rely on the representation in the course of the transaction. [However,] [i]f others become aware of the representation and act upon it, there is no liability even though defendant should reasonably have foreseen such a possibility.' " (*Public Employees' Retirement System v. Moody's Investors Service, Inc.* (2014) 226 Cal.App.4th 643, 667−668 [172 Cal.Rptr.3d 238].)

- "[P]laintiffs rely on section 311 of the Restatement Second of Torts (section 311), which addresses negligent misrepresentation involving physical harm. Under section 311(1), '[o]ne who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results [¶] … [¶] to such third persons as the actor should expect to be put in peril by the action taken.' [¶] Section 311's theory of liability is intended to be 'somewhat broader' than that for mere pecuniary loss. It 'finds particular application where it is a part of the actor's business or profession to give information upon which the

safety of the recipient or a third person depends.' This court applied and followed section 311 … " (*T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145, 162–163 [226 Cal.Rptr.3d 336, 407 P.3d 18], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 818–820, 823–826

Chin et al., California Practice Guide: Employment Litigation, Ch. 5(I)-H,, *Negligent Misrepresentation*, ¶ 5:781 et seq. (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-D, *Negligent Misrepresentation*, ¶ 11:41 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.10 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.14 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.270 et seq. (Matthew Bender)

2 California Civil Practice: Torts, §§ 22:13–22:15 (Thomson Reuters)

1910. Real Estate Seller's Nondisclosure of Material Facts

[*Name of plaintiff***] claims that [***name of defendant***] failed to disclose certain information, and that because of this failure to disclose, [***name of plaintiff***] was harmed. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] purchased [***describe real property***] from [***name of defendant***];**
2. **That [***name of defendant***] knew that [***specify information that was not disclosed***];**
3. **That [***name of defendant***] did not disclose this information to [***name of plaintiff***];**
4. **That [***name of plaintiff***] did not know, and could not reasonably have discovered, this information;**
5. **That [***name of defendant***] knew that [***name of plaintiff***] did not know, and could not reasonably have discovered, this information;**
6. **That this information significantly affected the value or desirability of the property;**
7. **That [***name of plaintiff***] was harmed; and**
8. **That [***name of defendant***]'s failure to disclose the information was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2009

Directions for Use

This instruction sets forth the common law duty of disclosure that a real estate seller has to his or her buyer. Nondisclosure is tantamount to a misrepresentation. (See *Calemine v. Samuelson* (2009) 171 Cal.App.4th 153, 161 [89 Cal.Rptr.3d 495].)

For certain transfers, there is also a statutory duty of disclosure. (See Civ. Code, § 1102 et seq.) The scope of the required disclosure is set forth on a statutory form. (See Civ. Code, § 1102.6.) The common law duty is not preempted by the statutory duty (see Civ. Code, § 1102.1(a)), but breach of the statutory duty can constitute proof of breach of the common law duty if all of the elements are established. (See, e.g., *Calemine, supra,* 171 Cal.App.4th at pp. 164–165 [seller did not disclose earlier lawsuits, as required by statutory form].)

Sources and Authority

- Real Estate Buyer's Action Against Seller. Civil Code section 1102.13.

- " 'A real estate seller has both a common law and statutory duty of disclosure. … "In the context of a real estate transaction, '[i]t is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property … and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]' [Citations.] Undisclosed facts are material if they would have a significant and measurable effect on market value. [Citation.]" … Where a seller fails to disclose a material fact, he may be subject to liability 'for mere nondisclosure since his conduct in the transaction *amounts to a representation of the nonexistence of the facts which he has failed to disclose* [citation]." [Citation.]' " (*RSB Vineyards, LLC v. Orsi* (2017) 15 Cal.App.5th 1089, 1097 [223 Cal.Rptr.3d 458], original italics.)

- "~~A real estate seller has both a common law and statutory duty of disclosure. [Under the common law duty]: 'In the context of a real estate transaction, " … where the seller knows of facts materially affecting the value or desirability of the property … and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]" [Citations.] Undisclosed facts are material if they would have a significant and measurable effect on market value. [Citation.]' A seller's duty of disclosure is limited to material facts; once the essential facts are disclosed a seller is not under a duty to provide details that would merely serve to elaborate on the disclosed facts. Where a seller fails to disclose a material fact, he may be subject to liability 'for mere nondisclosure since his conduct in the transaction amounts to a representation of the nonexistence of the facts which he has failed to disclose [citation].'~~ Generally, whether the undisclosed matter was of sufficient materiality to have affected the value or desirability of the property is a question of fact." (*Calemine, supra*, 171 Cal.App.4th at p. 161, internal citations omitted.)

- "Actual knowledge can, and often is, shown by inference from circumstantial evidence. In that case, however, ' "actual knowledge can be inferred from the circumstances only if, in the light of the evidence, such inference is not based on speculation or conjecture. Only where the circumstances are such that the defendant 'must have known' and not 'should have known' will an inference of actual knowledge be permitted." ' " (*RSB Vineyards, LLC, supra*, 15 Cal.App.5th at p. 1098, internal citation omitted.)

- "Generally, where one party to a transaction has sole knowledge or access to material facts and knows that such facts are not known or reasonably discoverable by the other party, then a duty to disclose exists." (See *Shapiro v. Sutherland* (1998) 64 Cal.App.4th 1534, 1544 [76 Cal.Rptr.2d 101].)

- "Failure of the seller to fulfill [the] duty of disclosure constitutes actual fraud." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736 [29 Cal.Rptr. 201].)

- "When and where the action by the purchaser is based on conditions that are visible and that a personal inspection at once discloses and, when it is admitted that such personal inspection was in fact made, then manifestly it cannot be successfully contended that the purchaser relied upon any alleged misrepresentations with regard to such visible conditions. But personal inspection is no defense when and where the conditions are not visible and are known only to the seller, and

‘where material facts are accessible to the vendor only and he knows them not to be within the reach of the diligent attention and observation of the vendee, the vendor is bound to disclose such facts to the vendee.’ ” (*Buist v. C. Dudley De Velbiss Corp.* (1960) 182 Cal.App.2d 325, 331 [6 Cal.Rptr. 259].)

- “In enacting [Civil Code section 1102 et seq.], the Legislature made clear it did not intend to alter a seller's common law duty of disclosure. The purpose of the enactment was instead to make the required disclosures specific and clear. (*Calemine, supra*, 171 Cal.App.4th at pp. 161–162.)

- “The legislation was sponsored by the California Association of Realtors to provide a framework for formal disclosure of facts relevant to a decision to purchase realty. The statute therefore confirms and perhaps clarifies a disclosure obligation that existed previously at common law.” (*Shapiro, supra*, 64 Cal.App.4th at p. 1539, fn. 6.)

Secondary Sources

1 California Real Estate Law and Practice, Ch. 71, *Real Property Purchase and Sale Agreements*, § 71.30 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

50 California Forms of Pleading and Practice, Ch. 569, *Vendor and Purchaser of Real Property*, § 569.11 (Matthew Bender)

2A California Points and Authorities, Ch. 31, *Brokers and Salesperson*, § 31.142 (Matthew Bender)

Greenwald et al., California Practice Guide: Real Property Transactions (The Rutter Group) ¶ 4:351 et seq.

2000. Trespass—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] trespassed on [his/her/its] property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**

2. **That [***name of defendant***] [intentionally/, although not intending to do so, [recklessly [or] negligently]] entered [***name of plaintiff***]'s property] [or]**

   [intentionally/, although not intending to do so, [recklessly [or] negligently]] caused [another person/[*insert name of thing***]] to enter [***name of plaintiff***]'s property];**

3. **That [***name of plaintiff***] did not give permission for the entry [or that [***name of defendant***] exceeded [***name of plaintiff***]'s permission];**

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

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

[Entry can be on, above, or below the surface of the land.]

[Entry may occur indirectly, such as by causing vibrations that damage the land or structures or other improvements on the land.]

New September 2003; Revised June 2013

Directions for Use

With regard to element 2, liability for trespass may be imposed for conduct that is intentional, reckless, negligent, or the result of an extra-hazardous activity. (*Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 [235 Cal.Rptr. 165].) However, intent to trespass means only that the person intended to be in the particular place where the trespass is alleged to have occurred. (*Miller v. National Broadcasting Corp.* (1986) 187 Cal.App.3d 1463, 1480-1481 [232 Cal.Rptr. 668].) Liability may be also based on the defendant's unintentional, but negligent or reckless, act, for example, an automobile accident. An intent to damage is not necessary. (*Meyer v. Pacific Employers Insurance Co.* (1965) 233 Cal.App.2d 321, 326 [43 Cal.Rptr. 542].)

It is no defense that the defendant mistakenly, but in good faith, believed that he or she had a right to be in that location. (*Cassinos v. Union Oil Co.* (1993) 14 Cal.App.4th 1770, 1780 [18 Cal.Rptr.2d 574].) In such a case, the word "intentionally" in element 2 might be confusing to the jury. To alleviate this possible confusion, give the third option to CACI No. 2004, *"Intentional Entry" Explained.*

If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph

above element 4, add "and" at the end of element 2, and adjust punctuation accordingly:

> If you find all of the above, then the law assumes that [*name of plaintiff*] has been harmed and [*name of plaintiff*] is entitled to a nominal sum such as one dollar. [*Name of plaintiff*] is entitled to additional damages if [*name of plaintiff*] proves the following:

The last sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read "actually" in the fourth element only if nominal damages are also being sought.

Nominal damages alone are not available in cases involving intangible intrusions such as noise and vibrations; proof of actual damage to the property is required: "[T]he rule is that actionable trespass may not be predicated upon nondamaging noise, odor, or light intrusion. …" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 936 [55 Cal.Rptr.2d 724, 920 P.2d 669], internal citation omitted.) For an instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- "Generally, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership." (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 258 [225 Cal.Rptr.3d 305]~~As a general rule, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership." (*Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1390 [18 Cal.Rptr.2d 530], internal citation omitted~~.)

- " 'Trespass is an unlawful interference with possession of property.' The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was a substantial factor in causing the harm. (See CACI No. 2000.)" (*Ralphs Grocery Co., supra,* 17 Cal.App.5th at pp. 261–262, internal citation omitted.)

- "[I]n order to state a cause of action for trespass a plaintiff must allege an unauthorized and tangible entry on the land of another, which interfered with the plaintiff's exclusive possessory rights." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1174 [227 Cal.Rptr.3d 390].)

- "~~Trespass is an unlawful interference with possession of property.~~ The emission of sound waves which cause actual physical damage to property constitutes a trespass. Liability for trespass may be imposed for conduct which is intentional, reckless, negligent or the result of an extra-hazardous activity." (*Staples, supra,* 189 Cal.App.3d at p. 1406, internal citations omitted.)

- "California's definition of trespass is considerably narrower than its definition of nuisance. " 'A trespass is an invasion of the interest in the exclusive possession of land, as by entry upon it ... . A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession.' " California has adhered firmly to the view that '[t]he cause of action for trespass is designed to protect possessory-not necessarily ownership-interests in land

from unlawful interference.' " (*Capogeannis v. Superior Court* (1993) 12 Cal.App.4th 668, 674 [15 Cal.Rptr.2d 796], internal citations omitted.)

- " '[A] trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has tortiously placed there, whether or not the actor has the ability to remove it.' Under this definition, 'tortious conduct' denotes that conduct, whether of act or omission, which subjects the actor to liability under the principles of the law of torts." (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 345 [23 Cal.Rptr.2d 377], internal citations omitted.)

- The common-law distinction between direct and constructive trespass is not followed in California. A trespass may be committed by consequential and indirect injuries as well as by direct and forcible harm. (*Gallin v. Poulou* (1956) 140 Cal.App.2d 638, 641 [295 P.2d 958].)

- "An action for trespass may technically be maintained only by one whose right to possession has been violated; however, an out-of-possession property owner may recover for an injury to the land by a trespasser which damages the ownership interest." (*Smith v. Cap Concrete, Inc.* (1982) 133 Cal.App.3d 769, 774 [184 Cal.Rptr. 308], internal citation omitted.)

- "Under the forcible entry statutes the fact that a defendant may have title or the right to possession of the land is no defense. The plaintiff's interest in peaceable even if wrongful possession is secured against forcible intrusion by conferring on him the right to restitution of the premises, the primary remedy, and incidentally awarding damages proximately caused by the forcible entry." (*Allen v. McMillion* (1978) 82 Cal.App.3d 211, 218-219 [147 Cal.Rptr. 77], internal citations omitted.)

- "Where there is a consensual entry, there is no tort, because lack of consent is an element of the wrong." (*Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 16–17 [135 Cal.Rptr. 915].)

- " 'A conditional or restricted consent to enter land creates a privilege to do so only insofar as the condition or restriction is complied with.' " (*Civic Western Corp., supra,* 66 Cal.App.3d at p. 17, quoting Rest.2d Torts, § 168.)

- "Where one has permission to use land for a particular purpose and proceeds to abuse the privilege, or commits any act hostile to the interests of the lessor, he becomes a trespasser. [¶] 'A good faith belief that entry has been authorized or permitted provides no excuse for infringement of property rights if consent was not in fact given by the property owner whose rights are at issue. Accordingly, by showing they gave no authorization, [plaintiffs] established the lack of consent necessary to support their action for injury to their ownership interests.' " (*Cassinos, supra,* 14 Cal.App.4th at p. 1780, internal citations omitted.)

- " '[T]he intent required as a basis for liability as a trespasser is simply an intent to be at the place on the land where the trespass allegedly occurred ... . The defendant is liable for an intentional entry although he has acted in good faith, under the mistaken belief, however reasonable, that he is committing no wrong.' " (*Miller, supra,* 187 Cal.App.3d at pp. 1480-1481, internal citation omitted.)

- "The general rule is simply that damages may be recovered for annoyance and distress, including mental anguish, proximately caused by a trespass." (*Armitage v. Decker* (1990) 218 Cal.App.3d 887, 905 [267 Cal.Rptr. 399], internal citations omitted.)

- "Causes of action for conversion and trespass support an award for exemplary damages." (*Krieger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 148 [173 Cal.Rptr. 751], internal citation omitted.)

- "It is true that an action for trespass will support an award of nominal damages where actual damages are not shown. However, nominal damages need not be awarded where no actual loss has occurred. 'Failure to return a verdict for nominal damages is not in general ground for reversing a judgment or granting a new trial.'" (*Staples, supra,* 189 Cal.App.3d at p. 1406, internal citations omitted.)

- "Trespass may be ' "by personal intrusion of the wrongdoer or by his failure to leave; by throwing or placing something on the land; or by causing the entry of some other person." ' A trespass may be on the surface of the land, above it, or below it. The migration of pollutants from one property to another may constitute a trespass, a nuisance, or both." (*Martin Marietta Corp. v. Insurance Co. of North America* (1995) 40 Cal.App.4th 1113, 1132 [47 Cal.Rptr.2d 670], internal citations omitted.)

- "Respondent's plant was located in a zone which permitted its operation. It comes within the protection of section 731a of the Code of Civil Procedure which, subject to certain exceptions, generally provides that where a manufacturing or commercial operation is permitted by local zoning, no private individual can enjoin such an operation. It has been determined, however, that this section does not operate to bar recovery for damages for trespassory invasions of another's property occasioned by the conduct of such manufacturing or commercial use." (*Roberts v. Permanente Corp.* (1961) 188 Cal.App.2d 526, 529 [10 Cal.Rptr. 519], internal citations omitted.)

- "[A]s a matter of law, [plaintiff] cannot state a cause of action against the [defendants] for trespassing on the Secondary Access Easement because they own that land and her easement does not give her a possessory right, not to mention an exclusive possessory right in that property." (*McBride, supra*, 18 Cal.App.5th at p. 1174.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 693–695

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, §§ 550.11, 550.19 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.20 (Matthew Bender)

1 California Civil Practice: Torts §§ 18:1, 18:4–18:8, 18:10 (Thomson Reuters West)

2020. Public Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] suffered harm because [***name of defendant***] created a nuisance. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***], by acting or failing to act, created a condition that [***insert one or more of the following:***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;] [or]

   [was [a/an] [fire hazard/*specify other potentially dangerous condition***] to [***name of plaintiff***]'s property;]**

2. **That the condition affected a substantial number of people at the same time;**

3. **That an ordinary person would be reasonably annoyed or disturbed by the condition;**

4. **That the seriousness of the harm outweighs the social utility of [***name of defendant***]'s conduct;**

5. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**

6. **That [***name of plaintiff***] suffered harm that was different from the type of harm suffered by the general public; and**

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

New September 2003; Revised December 2007, June 2016, November 2017

Directions for Use

Give this instruction for a claim for public nuisance. For an instruction on private nuisance, give CACI No. 2021, *Private Nuisance—Essential Factual Elements.* While a private nuisance is designed to vindicate individual land ownership interests, a public nuisance is not dependent on an interference with

any particular rights of land: The public nuisance doctrine aims at the protection and redress of community interests. (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 358 [213 Cal.Rptr.3d 538].)

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Public Nuisance. Civil Code section 3480.
- Action by Private Person for Public Nuisance. Civil Code section 3493.
- Act Done Under Express Authority of Statute. Civil Code section 3482.
- Property Used for Dogfighting and Cockfighting. Civil Code section 3482.8.
- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. ...' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury." ' " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)
- "Public nuisance and private nuisance 'have almost nothing in common except the word "nuisance" itself.' Whereas private nuisance is designed to vindicate individual land ownership interests, the public nuisance doctrine has historically distinct origins and aims at 'the protection and redress of *community interests*.' With its roots tracing to the beginning of the 16th century as a criminal offense against the crown, public nuisances at common law are 'offenses against, or interferences with, the exercise of *rights common to the public*,' such as public health, safety, peace, comfort, or convenience." (*Citizens for Odor Nuisance Abatement, supra,* 8 Cal.App.5th at p. 358, original italics, internal citation omitted.)
- "Where the nuisance alleged is not also a private nuisance as to a private individual he does not have a cause of action on account of a public nuisance unless he alleges facts showing special injury to himself in person or property of a character different in kind from that suffered by the general public." (*Venuto, supra,* 22 Cal.App.3d at p. 124, internal citations omitted; but see *Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1550 [87 Cal.Rptr.3d 602] ["to the extent *Venuto* … can be read as precluding an action to abate a public nuisance by a private individual who has suffered personal injuries as a result of the challenged condition, we believe it is an incorrect statement of the law"].)
- "Unlike the private nuisance-tied to and designed to vindicate individual ownership interests in land-the 'common' or public nuisance emerged from distinctly different historical origins. The public nuisance doctrine is aimed at the protection and redress of community interests and, at least in theory, embodies a kind of collective ideal of civil life which the courts have vindicated by equitable remedies since the beginning of the 16th century." (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th

1090, 1103 [60 Cal.Rptr.2d 277, 929 P.2d 596].)

- "[W]hen the nuisance is a private as well as a public one, there is no requirement the plaintiff suffer damage different in kind from that suffered by the general public. That is, the plaintiff ' "does not lose his rights as a landowner merely because others suffer damage of the same kind, or even of the same degree … ." ' " (*Birke, supra,* 169 Cal.App.4th at p. 1551, internal citations omitted.)

- "Of course, not every interference with collective social interests constitutes a public nuisance. To qualify ... the interference must be both substantial and unreasonable." (*People ex rel. Gallo, supra*, 14 Cal.4th at p. 1105.)

- "It is substantial if it causes significant harm and unreasonable if its social utility is outweighed by the gravity of the harm inflicted." *People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 112 [227 Cal.Rptr.3d 499].)

- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke, supra,* 169 Cal.App.4th at p. 1552 [citing this instruction], internal citation omitted.)

- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)

- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' "where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. …" [Citations.]' " (*City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422], internal citations omitted.)

- "An essential element of a cause of action for nuisance is damage or injury." (*Helix Land Co., Inc. v. City of San Diego* (1978) 82 Cal.App.3d 932, 950 [147 Cal.Rptr. 683].)

- "[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property… ." (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)

- "A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated." (*People v. Oliver* (1948) 86 Cal.App.2d 885, 889 [195 P.2d 926].)

- "By analogy to the rules governing tort liability, courts apply the same elements to determine liability for a public nuisance." (*People ex rel. Gallo, supra,* 14 Cal.4th at p. 1105, fn. 3, internal citation omitted.)

- "The elements 'of a cause of action for public nuisance include the existence of a duty and causation.' ~~Public nuisance liability 'does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance.~~' " (*Melton v. Boustred* (2010) 183

Cal.App.4th 521, 542 [107 Cal.Rptr.3d 481], internal citations omitted.)

- "[L]iability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance." (*People v. ConAgra Grocery Products Co.*, *supra*, 17 Cal.App.5th at p. 109.)

- "Causation is an essential element of a public nuisance claim. A plaintiff must establish a 'connecting element' or a 'causative link' between the defendant's conduct and the threatened harm." (*Citizens for Odor Nuisance Abatement*, *supra*, 8 Cal.App.5th at p. 359 [citing this instruction], internal citation omitted.)

- "Causation may consist of either '(a) an act; or [¶] (b) a failure to act under circumstances in which the actor is under a duty to take positive action to prevent or abate the interference with the public interest or the invasion of the public interest.' A plaintiff must show the defendant's conduct was a 'substantial factor' in causing the alleged harm." (*Citizens for Odor Nuisance Abatement*, *supra*, 8 Cal.App.5th at p. 359 [citing this instruction], internal citation omitted.)

- " 'Where negligence and nuisance causes of action rely on the same facts about lack of due care, the nuisance claim is a negligence claim.' The nuisance claim 'stands or falls with the determination of the negligence cause of action' in such cases." (*Melton*, *supra*, 183 Cal.App.4th at p. 542, internal citations omitted.)

- "[W]here the law expressly declares something to be a nuisance, then no inquiry beyond its existence need be made and in this sense its mere existence is said to be a nuisance per se. [Citation.] But, to rephrase the rule, to be considered a nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law." (*People v. ConAgra Grocery Products Co.*, *supra*, 17 Cal.App.5th at p. 114.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 152

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 5-D, *Common Law Environmental Hazards Liability*, ¶¶ 5:140-5:179 (The Rutter Group)

California Real Property Remedies and Damages (Cont.Ed.Bar 2d ed.) Ch. 11, Remedies for Nuisance and Trespass, § 11.7

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.04, 17.06 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.12 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 17:1–17:3 (Thomson Reuters)

2100. Conversion—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully exercised control over [his/her/its] personal property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/possessed/had a right to possess] [a/an] [***insert item of personal property***];**

2. **That [***name of defendant***] substantially interfered with [***name of plaintiff***]'s property by knowingly or intentionally [***insert one or more of the following:***]**

   [taking possession of the [*insert item of personal property***];] [or]**

   [preventing [*name of plaintiff***] from having access to the [***insert item of personal property***];] [or]**

   [destroying the [*insert item of personal property***];] [or]**

   [refusing to return the [*insert item of personal property***] after [***name of plaintiff***] demanded its return.]**

3. **That [***name of plaintiff***] did not consent;**

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

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

New September 2003; Revised December 2009, December 2010, May 2017

Directions for Use

The last option for element 2 may be used if the defendant's original possession of the property was not tortious. (See *Atwood v. S. Cal. Ice Co.* (1923) 63 Cal.App. 343, 345 [218 P. 283], disapproved on other grounds in *Wilson v. Crown Transfer & Storage Co.* (1927) 201 Cal. 701 [258 P. 596].)

Sources and Authority

- "Conversion is the wrongful exercise of dominion over the property of another. The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." (*Lee v. Hanley* (2015) 61 Cal.4th 1225, 1240 [191 Cal.Rptr.3d 536, 354 P.3d 334].)

- "It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of control or ownership over the property, or that the alleged converter has applied the property to his own use." …' " (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507 [85 Cal.Rptr.3d 268].)

- "[A]ny act of dominion wrongfully exerted over the personal property of another inconsistent with the owner's rights thereto constitutes conversion." (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 50 [108 Cal.Rptr.3d 455].)

- "To prove a cause of action for conversion, the plaintiff must show the defendant acted intentionally to wrongfully dispose of the property of another." (*Duke v. Superior Court* (2017) 18 Cal.App.5th 490, 508 [226 Cal.Rptr.3d 807].)

- "[Conversion] must be knowingly or intentionally done, but a *wrongful intent* is not necessary. Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (*Taylor v. Forte Hotels Int'l* (1991) 235 Cal.App.3d 1119, 1124 [1 Cal.Rptr.2d 189], original italics, internal citations omitted.)

  "Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial. The basis of a conversion action ' "rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore, neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are the gist of the action." [Citations.]' " (*Los Angeles Federal Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1387 [147 Cal.Rptr.3d 768].)

- " ' "Conversion is a strict liability tort," ' so the Bank cannot defeat the claim on the grounds that it accepted a forged signature in good faith. Financial institutions can be liable to their depositors for transferring money out of their accounts on forged instruments." (*Fong v. East West Bank* (2018), 19 Cal.App.5th 224, 235 [227 Cal.Rptr.3d 838], internal citation omitted.)

- "The rule of strict liability applies equally to purchasers of converted goods, or more generally to purchasers from sellers who lack the power to transfer ownership of the goods sold. That is, there is no general exception for bona fide purchasers." (*Regent Alliance Ltd. v. Rabizadeh* (2014) 231 Cal.App.4th 1177, 1181 [180 Cal.Rptr.3d 610], internal citations omitted.)

- "There are recognized exceptions to the general rule of strict liability. Some exceptions are based on circumstances in which 'the person transferring possession may have the legal power to convey to a bona fide transferee a good title,' as, for example, when 'a principal has clothed an agent in apparent authority exceeding that which was intended.' Another exception concerns goods obtained by means of a fraudulent misrepresentation. If the party who committed the fraud then sells the goods to 'a bona fide purchaser' who 'takes for value and without notice of the fraud, then such purchaser gets good title to the chattel and may not be held for conversion (though the original converter may be).' "

(*Regent Alliance Ltd., supra,* 231 Cal.App.4th at p. 1183, internal citation omitted.)

- "[I]t is generally acknowledged that conversion is a tort that may be committed only with relation to personal property and not real property." (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7 [89 Cal.Rptr. 323], disagreeing with *Katz v. Enos* (1945) 68 Cal.App.2d 266, 269 [156 P.2d 461].)

- "The first element of that cause of action is his ownership or right to possession of the property at the time of the conversion. Once it is determined that [plaintiff] has a right to reinstate the contract, he has a right to possession of the vehicle and standing to bring conversion. Unjustified refusal to turn over possession on demand constitutes conversion even where possession by the withholder was originally obtained lawfully and of course so does an unauthorized sale." (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609 [218 Cal.Rptr. 15], internal citations omitted.)

- " 'To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. … Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.' " (*Moore v. Regents of the Univ. of Cal.* (1990) 51 Cal.3d 120, 136 [271 Cal.Rptr. 146, 793 P.2d 479], internal citations omitted.)

- "In a conversion action the plaintiff need show only that he was entitled to possession at the time of conversion; the fact that plaintiff regained possession of the converted property does not prevent him from suing for damages for the conversion." (*Enterprise Leasing Corp. v. Shugart Corp*. (1991) 231 Cal.App.3d 737, 748 [282 Cal.Rptr. 620], internal citation omitted.)

- "Neither legal title nor absolute ownership of the property is necessary. … A party need only allege it is 'entitled to immediate possession at the time of conversion. … ' … However, a mere contractual right of payment, without more, will not suffice." (*Plummer, supra,* 184 Cal.App.4th at p. 45, internal citation omitted.)

- "The existence of a lien … can establish the immediate right to possess needed for conversion. 'One who holds property by virtue of a lien upon it may maintain an action for conversion if the property was wrongfully disposed of by the owner and without authority … .' Thus, attorneys may maintain conversion actions against those who wrongfully withhold or disburse funds subject to their attorney's liens." (*Plummer, supra,* 184 Cal.App.4th at p. 45, internal citation omitted.)

- "Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. As [plaintiff] was a cotenant and had the right of possession of the realty, which included the right to keep his personal property thereon, [defendant]'s act of placing the goods in storage, although not constituting the assertion of ownership and a substantial interference with possession to the extent of a conversion, amounted to an intermeddling. Therefore, [plaintiff] is entitled to actual damages in an amount sufficient to compensate him for any impairment of the property or loss of its use." (*Zaslow v. Kroenert* (1946) 29 Cal.2d 541, 551–552 [176 P.2d 1], internal citation omitted.)

- "[T]he law is well settled that there can be no conversion where an owner either expressly or

impliedly assents to or ratifies the taking, use or disposition of his property." (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 [139 P.2d 80], internal citations omitted.)

- "As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. 'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass." (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 552 [51 Cal.Rptr. 575], internal citations omitted.)

- "If a defendant is authorized to make a specific use of a plaintiff's property, use in excess of that authorized may subject the defendant to liability for conversion, if such use seriously violates another's right to control the use of the property." (*Duke*, *supra*, 18 Cal.App.5th at p. 506.)

- "[D]amages for emotional distress growing out of a defendant's conversion of personal property are recoverable." (*Hensley v. San Diego Gas & Electric Co.* (2017) 7 Cal.App.5th.1337, 1358 [213 Cal.Rptr.3d 803].)

- " 'Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment.' A 'generalized claim for money [is] not actionable as conversion.' " (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 [58 Cal.Rptr.3d 516], internal citations omitted.)

- "Generally, conversion has been held to apply to the taking of intangible property rights when 'represented by documents, such as bonds, notes, bills of exchange, stock certificates, and warehouse receipts.' As one authority has written, 'courts have permitted a recovery for conversion of assets reflected in such documents as accounts showing amounts owed, life insurance policies, and other evidentiary documents. These cases are far removed from the paradigm case of physical conversion; they are essentially financial or economic tort cases, not physical interference cases.' " (*Welco Electronics, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 209 [166 Cal.Rptr.3d 877], internal citation omitted.)

- "[I]t is 'well settled in California that shares of corporate stock are subject to an action in conversion' and 'it is not necessary that possession of the certificate evidencing title be disturbed.' Instead, it is sufficient that there is interference with the owner's 'free and unhampered right to dispose of property without limitations imposed by strangers to the title.' " (*Applied Medical Corp. v. Thomas* (2017) 10 Cal.App.5th 927, 938 [217 Cal.Rptr.3d 169].)

- "[T]here is no special rule preventing a depositor from pursuing a conversion action against the bank that holds his or her money. … 'The law applicable to conversion of personal property applies to instruments,' which includes certificates of deposit." (*Fong*, *supra*, 19 Cal.App.5th at pp. 232–233.)

- "Credit card, debit card, or PayPal information may be the subject of a conversion." (*Welco Electronics, Inc., supra,* 223 Cal.App.4th at p. 212, footnote omitted.)

- "One who buys property in good faith from a party lacking title and the right to sell may be liable for

conversion. The remedies for conversion include specific recovery of the property, damages, and a quieting of title." (*State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1076, 1081–1082 [62 Cal.Rptr.2d 178], internal citations omitted.)

- "In order to establish a conversion, the plaintiff 'must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.' Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort." (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 812 [26 Cal.Rptr.2d 391], internal citations omitted.)

- "A conversion can occur when a willful failure to return property deprives the owner of possession." (*Fearon v. Department of Corrections* (1984) 162 Cal.App.3d 1254, 1257 [209 Cal.Rptr. 309], internal citation omitted.)

- "A demand for return of the property is not a condition precedent to institution of the action when possession was originally acquired by a tort as it was in this case." (*Igauye v. Howard* (1952) 114 Cal.App.2d 122, 127 [249 P.2d 558].)

- " 'Negligence in caring for the goods is not an act of dominion over them such as is necessary to make the bailee liable as a converter.' Thus a warehouseman's negligence in causing a fire which destroyed the plaintiffs' goods will not support a conversion claim." (*Gonzales v. Pers. Storage* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473], internal citations omitted.)

- "Although damages for conversion are frequently the equivalent to the damages for negligence, i.e., specific recovery of the property or damages based on the value of the property, negligence is no part of an action for conversion." (*Taylor, supra,* 235 Cal.App.3d at p. 1123, internal citation omitted.)

- "A person without legal title to property may recover from a converter if the plaintiff is responsible to the true owner, such as in the case of a bailee or pledgee of the property." (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1096 [64 Cal.Rptr.2d 457], internal citation omitted.)

- "With respect to plaintiffs' causes of action for conversion, '[o]ne is privileged to commit an act which would otherwise be a trespass to or a conversion of a chattel in the possession of another, for the purpose of defending himself or a third person against the other, under the same conditions which would afford a privilege to inflict a harmful or offensive contact upon the other for the same purpose.' 'For the purpose of defending his own person, an actor is privileged to make intentional invasions of another's interests or personality when the actor reasonably believes that such other person intends to cause a confinement or a harmful or offensive contact to the actor, of that such invasion of his interests is reasonably probable, and the actor reasonably believes that the apprehended harm can be safely prevented only by the infliction of such harm upon the other. A similar privilege is afforded an actor for the protection of certain third persons.' " (*Church of Scientology v. Armstrong* (1991) 232 Cal.App.3d 1060, 1072 [283 Cal.Rptr. 917], internal citations omitted [labeled "defense of justification"]; see Rest.2d Torts, § 261.)

- "We recognize that the common law of conversion, which developed initially as a remedy for the dispossession or other loss of chattel, may be inappropriate for some modern intangible personal property, the unauthorized use of which can take many forms. In some circumstances, newer economic torts have developed that may better take into account the nature and uses of intangible property, the interests at stake, and the appropriate measure of damages. On the other hand, if the law of conversion can be adapted to particular types of intangible property and will not displace other, more suitable law, it may be appropriate to do so. (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 124 [55 Cal.Rptr.3d 621], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 810–831

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 2-C, *Tort Liability,* ¶ 2:427.4 et seq. (The Rutter Group)

Rylaarsdam & Turner, California Practice Guide: Civil Procedure Before Trial--Statutes of Limitations, Ch. 4-D, *Actions Involving Personal Property (Including Intangibles),* ¶ 4:1101 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.40 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 150, *Conversion,* §§ 150.10, 150.40, 150.41 (Matthew Bender)

5 California Points and Authorities, Ch. 51, *Conversion,* § 51.21[3][b] (Matthew Bender)

2404. Breach of Employment Contract—Unspecified Term—"Good Cause" Defined

Good cause exists when an employer's decision to [discharge/demote] an employee is made in good faith and based on a fair and honest reason. Good cause does not exist if the employer's reasons for the [discharge/demotion] are trivial, arbitrary, inconsistent with usual practices, [or] unrelated to business needs or goals [or if the stated reasons conceal the employer's true reasons].

In deciding whether [*name of defendant***] had good cause to [discharge/demote] [***name of plaintiff***], you must balance [***name of defendant***]'s interest in operating the business efficiently and profitably against the interest of [***name of plaintiff***] in maintaining employment.**

[If [*name of plaintiff***] had a sensitive managerial position, then [***name of defendant***] had substantial, though not unlimited, discretion in [discharging/demoting] [him/her].]**

New September 2003

Directions for Use

This instruction may not be appropriate in the context of an implied employment contract where the parties have agreed to a particular meaning of "good cause" (e.g., a written employment agreement specifically defining "good cause" for discharge). If so, the instruction should be modified accordingly.

Only read the last bracketed phrase in the first paragraph in cases where there is an issue involving pretext.

The last optional paragraph should be given when the employee is in such a position that the employer would be allowed greater discretion in its decision to discharge the employee: "[W]here, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment." (*Pugh v. See's Candies, Inc.* (*Pugh I*) (1981) 116 Cal.App.3d 311, 330 [171 Cal.Rptr. 917], disapproved on other grounds in *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 350–351 [100 Cal.Rptr.2d 352, 8 P.3d 1089].) Note that the term "confidential position" has not been defined by California case law.

When the reason given for the discharge is misconduct, and there is a factual dispute whether the misconduct occurred, then the court should give CACI No. 2405, *Breach of Implied Employment Contract—Unspecified Term—"Good Cause" Defined—Misconduct*, instead of this instruction. (See *Cotran v. Rollins Hudig Hall International, Inc.* (1998) 17 Cal.4th 93, 107 [69 Cal.Rptr.2d 900, 948 P.2d 412].)

Sources and Authority

- "Three factual determinations are relevant to the question of employer liability: (1) did the employer act with good faith in making the decision to terminate; (2) did the decision follow an investigation that was appropriate under the circumstances; and (3) did the employer have reasonable grounds for

believing the employee had engaged in the misconduct." (*Jameson v. Pacific Gas & Electric Co.* (2017) 16 Cal.App.5th 901, 910 [225 Cal.Rptr.3d 171~~If the evidence is uncontradicted and permits only one conclusion, then the issue [of good cause] is legal, not factual. Where, however, as here, the evidence is contradicted, the issue is one for the trier of fact to decide." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 733 [269 Cal.Rptr. 299], disapproved on other grounds in *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 394 fn. 2 [46 Cal.Rptr.3d 668, 139 P.3d 56~~].)

- " 'Good cause' in the context of implied employment contracts is defined as: 'fair and honest' reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual.' " (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 872 [172 Cal.Rptr.3d 732], internal citations omitted.)

- "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 … ." (*Jameson*, *supra*, 16 Cal.App.5th at p. 911.)

- "The term is relative. Whether good cause exists is dependent upon the particular circumstances of each case. In deciding whether good cause exists, there must be a balance between the employer's interest in operating its business efficiently and profitably and the employee's interest in continued employment. Care must be exercised so as not to interfere with the employer's legitimate exercise of managerial discretion. … Where there is a contract to terminate only for good cause, the employer has no right to terminate for an arbitrary or unreasonable decision." (*Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 994 [6 Cal.Rptr.2d 184], internal citations omitted, abrogated on another ground in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 351 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)

- " '*Cotran* did not delineate the earmarks of an appropriate investigation but noted that investigative fairness contemplates listening to both sides and providing employees a fair opportunity to present their position and to correct or contradict relevant statements prejudicial to their case, without the procedural formalities of a trial.' [Citation] [¶] … Although the elements of the *Cotran* standard are triable to the jury, 'if the facts are undisputed or admit of only one conclusion, then summary judgment may be entered … .' " (*Jameson*, *supra*, 16 Cal.App.5th at p. 910.)

- " '[G]ood cause' in [the context of wrongful termination based on an implied contract] is quite different from the standard applicable in determining the propriety of an employee's termination under a contract for a specified term." (*Pugh, supra,* 116 Cal.App.3d at p. 330.)

- "We have held that appellant has demonstrated a prima facie case of wrongful termination in violation of his contract of employment. The burden of coming forward with evidence as to the reason for appellant's termination now shifts to the employer. Appellant may attack the employer's offered explanation, either on the ground that it is pretextual (and that the real reason is one prohibited by contract or public policy, or on the ground that it is insufficient to meet the employer's obligations under contract or applicable legal principles. Appellant bears, however, the ultimate burden of proving that he was terminated wrongfully." (*Pugh, supra,* 116 Cal.App.3d at pp. 329-330, internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 208, 209, 231

Chin et al., Cal. Practice Guide: Employment Litigation ¶¶ 4:270–4:273, 4:300 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.22–8.25

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.09[5][b] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.21, 249.63 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, §§ 100.21, 100.27, 100.29, 100.34 (Matthew Bender)

California Civil Practice: Employment Litigation, § 6:19 (Thomson Reuters)

2509. "Adverse Employment Action" Explained

[*Name of plaintiff***] must prove that [he/she] was subjected to an adverse employment action.**

Adverse employment actions are not limited to ultimate actions such as termination or demotion. There is an adverse employment action if [*name of defendant***] has taken an action or engaged in a course or pattern of conduct that, taken as a whole, materially and adversely affected the terms, conditions, or privileges of [***name of plaintiff***]'s employment. An adverse employment action includes conduct that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion. However, minor or trivial actions or conduct that is not reasonably likely to do more than anger or upset an employee cannot constitute an adverse employment action.**

New June 2012

Directions for Use

Give this instruction with CACI No. 2500, *Disparate Treatment—Essential Factual Elements,* CACI No. 2505, *Retaliation,* CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* CACI No. 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements,* or CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements,* if there is an issue as to whether the employee was the victim of an adverse employment action.

For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute discrimination or retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Or the case may involve acts that, considered alone, would not appear to be adverse, but could be adverse under the particular circumstances of the case. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389–1390 [37 Cal.Rptr.3d 113] [lateral transfer can be adverse employment action even if wages, benefits, and duties remain the same].)

Sources and Authority

- "Appropriately viewed, [section 12940(a)] protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Yanowitz, supra,* 36 Cal.4th at pp. 1053–1054, footnotes omitted.)

- "[T]he determination of what type of adverse treatment properly should be considered discrimination in the terms, conditions, or privileges of employment is not, by its nature, susceptible to a mathematically precise test, and the significance of particular types of adverse actions must be evaluated by taking into account the legitimate interests of both the employer and the employee. Minor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable, but adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion falls within the reach of the antidiscrimination provisions of sections 12940(a) and 12940(h)." (*Yanowitz, supra*, 36 Cal.4th at pp. 1054–1055.)

- "An ' "adverse employment action," ' … , requires a 'substantial adverse change in the terms and conditions of the plaintiff's employment'. " (*Holmes v. Petrovich Development Co., LLC* (2011) 191 Cal.App.4th 1047, 1063 [119 Cal.Rptr.3d 878, internal citations omitted.)

- "Contrary to [defendant]'s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer's retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute." (*Yanowitz, supra*, 36 Cal.4th at pp. 1055–1056, internal citations omitted.)

- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424 [69 Cal.Rptr.3d 1], internal citations omitted.)

- "The employment action must be both detrimental and substantial ... [¶]. We must analyze [plaintiff's] complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury ... . [W]e do not find that [plaintiff's] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events ... . The other allegations ... are not accompanied by facts which evidence both a substantial and detrimental effect on her employment." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511–512 [91 Cal.Rptr.2d 770], internal citations omitted.)

- "The 'materiality' test of adverse employment action … looks to 'the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career,' and the test 'must be interpreted liberally … with a reasonable appreciation of the realities of the workplace … .' " (*Patten, supra,* 134 Cal.App.4th at p. 1389.)

- "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." (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 366-367 [225 Cal.Rptr.3d 321].)

- "[A] mere oral or written criticism of an employee … does not meet the definition of an adverse employment action under [the] FEHA." (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 92 [221 Cal.Rptr.3d 668].)

- "Mere ostracism in the workplace is insufficient to establish an adverse employment decision. However, ' "[W]orkplace harassment, if sufficiently severe or pervasive, may in and of itself constitute an adverse employment action sufficient to satisfy the second prong of the prima facie case for … retaliation cases." [Citation].' " (*Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 212 [126 Cal.Rptr.3d 651], internal citations omitted.)

- "Not every change in the conditions of employment, however, constitutes an adverse employment action. ' "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." … ' '[W]orkplaces are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.' " (*Malais v. Los Angeles City Fire Dept.* (2007) 150 Cal.App.4th 350, 357 [58 Cal.Rptr.3d 444].)

- "[R]efusing to allow a former employee to rescind a voluntary discharge—that is, a resignation free of employer coercion or misconduct—is not an adverse employment action." (*Featherstone v. Southern California Permanente Medical Group* (2017) 10 Cal.App.5th 1150, 1161 [217 Cal.Rptr.3d 258].)

- "[T]he reduction of [plaintiff]'s hours alone could constitute a material and adverse employment action by the [defendant]." (*Light, supra,* 14 Cal.App.5th at p. 93.)

- "[T]he denial of previously promised training and the failure to promote may constitute adverse employment actions." (*Light, supra,* 14 Cal.App.5th at p. 93.)

- "The trial court correctly found that the act of placing plaintiff on administrative leave [involuntarily] was an adverse employment action." (*Whitehall, supra,* 17 Cal.App.5th at p. 367.)

Secondary Sources

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

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1052–1055

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair*

Employment And Housing Act, ¶¶ 7:203, 7:731, 7:785 (The Rutter Group)

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

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

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.12 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

2527. Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant (Gov. Code, § 12940(k))

[*Name of plaintiff***] claims that [***name of defendant***] failed to take all reasonable steps to prevent [harassment/discrimination/retaliation] [based on [***describe protected status—e.g., race, gender, or age***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/was a person providing services under a contract with [***name of defendant***]];**

2. **That [***name of plaintiff***] was subjected to [harassment/discrimination/retaliation] in the course of employment;**

3. **That [***name of defendant***] failed to take all reasonable steps to prevent the [harassment/discrimination/retaliation];**

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

5. **That [***name of defendant***]'s failure to take all reasonable steps to prevent [harassment/discrimination/retaliation] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2006; *Revised April 2007, June 2013, December 2015*

Directions for Use

Give this instruction after the appropriate instructions in this series on the underlying claim for discrimination, retaliation, or harassment if the employee also claims that the employer failed to prevent the conduct. (See Gov. Code, § 12940(k).) Read the bracketed language in the opening paragraph beginning with "based on" if the claim is for failure to prevent harassment or discrimination.

For guidance for a further instruction on what constitutes "reasonable steps," see section 11019(b)(4) of Title 2 of the California Code of Regulations.

Sources and Authority

- Prevention of Discrimination and Harassment. Government Code section 12940(k).

- "The employer's duty to prevent harassment and discrimination is affirmative and mandatory." (*Northrop Grumman Corp. v. Workers' Comp. Appeals Bd.* (2002) 103 Cal.App.4th 1021, 1035 [127 Cal.Rptr.2d 285].)

- "Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to

(1) end the current harassment and (2) to deter future harassment. [Citation.] The employer's obligation to take prompt corrective action requires (1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and (2) that permanent remedial steps be implemented by the employer to prevent future harassment … ." (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 701 [224 Cal.Rptr.3d 542].)

- "This section creates a tort that is made actionable by statute. ' " '[T]he word "tort" means a civil wrong, other than a breach of contract, for which the law will provide a remedy in the form of an action for damages.' 'It is well settled the Legislature possesses a broad authority ... to establish ... tort causes of action.' Examples of statutory torts are plentiful in California law." ' Section 12960 et seq. provides procedures for the prevention and elimination of unlawful employment practices. In particular, section 12965, subdivision (a) authorizes the Department of Fair Employment and Housing (DFEH) to bring an accusation of an unlawful employment practice if conciliation efforts are unsuccessful, and section 12965, subdivision (b) creates a private right of action for damages for a complainant whose complaint is not pursued by the DFEH." (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 286 [73 Cal.Rptr.2d 596], internal citations omitted.)

- "With these rules in mind, we examine the section 12940 claim and finding with regard to whether the usual elements of a tort, enforceable by private plaintiffs, have been established: Defendants' legal duty of care toward plaintiffs, breach of duty (a negligent act or omission), legal causation, and damages to the plaintiff." (*Trujillo*, *supra,* 63 Cal.App.4th at pp. 286–287, internal citation omitted.)

- "[W]hether an employer sufficiently complied with its mandate to 'take immediate and appropriate corrective action' is a question of fact." (*M.F.*, *supra*, 16 Cal.App.5th at p. 703, internal citation omitted.)

- "[C]ourts have required a finding of actual discrimination or harassment under FEHA before a plaintiff may prevail under section 12940, subdivision (k)." (*Dickson v. Burke Williams, Inc.* (2015) 234 Cal.App.4th 1307, 1314 [184 Cal.Rptr.3d 774].)

- "Also, there is a significant question of how there could be legal causation of any damages (either compensatory or punitive) from such a statutory violation, where the only jury finding was the failure to prevent actionable harassment or discrimination, which, however, did not occur." (*Trujillo, supra,* 63 Cal.App.4th at p. 289.)

- "[T]he 'Directions for Use' to CACI No. 2527 (2015), … states that the failure to prevent instruction should be given 'after the appropriate instructions in this series on the underlying claim for . . . harassment if the employee also claims that the employer failed to prevent the conduct.' An instruction on the elements of an underlying sexual harassment claim would be unnecessary if the failure to take reasonable steps necessary to prevent a claim for harassment could be based on harassing conduct that was not actionable harassment." (*Dickson, supra,* 234 Cal.App.4th at p. 1317.)

- "In accordance with … the fundamental public policy of eliminating discrimination in the workplace under the FEHA, we conclude that retaliation is a form of discrimination actionable under [Gov. Code] section 12940, subdivision (k)." (*Taylor v. City of Los Angeles Dept. of Water & Power* (2006)

144 Cal.App.4th 1216, 1240 [51 Cal.Rptr.3d 206], disapproved on other grounds in *Jones v. The Lodge at Torrey Pines Partnership* (2008), 42 Cal.4th 1158 [72 Cal.Rptr.3d 624, 177 P.3d 232].)

- "[Defendant] suggests that a separate element in CACI No. 2527 requiring [plaintiff] to prove that the failure to prevent discrimination or retaliation was 'a substantial factor in causing her harm' is equivalent to the disputed element in the other CACI instructions requiring [plaintiff] to prove that her pregnancy-related leave was 'a motivating reason' for her discharge. However, the 'substantial factor in causing harm' element in CACI No. 2527 does not concern the causal relationship between the adverse employment action and the plaintiff's protected status or activity. Rather, it concerns the causal relationship between the discriminatory or retaliatory conduct, if proven, and the plaintiff's injury." (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 480 [161 Cal.Rptr.3d 758].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 921

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, Title VII And The California Fair Employment and Housing Act, ¶¶ 7:670–7:672 (The Rutter Group)

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.02[6], 41.80[1], 41.81[7] (Matthew Bender)

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

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

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

New November 2017

Directions for Use

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

Sources and Authority

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

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

- "[CACI No. 2800] was correctly given, however, because the evidence was able to support a finding that the work was not a contributing cause of the injury. [¶] The jury could properly make this finding by applying special instruction No. 5, the instruction stating that an employer's conduct falls outside the workers' compensation scheme when an employer steps outside of its proper role or engages in conduct unrelated to the employment. This instruction stated the doctrine of *Fermino* correctly. If the jury found that carrying out the mock robbery was not within the employer's proper role, it could also find that unwittingly participating in the mock robbery as a victim was not part of the employee's work." (*Lee v. West Kern Water Dist.* (2016) 5 Cal.App.5th 606, 628–629 [210 Cal.Rptr.3d 362].)

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

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

- "[T]he exclusive remedy provisions are not applicable under certain circumstances, sometimes variously identified as 'conduct where the employer or insurer stepped out of their proper roles' [citations], or 'conduct of an employer having a "questionable" relationship to the employment' [citations], but which may be essentially defined as not stemming from a risk reasonably encompassed within the compensation bargain." (*Light v. Department of Parks & Recreation* (2017) 14 Cal.App.5th 75, 97 [221 Cal.Rptr.3d 668].)

Secondary Sources

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

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

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

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

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

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

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

3020. Excessive Use of Force—Unreasonable Arrest or Other Seizure—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] used excessive force in [arresting/detaining] [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force in [arresting/detaining] [***name of plaintiff***];**

2. **That the force used by [***name of defendant***] was excessive;**

3. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

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

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

Force is not excessive if it is reasonably necessary under the circumstances. In deciding whether force is reasonably necessary or excessive, you should determine, based on all of the facts and circumstances, what force a reasonable law enforcement officer on the scene would have used under the same or similar circumstances. You should consider the following:

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

(b) The seriousness of the crime at issue; [and]

(c) Whether [*name of plaintiff***] was actively [resisting [arrest/detention]/ [or] attempting to avoid [arrest/detention] by flight][./; and]**

(d) [*specify other factors particular to the case***].**

New September 2003; Revised June 2012; Renumbered from CACI No. 3001 December 2012; Revised June 2015, June 2016

Directions for Use

The "official duties" referred to in element 3 must be duties created by a state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

The three factors (a), (b), and (c) listed are often referred to as the "*Graham* factors." (See *Graham v.*

Connor (1989) 490 U.S. 386, 396 [109 S.Ct. 1865, 104 L.Ed.2d 443].) The *Graham* factors are not exclusive. (See *Glenn v. Wash. County* (9th Cir. 2011) 661 F.3d 460, 467–468.) Additional factors may be added if appropriate to the facts of the case.

Additional considerations and verdict form questions will be needed if there is a question of fact as to whether the defendant law enforcement officer had time for reflective decision-making before applying force. If the officers' conduct required a reaction to fast-paced circumstances presenting competing public safety obligations, the plaintiff must prove intent to harm. (See *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372 [190 Cal.Rptr.3d 693].)

No case has yet determined, and therefore it is unclear, whether the defense has either the burden of proof or the burden of producing evidence on reaction to fast-paced circumstances. (See Evid. Code, §§ 500 [party has burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted], 550 [burden of producing evidence as to particular fact is on party against whom a finding on the fact would be required in absence of further evidence].)

For an instruction for use in a negligence claim under California common law based on the same event and facts, see CACI No. 440, *Unreasonable Force by Law Enforcement Officer in Arrest or Other Seizure—Essential Factual Elements*. For an instruction for use alleging excessive force as a battery, see CACI No. 1305, *Battery by Police Officer.*

Sources and Authority

- "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force. In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." (*Graham, supra,* 490 U.S. at p. 395, internal citations and footnote omitted.)

- "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons ... against unreasonable ... seizures' of the person." (*Graham, supra,* 490 U.S. at p. 394.)

- "[A]ll claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." (*Graham, supra,* 490 U.S. at p. 395.)

- "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." (*Graham, supra,* 490 U.S. at p. 396.)

- "Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' ... its proper application requires careful attention to the facts

and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra,* 490 U.S. at p. 396, internal citation omitted.)

- "The most important of these [factors from *Graham,* above] is whether the suspect posed an immediate threat to the officers or others, as measured objectively under the circumstances." (*Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702, 712 [141 Cal.Rptr.3d 553] .)

- "[The *Graham*] factors, however, are not exclusive. We 'examine the totality of the circumstances and consider "whatever specific factors may be appropriate in a particular case, whether or not listed in *Graham*." ' Other relevant factors include the availability of less intrusive alternatives to the force employed, whether proper warnings were given and whether it should have been apparent to officers that the person they used force against was emotionally disturbed." (*Glenn, supra,* 661 F.3d at p. 467, internal citations omitted.)

- "With respect to the possibility of less intrusive force, officers need not employ the least intrusive means available[,] so long as they act within a range of reasonable conduct." (*Estate of Lopez v. Gelhaus* (9th Cir. 2017) 871 F.3d 998, 1006.)

- "Courts 'also consider, under the totality of the circumstances, the quantum of force used to arrest the plaintiff, the availability of alternative methods of capturing or detaining the suspect, and the plaintiff's mental and emotional state.' " (*Brooks v. Clark Cnty.* (9th Cir. 2016) 828 F.3d 910, 920.)

- "Because the reasonableness standard 'nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.' " (*Torres v. City of Madera* (9th Cir. 2011) 648 F.3d 1119, 1125.)

- "Justice Stevens incorrectly declares [the 'objective reasonableness' standard under *Graham*] to be 'a question of fact best reserved for a jury,' and complains we are 'usurp[ing] the jury's factfinding function.'. At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party *to the extent supportable by the record*, the reasonableness of [defendant]'s actions--or, in Justice Stevens' parlance, '[w]hether [respondent's] actions have risen to a level warranting deadly force,' is a pure question of law." (*Scott v. Harris* (2007) 550 U.S. 372, 381, fn. 8 [127 S. Ct. 1769; 167 L. Ed. 2d 686], original italics, internal citations omitted.)

- "Because there are no genuine issues of material fact and 'the relevant set of facts' has been determined, the reasonableness of the use of force is 'a pure question of law.' " (*Lowry v. City of San Diego* (9th Cir. 2017) 858 F.3d 1248, 1256 (en banc).)

- "In assessing the objective reasonableness of a particular use of force, we consider: (1) 'the severity of the intrusion on the individual's Fourth Amendment rights by evaluating the type and amount of force inflicted,' (2) 'the government's interest in the use of force,' and (3) the balance between 'the gravity of the intrusion on the individual' and 'the government's need for that intrusion.' " (*Lowry,*

supra, 858 F.3d at p. 1256.)

- "To be sure, the reasonableness inquiry in the context of excessive force balances 'intrusion[s] on the individual's Fourth Amendment interests' against the government's interests. But in weighing the evidence in favor of the officers, rather than the [plaintiffs], the district court unfairly tipped the reasonableness inquiry in the officers' favor." (*Sandoval v. Las Vegas Metro. Police Dep't* (9th Cir. 2014) 756 F.3d 1154, 1167, internal citation omitted.)

- "The Fourth Amendment's 'reasonableness' standard is not the same as the standard of 'reasonable care' under tort law, and negligent acts do not incur constitutional liability." (*Hayes, supra,* 57 Cal.4th at p. 639.)

- "[S]tate negligence law, which considers the totality of the circumstances surrounding any use of deadly force, is broader than federal Fourth Amendment law, which tends to focus more narrowly on the moment when deadly force is used." (*Hayes, supra,* 57 Cal.4th at p. 639, internal citations omitted.)

- "We are cognizant of the Supreme Court's command to evaluate an officer's actions 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.' We also recognize the reality that 'police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation.' This does not mean, however, that a Fourth Amendment violation will be found only in those rare instances where an officer and his attorney are unable to find a sufficient number of compelling adjectives to describe the victim's conduct. Nor does it mean that we can base our analysis on what officers actually felt or believed during an incident. Rather, we must ask if the officers' conduct is ' "objectively reasonable" in light of the facts and circumstances confronting them' without regard for an officer's subjective intentions." (*Bryan v. MacPherson* (9th Cir. 2010) 630 F.3d 805, 831, internal citations omitted.)

- "Deadly force is permissible only 'if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm.' " (*A. K. H. v. City of Tustin* (9th Cir. 2016) 837 F.3d 1005, 1011.)

- "[A]n officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force '[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others.' " (*Wilkinson v. Torres* (9th Cir. 2010) 610 F.3d 546, 550, internal citations omitted.)

- " '[I]f police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended.' But terminating a threat doesn't necessarily mean terminating the suspect. If the suspect is on the ground and appears wounded, he may no longer pose a threat; a reasonable officer would reassess the situation rather than continue shooting." (*Zion v. Cty. of Orange* (9th Cir. 2017) 874 F.3d 1072, 1076, internal citation omitted.)

- "Resistance, or the reasonable perception of resistance, does not entitle police officers to use any

amount of force to restrain a suspect. Rather, police officers who confront actual (or perceived) resistance are only permitted to use an amount of force that is reasonable to overcome that resistance." (*Barnard v. Theobald* (9th Cir. 2013) 721 F.3d 1069, 1076, internal citations omitted.)

- " In any event, the court correctly instructed the jury on the mental state required in a Fourteenth Amendment excessive use of force case under section 1983 because this case did not involve reflective decisionmaking by the officers, but instead their reaction to fast-paced circumstances presenting competing public safety obligations. Given these circumstances, [plaintiff] was required to prove that the officers acted with a purpose to cause harm to her son." (*Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1372 [190 Cal.Rptr.3d 693].)

- "[T]he fact that the 'suspect was armed with a deadly weapon' does *not* render the officers' response per se reasonable under the Fourth Amendment. [¶] This is not to say that the Fourth Amendment always requires officers to delay their fire until a suspect turns his weapon on them. If the person is armed—or reasonably suspected of being armed—a furtive movement, harrowing gesture, or serious verbal threat might create an immediate threat." (*George v. Morris* (9th Cir. 2013) 724 F.3d 1191, 1200, original italics, internal citations omitted.)

- " '[A] simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern.' Here, whether objective factors supported [defendant]'s supposed subjective fear is not a question that can be answered as a matter of law based upon the limited evidence in the record, especially given that on summary judgment that evidence must be construed in the light most favorable to [plaintiff], the non-moving party. Rather, whether [defendant]'s claim that he feared a broccoli-based assault is credible and reasonable presents a genuine question of material fact that must be resolved not by a court ruling on a motion for summary judgment but by a jury in its capacity as the trier of fact." (*Young v. County of Los Angeles* (9th Cir. 2011) 655 F.3d 1156, 1163–1164.)

- "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." (*Fetters v. County of Los Angeles* (2016) 243 Cal.App.4th 825, 838 [196 Cal.Rptr.3d 848].)

- "Although *Graham* does not specifically identify as a relevant factor whether the suspect poses a threat to *himself,* we assume that the officers could have used some reasonable level of force to try to prevent [decedent] from taking a suicidal act. But we are aware of no published cases holding it reasonable to use a *significant* amount of force to try to stop someone from attempting suicide. Indeed, it would be odd to permit officers to use force capable of causing serious injury or death in an effort to prevent the possibility that an individual might attempt to harm only himself. We do not rule out that in some circumstances some force might be warranted to prevent suicide, but in cases like this one the 'solution' could be worse than the problem." (*Glenn, supra,* 661 F.3d at p. 468.)

- "This Court has 'refused to create two tracks of excessive force analysis, one for the mentally ill and one for serious criminals.' The Court has, however, 'found that even when an emotionally disturbed individual is acting out and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted . . . with a

mentally ill individual.' A reasonable jury could conclude, based upon the information available to [defendant officer] at the time, that there were sufficient indications of mental illness to diminish the governmental interest in using deadly force." (*Hughes v. Kisela* (9th Cir. 2016) 841 F.3d 1081, 1086.)

- "By contrast, if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force." (*Marquez v. City of Phoenix* (9th Cir. 2012) 693 F.3d 1167, 1175, internal citation omitted.)

- "[P]reshooting conduct is included in the totality of circumstances surrounding an officer's use of deadly force, and therefore the officer's duty to act reasonably when using deadly force extends to preshooting conduct. But in a case like this one, where the preshooting conduct did not cause the plaintiff any injury independent of the injury resulting from the shooting, the reasonableness of the officers' preshooting conduct should not be considered in isolation. Rather, it should be considered in relation to the question whether the officers' ultimate use of deadly force was reasonable." (*Hayes, supra,* 57 Cal.4th at p. 632, internal citation omitted.)

- "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied." (*Nelson v. City of Davis* (9th Cir. 2012) 685 F.3d 867, 875.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." (*Heck v. Humphrey* (1994) 512 U.S. 477, 486–487 [114 S.Ct. 2364, 129 L.Ed.2d 383], footnotes and internal citation omitted.)

- "*Heck* requires the reviewing court to answer three questions: (1) Was there an underlying conviction

or sentence relating to the section 1983 claim? (2) Would a 'judgment in favor of the plaintiff [in the section 1983 action] "necessarily imply" … the invalidity of the prior conviction or sentence?' (3) 'If so, was the prior conviction or sentence already invalidated or otherwise favorably terminated?' " (*Fetters, supra*, 243 Cal.App.4th at p. 834.)

- "The *Heck* inquiry does not require a court to consider whether the section 1983 claim would establish beyond all doubt the invalidity of the criminal outcome; rather, a court need only 'consider whether a judgment in favor of the plaintiff would necessarily *imply* the invalidity of his conviction or sentence.' " (*Fetters, supra,* 243 Cal.App.4th at p. 841, original italics.)

- "[A] dismissal under section 1203.4 does not invalidate a conviction for purposes of removing the *Heck* bar preventing a plaintiff from bringing a civil action." (*Baranchik v. Fizulich* (2017) 10 Cal.App.5th 1210, 1224 [217 Cal.Rptr.3d 423].)

- "[Plaintiff]'s section 1983 claim *is* barred to the extent it alleges that [the arresting officer] lacked justification to arrest him or to respond with reasonable force to his resistance. The use of deadly force in this situation, though, requires a separate analysis. 'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 899 [76 Cal.Rptr.3d 787, 183 P.3d 471], original italics.)

- "Plaintiffs contend that the use of force is unlawful because the arrest itself is unlawful. But that is not so. We have expressly held that claims for false arrest and excessive force are analytically distinct." (*Sharp v. Cty. of Orange* (9th Cir. 2017) 871 F.3d 901, 916.)

- "[T]he district court effectively required the jury to presume that the arrest *was* constitutionally lawful, and so not to consider facts concerning the basis for the arrest. Doing so removed critical factual questions that were within the jury's province to decide. For instance, by taking from the jury the question whether [officer]'s arrest of [plaintiff] for resisting or obstructing a police officer was lawful, the district judge implied simultaneously that [plaintiff] was in fact resisting or failing to obey the police officer's lawful instructions. Presuming such resistance could certainly have influenced the jury's assessment of 'the need for force,' as well as its consideration of the other *Graham* factors, including 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight. By erroneously granting judgment as a matter of law on [plaintiff]'s unlawful arrest claim, the district court impermissibly truncated the jury's consideration of [plaintiff]'s excessive force claim." (*Velazquez v. City of Long Beach* (9th Cir. 2015) 793 F.3d 1010, 1027, original italics.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1526

et seq. (The Rutter Group)

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶¶ 10.00–10.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3051. Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully removed [***name of plaintiff***]'s child from [his/her] parental custody because [***name of defendant***] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] removed [***name of plaintiff***]'s child from [his/her] parental custody without a warrant;**

2. **That [***name of defendant***] was performing or purporting to perform [his/her] official duties;**

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

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

New June 2016

Directions for Use

This instruction is a variation on CACI No. 3021, *Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements*, and CACI No. 3023, *Unreasonable Search—Search Without a Warrant—Essential Factual Elements*, in which the warrantless act is the removal of a child from parental custody rather than an arrest or search. This instruction asserts a parent's due process right to familial association under the Fourteenth Amendment. It may be modified to assert or include the child's right under the Fourth Amendment to be free of a warrantless seizure. (See *Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1473−1474 [150 Cal.Rptr.3d 735].)

Warrantless removal is a constitutional violation unless the authorities possess information at the time of the seizure that establishes reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury. (*Arce, supra,* 211 Cal.App.4th at p. 1473.) The committee believes that the defendant bears the burden of proving imminent danger. (See Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."]; cf. *Welsh v. Wisconsin* (1984) 466 U.S. 740, 750 [104 S.Ct. 2091, 80 L.Ed.2d 732] ["Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."].) CACI No. 3026, *Affirmative Defense─Exigent Circumstances* (to a warrantless search), may be modified to respond to this claim.

If the removal of the child was without a warrant and without exigent circumstances, but later found to be justified by the court, damages are limited to those caused by the procedural defect, not the removal. (See

Watson v. City of San Jose (9th Cir. 2015) 800 F.3d 1135, 1139.)

Sources and Authority

- " ' "Parents and children have a well-elaborated constitutional right to live together without governmental interference.' [Citation.] 'The Fourteenth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies." This 'right to family association' requires '[g]overnment officials … to obtain prior judicial authorization before intruding on a parent's custody of her child unless they possess information at the time of the seizure that establishes "reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury." [Citation.]' " (*Arce, supra*, 211 Cal.App.4th at p. 1473, internal citations omitted.)

- " 'The Fourth Amendment also protects children from removal from their homes [without prior judicial authorization] absent such a showing. [Citation.] Officials, including social workers, who remove a child from its home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant.' Because 'the same legal standard applies in evaluating Fourth and Fourteenth Amendment claims for the removal of children," we may "analyze [the claims] together.' " (*Arce, supra*, 211 Cal.App.4th at pp. 1473−1474.)

- "While the constitutional source of the parent's and the child's rights differ, the tests under the Fourteenth Amendment and the Fourth Amendment for when a child may be seized without a warrant are the same. The Constitution requires an official separating a child from its parents to obtain a court order unless the official has reasonable cause to believe the child is in 'imminent danger of serious bodily injury.' Seizure of a child is reasonable also where the official obtains parental consent." (*Jones v. County of L.A.* (9th Cir. 2015) 802 F.3d 990, 1000, internal citations omitted.)

- "This requirement 'balance[s], on the one hand, the need to protect children from abuse and neglect and, on the other, the preservation of the essential privacy and liberty interests that families are guaranteed under both the Fourth and Fourteenth Amendments of our Constitution.' " (*Demaree v. Pederson* (9th Cir. 2018) 880 F.3d 1066, 1074.)

- "[W]hether an official had 'reasonable cause to believe exigent circumstances existed in a given situation … [is a] "question[] of fact to be determined by a jury." [Citation.]' " (*Arce, supra*, 211 Cal.App.4th at p. 1475.)

- "Under the Fourth Amendment, government officials are ordinarily required to obtain prior judicial authorization before removing a child from the custody of her parent. However, officials may seize a child without a warrant 'if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.' " (*Kirkpatrick v. Cnty. of Washoe* (9th Cir. 2016) 843 F.3d 784, 790 (en banc) .)

- "[I]t does not matter whether the warrant could be obtained in hours or days. What matters is whether there is an identifiable risk of serious harm or abuse *during whatever the delay period is*." (*Demaree*, *supra*, 880 F.3d at p. 1079, original italics.)

- "The parental right secured by the Fourteenth Amendment 'is not reserved for parents with full legal and physical custody.' At the same time, however, '[p]arental rights do not spring full-blown from the biological connection between parent and child.' Judicially enforceable interests arising under the Fourteenth Amendment 'require relationships more enduring,' which reflect some assumption 'of parental responsibility.' It is '[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child,' that 'his interest in personal contact with his child acquires substantial protection under the due process clause.' Until then, a person with only potential parental rights enjoys a liberty interest in the companionship, care, and custody of his children that is 'unambiguously lesser in magnitude.' " (*Kirkpatrick, supra,* 843 F.3d at p. 789.)

- "[A] child is seized for purposes of the Fourth and Fourteenth Amendments when a representative of the state takes action causing a child to be detained at a hospital as part of a child abuse investigation, such that a reasonable person in the same position as the child's parent would believe that she cannot take her child home." (*Jones, supra,* 802 F.3d at p. 1001.)

- "[A] jury is needed to determine what a reasonable parent in the [plaintiffs'] position would have believed and whether [defendant]'s conduct amounted to a seizure." (*Jones, supra*, 802 F.3d at p. 1002.)

- "In sum, although we do not dispute that Shaken Baby Syndrome is a serious, life-threatening injury, we disagree with the County defendants' assertion that a child may be detained without prior judicial authorization based solely on the fact that he or she has suffered a serious injury. Rather, the case law demonstrates that the warrantless detention of a child is improper unless there is "specific, articulable evidence" that the child would be placed at imminent risk of serious harm absent an immediate interference with parental custodial rights." (*Arce, supra,* 211 Cal.App.4th at p. 1481.)

- "[I]n cases where 'a deprivation is justified but procedures are deficient, whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure.' In such cases, … a plaintiff must 'convince the trier of fact that he actually suffered distress because of the denial of procedural due process itself.' " (*Watson, supra,* 800 F.3d at p. 1139, internal citation omitted; see *Carey v. Piphus* (1978) 435 U.S. 247, 263 [98 S.Ct. 1042, 55 L.Ed.2d 252].)

Secondary Sources

3 Civil Rights Actions, Ch. 12B, *Deprivation of Rights Under Color of State Law--Family Relations,* ¶ 12B.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes,* § 113.14 (Matthew Bender)

3 California Points and Authorities, Ch. 35A, *Civil Rights: Equal Protection*, § 35A.29 et seq. (Matthew Bender)

3060. Unruh Civil Rights Act—Essential Factual Elements (Civ. Code, §§ 51, 52)

[*Name of plaintiff***] claims that [***name of defendant***] denied [him/her] full and equal [accommodations/advantages/facilities/privileges/services] because of [his/her] [sex/race/color/religion/ancestry/national origin/disability/medical condition/genetic information/marital status/sexual orientation/citizenship/primary language/immigration status/[***insert other actionable characteristic***]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [denied/aided or incited a denial of/discriminated or made a distinction that denied] full and equal [accommodations/advantages/facilities/privileges/services] to [***name of plaintiff***];**

2. **[That a substantial motivating reason for** [***name of defendant***]**'s conduct was [its perception of] [***name of plaintiff***]'s [sex/race/color/religion/ancestry/national origin/ medical condition/genetic information/marital status/sexual orientation/ citizenship/primary language/immigration status/[***insert other actionable characteristic***]];]**

   [That the [sex/race/color/religion/ancestry/national origin/medical condition/genetic information/marital status/sexual orientation/ citizenship/primary language/immigration status/[*insert other actionable characteristic***]] of a person whom [***name of plaintiff***] was associated with was a substantial motivating reason for [***name of defendant***]'s conduct;]**

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

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

New September 2003; Revised December 2011, June 2012; Renumbered from CACI No. 3020 December 2012; Revised June 2013, June 2016

Directions for Use

Select the bracketed option from element 2 that is most appropriate to the facts of the case.

Note that element 2 uses the term "substantial motivating reason" to express both intent and causation between the protected classification and the defendant's conduct. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies under the Unruh Act has not been addressed by the courts.

With the exception of claims that are also violations of the Americans With Disabilities Act (ADA) (see *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 665 [94 Cal.Rptr.3d 685, 208 P.3d 623]), intentional discrimination is required for violations of the Unruh Act. (See *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1149 [278 Cal.Rptr. 614, 805 P.2d 873].) The intent requirement is encompassed within the motivating-reason element. For claims that are also violations of the ADA, do not give element 2.

Note that there are two causation elements. There must be a causal link between the discriminatory intent and the adverse action (see element 2), and there must be a causal link between the adverse action and the harm (see element 4).

For an instruction on damages under the Unruh Act, see CACI No. 3067, *Unruh Civil Rights Act—Damages*. Note that the jury may award a successful plaintiff up to three times actual damages but not less than $4,000 regardless of any actual damages. (Civ. Code, § 52(a).) In this regard, harm is presumed, and elements 3 and 4 may be considered as established if no actual damages are sought. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Unruh Act violations are per se injurious]; Civ. Code, § 52(a) [provides for minimum statutory damages for every violation regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].)

The judge may decide the issue of whether the defendant is a business establishment as a matter of law. (*Rotary Club of Duarte v. Bd. of Directors* (1986) 178 Cal.App.3d 1035, 1050 [224 Cal.Rptr. 213].) Special interrogatories may be needed if there are factual issues. This element has been omitted from the instruction because it is unlikely to go to a jury.

The Act is not limited to the categories expressly mentioned in the statute. Other forms of arbitrary discrimination by business establishments are prohibited. (*In re Cox* (1970) 3 Cal.3d 205, 216 [90 Cal.Rptr. 24, 474 P.2d 992].) Therefore, this instruction allows the user to "*insert other actionable characteristic*" throughout. Nevertheless, there are limitations on expansion beyond the statutory classifications. First, the claim must be based on a personal characteristic similar to those listed in the statute. Second, the court must consider whether the alleged discrimination was justified by a legitimate business reason. Third, the consequences of allowing the claim to proceed must be taken into account. (*Semler v. General Electric Capital Corp.* (2011) 196 Cal.App.4th 1380, 1392–1393 [127 Cal.Rptr.3d 794]; see *Harris, supra,* 52 Cal.3d at pp. 1159–1162.) However, these issues are most likely to be resolved by the court rather than the jury. (See *Harris, supra,* 52 Cal.3d at p. 1165.) Therefore, no elements are included to address what may be an "other actionable characteristic." If there are contested factual issues, additional instructions or special interrogatories may be necessary.

Sources and Authority

- Unruh Civil Rights Act. Civil Code section 51.
- Remedies Under Unruh Act. Civil Code section 52.
- "The Unruh Act was enacted to 'create and preserve a nondiscriminatory environment in California business establishments by "banishing" or "eradicating" arbitrary, invidious discrimination by such establishments.' " (*Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 937 [190 Cal.Rptr.3d 33].)

- "Invidious discrimination is the treatment of individuals in a manner that is malicious, hostile, or damaging." (*Javorsky v. Western Athletic Clubs, Inc.* (2015) 242 Cal.App.4th 1386, 1404 [195 Cal.Rptr.3d 706].)

- " 'The Legislature used the words "all" and "of every kind whatsoever" in referring to business establishments covered by the Unruh Act, and the inclusion of these words without any exception and without specification of particular kinds of enterprises, leaves no doubt that the term "business establishments" was used in the broadest sense reasonably possible. The word "business" embraces everything about which one can be employed, and it is often synonymous with "calling, occupation, or trade, engaged in for the purpose of making a livelihood or gain." The word "establishment," as broadly defined, includes not only a fixed location, such as the "place where one is permanently fixed for residence or business," but also a permanent "commercial force or organization" or "a permanent settled position, (as in life or business)." ' " (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 795 [191 Cal.Rptr. 320, 662 P.2d 427], internal citations omitted.)

- Whether a defendant is a "business establishment" is decided as an issue of law. (*Rotary Club of Duarte, supra,* 178 Cal.App.3d at p. 1050.)

- "Here, the City was not acting as a business establishment. It was amending an already existing municipal code section to increase the minimum age of a responsible person from the age of 21 years to 30. The City was not directly discriminating against anyone and nothing in the plain language of the Unruh Civil Rights Act makes its provisions applicable to the actions taken by the City." (*Harrison v. City of Rancho Mirage* (2015) 243 Cal.App.4th 162, 175 [196 Cal.Rptr.3d 267].)

- "In addition to the particular forms of discrimination specifically outlawed by the Act (sex, race, color, etc.), courts have held the Act 'prohibit[s] discrimination based on several classifications which are not specifically enumerated in the statute.' These judicially recognized classifications include unconventional dress or physical appearance, families with children, homosexuality, and persons under 18." (*Hessians Motorcycle Club v. J.C. Flanagans* (2001) 86 Cal.App.4th 833, 836 [103 Cal.Rptr.2d 552], internal citations omitted.)

- "[T]here is no dispute that California courts have applied the Act to discrimination based on age. Furthermore, the Act targets not just the practice of outright exclusion, but pricing differentials as well." (*Javorsky, supra,* 242 Cal.App.4th at p. 1394, internal citations omitted.)

- "[T]he language and history of the Unruh Act indicate that the legislative object was to prohibit intentional discrimination in access to public accommodations. We have been directed to no authority, nor have we located any, that would justify extension of a disparate impact test, which has been developed and applied by the federal courts primarily in employment discrimination cases, to a general discrimination-in-public-accommodations statute like the Unruh Act. Although evidence of adverse impact on a particular group of persons may have probative value in public accommodations cases and should therefore be admitted in appropriate cases subject to the general rules of evidence, a plaintiff must nonetheless plead and prove a case of intentional discrimination to recover under the Act." (*Harris, supra,* 52 Cal.3d at p. 1149.)

- "On examining the language, statutory context, and history of section 51, subdivision (f), we conclude … [t]he Legislature's intent in adding subdivision (f) was to provide disabled Californians injured by violations of the ADA with the remedies provided by section 52. A plaintiff who establishes a violation of the ADA, therefore, need not prove intentional discrimination in order to obtain damages under section 52." (*Munson, supra,* 46 Cal.4th at p. 665.)

- "Civil Code section 51, subdivision (f) states: 'A violation of the right of any individual under the federal [ADA] shall also constitute a violation of this section.' The ADA provides in pertinent part: 'No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who … operates a place of public accommodation.' The ADA defines discrimination as 'a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.' " (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825], internal citations omitted.)

- " 'Although the Unruh Act proscribes "any form of arbitrary discrimination", certain types of discrimination have been denominated "reasonable" and, therefore, not arbitrary.' Thus, for example, 'legitimate business interests may justify limitations on consumer access to public accommodations.' " (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 520 [74 Cal.Rptr.2d 684], internal citations omitted.)

- "Discrimination may be reasonable, and not arbitrary, in light of the nature of the enterprise or its facilities, legitimate business interests (maintaining order, complying with legal requirements, and protecting business reputation or investment), and public policy supporting the disparate treatment." (*Javorsky, supra,* 242 Cal.App.4th at p. 1395.)

- "[T]he Act's objective of prohibiting 'unreasonable, arbitrary or invidious discrimination' is fulfilled by examining whether a price differential reflects an 'arbitrary, class-based generalization.' … [A] policy treating age groups differently in this respect may be upheld, at least if the pricing policy (1) ostensibly provides a social benefit to the recipient group; (2) the recipient group is disadvantaged economically when compared to other groups paying full price; and (3) there is no invidious discrimination." (*Javorsky, supra,* 242 Cal.App.4th at p. 1399.)

- "Unruh Act issues have often been decided as questions of law on demurrer or summary judgment when the policy or practice of a business establishment is valid on its face because it bears a reasonable relation to commercial objectives appropriate to an enterprise serving the public." (*Harris, supra,* 52 Cal.3d at p. 1165, internal citations omitted.)

- "It is thus manifested by section 51 that all persons are entitled to the full and equal privilege of associating with others in any business establishment. And section 52, liberally interpreted, makes clear that discrimination by such a business establishment against one's right of association on account of the associates' color, is violative of the Act. It follows ... that discrimination by a business establishment against persons on account of their association with others of the black race is

actionable under the Act." (*Winchell v. English* (1976) 62 Cal.App.3d 125, 129 [133 Cal.Rptr. 20].)

- "Appellant is disabled as a matter of law not only because she is HIV positive, but also because it is undisputed that respondent 'regarded or treated' her as a person with a disability. The protection of the Unruh Civil Rights Act extends both to people who are currently living with a physical disability that limits a life activity and to those who are regarded by others as living with such a disability. … 'Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the "regarded as" definition casts a broader net and protects *any* individual "regarded" or "treated" by an employer "as having, or having had, any physical condition that makes achievement of a major life activity difficult" or may do so in the future.' Thus, even an HIV-positive person who is outwardly asymptomatic is protected by the Unruh Civil Rights Act." (*Maureen K. v. Tuschka* (2013) 215 Cal.App.4th 519, 529−530 [155 Cal.Rptr.3d 620], original italics, internal citations omitted.)

- "[T]he Unruh Civil Rights Act prohibits arbitrary discrimination in public accommodations with respect to trained service dogs, but not to service-animals-in-training." (*Miller v. Fortune Commercial Corp.* (2017) 15 Cal.App.5th 214, 224 [223 Cal.Rptr.3d 133].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 898–914

Chin et al., California Practice Guide: Employment Litigation, Ch.7-G, *Unruh Civil Rights Act*, ¶ 7:1525 et seq. (The Rutter Group)

11 California Forms of Pleading and Practice, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.10-116.13 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act,* § 35.20 et seq. (Matthew Bender)

3066. Bane Act—Essential Factual Elements (Civ. Code, § 52.1)

[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with [or attempted to interfere with] [his/her] civil rights by threats, intimidation, or coercion. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. [**That [***name of defendant***] made threats of violence against [***name of plaintiff***] causing [***name of plaintiff***] to reasonably believe that if [he/she] exercised [his/her] right [***insert right, e.g., "to vote"***], [***name of defendant***] would commit violence against [[him/her]/ [or] [his/her] property] and that [***name of defendant***] had the apparent ability to carry out the threats;]**

[*or***]**

[That [*name of defendant***] acted violently against [[***name of plaintiff***]/ [and] [***name of plaintiff***]'s property] [to prevent [him/her] from exercising [his/her] right [***insert right***]/to retaliate against [***name of plaintiff***] for having exercised [his/her] right [***insert right***]];]**

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

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

New September 2003; Renumbered from CACI No. 3025 and Revised December 2012

Directions for Use

Select the first option for element 1 if the defendant's conduct involved threats of violence. (See Civ. Code, § 52.1(j).) Select the second option if the conduct involved actual violence.

The Bane Act provides that speech alone is not sufficient to constitute a violation unless it involves a credible threat of violence. (Civ. Code, § 52.1(j).) This limitation would appear to foreclose a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] [to state a cause of action under Bane Act there must first be violence or intimidation by threat of violence].) For example, it would not be a violation to threaten to report someone to immigration if the person exercises a right granted under labor law. No case has been found, however, that applies the speech limitation to foreclose such a claim, and several courts have suggested that this point is not fully settled. (See *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959 [137 Cal.Rptr.3d 839] [we "need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1"]; *City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 408 [39 Cal.Rptr.3d 1] [also noting issue but finding it unnecessary to address].) To assert such a claim, modify element 2 to allege coercion based on a nonviolent threat with severe consequences.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code section 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the reference to section 52 in subsection (b) of the Bane Act would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52.

Under the Unruh Act, if only the statutory minimum damages of $4,000 is sought, it is not necessary to prove harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) [“actual damages” means special and general damages].) Presumably, the same rule applies under the Bane Act as the statutory minimum of section 52(a) should be recoverable Therefore, omit elements 2 and 3 unless actual damages are sought. If actual damages are sought, combine CACI No. 3067, *Unruh Civil Rights Act—Damages*, and CACI No. 3068, *Ralph Act—Damages and Penalty*, to recover damages under both subsections (a) and (b) of section 52.

Sources and Authority

- Bane Act. Civil Code section 52.1.
- Remedies Under Bane Act. Civil Code section 52.
- “The Bane Act permits an individual to pursue a civil action for damages where another person ‘interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state.’ ‘The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., “threat[], intimidation or coercion”), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.’ ” (*King v. State of California* (2015) 242 Cal.App.4th 265, 294 [195 Cal.Rptr.3d 286], internal citation omitted.)
- “[S]ection 52.1, was enacted a decade [after the Ralph Act] as part of Assembly Bill No. 63 (1987–1988 Reg. Sess.) (Assembly Bill No. 63) and is known as the Tom Bane Civil Rights Act. It was intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence. The stated purpose of the bill was ‘to fill in the gaps left by the Ralph Act’ by allowing an individual to seek relief to prevent the violence from occurring before it was committed and providing for the filing of criminal charges. (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447 [39 Cal.Rptr.3d 706], internal citation omitted.)
- “The Legislature enacted section 52.1 to stem a tide of hate crimes.” (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 [70 Cal.Rptr.2d 844, 949 P.2d 941], internal citation omitted.)
- “[T]o state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence. Second, the violence or threatened violence must be due to plaintiff's membership in one

of the specified classifications set forth in Civil Code section 51.7 or a group similarly protected by constitution or statute from hate crimes." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1290 [217 Cal.Rptr.3d 275].)

- "The plaintiff must show 'the defendant interfered with or attempted to interfere with the plaintiff's legal right by threatening or committing violent acts.' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 395 [218 Cal.Rptr.3d 38].)

- "However, the statutory language does not limit its application to hate crimes. Notably, the statute does not require a plaintiff to allege the defendant acted with discriminatory animus or intent based upon the plaintiff's membership in a protected class of persons." (*Shoyoye, supra,* 203 Cal.App.4th at p. 956.)

- "Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.* (1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)

- "[T]he Bane Act requires that the challenged conduct be intentional." (*Simmons v. Superior Court* (2016) 7 Cal.App.5th 1113, 1125 [212 Cal.Rptr.3d 884].)

- "[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones, supra,* 17 Cal.4th at p. 334.)

- "The statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence." (*Shoyoye, supra,* 203 Cal.App.4th at p. 958.)

- Section 52.1 is not a remedy to be used against private citizens for violations of rights that apply only to the state or its agents. (*Jones, supra,* 17 Cal.4th at p. 337 [right to be free from unreasonable search and seizure].)

- " '[W]here coercion is inherent in the constitutional violation alleged, … the statutory requirement of "threats, intimidation, or coercion" is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.' " (*Simmons, supra,* 7 Cal.App.5th at p. 1126.)

- Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282], which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under section 52.1: "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things."

- "Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or

group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' ... The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S., supra,* 10 Cal.4th at p. 715, internal citation omitted.)

- "[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code section 52.1." (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741].)

- "[A] wrongful detention that is 'accompanied by the requisite threats, intimidation, or coercion'—'coercion independent from the coercion inherent in the wrongful detention itself' that is 'deliberate or spiteful'—is a violation of the Bane Act." (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981 [159 Cal.Rptr.3d 204], internal citations omitted.)

- "Here, there clearly *was* a showing of coercion separate and apart from the coercion inherent in an unlawful arrest. [Defendant officer] wrongfully detained and arrested plaintiff, because he had no probable cause to believe plaintiff had committed any crime. But, in addition, [defendant officer] deliberately and unnecessarily beat and pepper sprayed the unresisting, already handcuffed plaintiff. That conduct was not the coercion that is inherent in a wrongful arrest." (*Bender, supra,* 217 Cal.App.4th at p. 979, original italics.)

- "Civil Code section 52.1 does not address the immunity established by section 844.6 [public entity immunity for injury to prisoners]. Nothing in Civil Code section 52.1 indicates an intent to abrogate this specific immunity provision. The immunity that it creates therefore applies to [plaintiff]'s Bane Act claim." (*Towery v. State of California* (2017) 14 Cal.App.5th 226, 234 [221 Cal.Rptr.3d 692].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 895

Cheng, et al., Calif. Fair Housing and Public Accommodations § 9:38 (The Rutter Group) (The Bane Act)

California Civil Practice: Civil Rights Litigation, §§ 3:1–3:15 (Thomson Reuters)

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Employment Opportunity Laws,* § 40.12 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence,* § 117A.11 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act,* §§ 35.01, 35.27 (Matthew Bender)

3103. Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was neglected by [[***name of individual defendant***]/ [and] [***name of employer defendant***]] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] had a substantial caretaking or custodial relationship with [***name of plaintiff/decedent***], involving ongoing responsibility for [his/her] basic needs, which an able-bodied and fully competent adult would ordinarily be capable of managing without assistance;**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] while [he/she] was in [[***name of individual defendant***]'s/[***name of employer defendant***]'s employee's] care or custody;**

3. **That [[***name of individual defendant***]/[***name of employer defendant***]'s employee] failed to use the degree of care that a reasonable person in the same situation would have used in providing for [***name of plaintiff/decedent***]'s basic needs, including [***insert one or more of the following:***]**

   [assisting in personal hygiene or in the provision of food, clothing, or shelter;]

   [providing medical care for physical and mental health needs;]

   [protecting [*name of plaintiff/decedent***] from health and safety hazards;]**

   [preventing malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

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

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

New September 2003; Revised December 2005, June 2006, October 2008, January 2017

Directions for Use

This instruction may be given in cases brought under the Elder Abuse and Dependent Adult Civil Protection Act (the Act) by the victim of elder neglect, or by the survivors of the victim. If the victim is the plaintiff and is seeking damages for pain and suffering, see CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*, in the Damages series.

If the plaintiff seeks the enhanced remedies of attorney fees and costs, and in the case of a wrongful

death, the decedent's pain and suffering, give CACI No. 3104, *Neglect—Enhanced Remedies Sought,* in addition to this instruction. (See Welf. & Inst. Code, § 15657.)

If the individual responsible for the neglect is a defendant in the case, use "[*name of individual defendant*]" throughout. If only the individual's employer is a defendant, use "[*name of employer defendant*]'s employee" throughout.

If the plaintiff is seeking enhanced remedies against the individual's employer, also give either CACI No. 3102A, *Employer Liability for Enhanced Remedies—Both Individual and Employer Defendants,* or CACI No. 3102B, *Employer Liability for Enhanced Remedies—Employer Defendant Only.* To recover damages against the employer under a theory of vicarious liability, see instructions in the Vicarious Responsibility series (CACI No. 3700 et seq.).

The Act does not extend to cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) unless the professional had a substantial caretaking or custodial relationship with the elder or dependent adult patient, involving ongoing responsibility for one or more basic needs. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 152 [202 Cal.Rptr.3d 447, 370 P.3d 1011]; see Welf. & Inst. Code, § 15657.2; Civ. Code, § 3333.2(c)(2).)

The instructions in this series are not intended to cover every circumstance in which a plaintiff may bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

Sources and Authority

- "Elder Abuse" Defined. Welfare and Institutions Code section 15610.07.
- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Elder" Defined. Welfare and Institutions Code section 15610.27.
- "Neglect" Defined. Welfare and Institutions Code section 15610.57.
- Claims for Professional Negligence Excluded. Welfare and Institutions Code section 15657.2.
- "It is true that statutory elder abuse includes 'neglect as defined in Section 15610.57,' which in turn includes negligent failure of an elder custodian 'to provide medical care for [the elder's] physical and mental health needs.' … '[N]eglect' within the meaning of Welfare and Institutions Code section 15610.57 covers an area of misconduct distinct from 'professional negligence.' As used in the Act, neglect refers not to the substandard performance of medical services but, rather, to the 'failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' Thus, the statutory definition of 'neglect' speaks not of the *undertaking* of medical services, but of the failure to *provide* medical care." (*Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 783 [11 Cal.Rptr.3d 222, 86 P.3d 290], original italics, internal citations omitted.)

- "We granted review to consider whether a claim of neglect under the Elder Abuse Act requires a caretaking or custodial relationship—where a person has assumed significant responsibility for attending to one or more of those basic needs of the elder or dependent adult that an able-bodied and fully competent adult would ordinarily be capable of managing without assistance. Taking account of the statutory text, structure, and legislative history of the Elder Abuse Act, we conclude that it does." (*Winn, supra,* 63 Cal.4th at p. 155.)

- "[T]he Act does not apply unless the defendant health care provider had a substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs, with the elder patient. It is the nature of the elder or dependent adult's relationship with the defendant—not the defendant's professional standing—that makes the defendant potentially liable for neglect." (*Winn, supra,* 63 Cal.4th at p. 152.)

- "The Act seems premised on the idea that certain situations place elders and dependent adults at heightened risk of harm, and heightened remedies relative to conventional tort remedies are appropriate as a consequence. Blurring the distinction between neglect under the Act and conduct actionable under ordinary tort remedies—even in the absence of a care or custody relationship—risks undermining the Act's central premise. Accordingly, plaintiffs alleging professional negligence may seek certain tort remedies, though not the heightened remedies available under the Elder Abuse Act." (*Winn, supra,* 63 Cal.4th at p. 159, internal citation omitted.)

- " '[I]t is the defendant's relationship with an elder or a dependent adult—not the defendant's professional standing or expertise—that makes the defendant potentially liable for neglect.' For these reasons, *Winn* better supports the conclusion that the majority of [defendant]'s interactions with decedent were custodial. [Defendant] has cited no authority allowing or even encouraging a court to assess care and custody status on a task-by-task basis, and the *Winn* court's focus on the extent of dependence by a patient on a health care provider rather than on the nature of the particular activities that comprised the patient-provider relationship counsels against adopting such an approach." (*Stewart v. Superior Court* (2017) 16 Cal.App.5th 87, 103-104 [224 Cal.Rptr.3d 219].)

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- "[N]eglect as a form of abuse under the Elder Abuse Act refers 'to the failure of those responsible for attending to the basic needs and comforts of elderly or dependent adults, regardless of their professional standing, to carry out their custodial obligations.' " (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 404 [129 Cal.Rptr.3d 895].)

- "It seems to us, then, that respecting the patient's right to consent or object to surgery is a necessary component of 'provid[ing] medical care for physical and mental health needs.' Conversely, depriving a patient of the right to consent to surgery could constitute a failure to provide a necessary component

of what we think of as ‘medical care.’ ” (*Stewart*, *supra*, 16 Cal.App.5th at p. 107, internal citation omitted.)

- “[A] violation of staffing regulations here may provide a basis for finding neglect. Such a violation might constitute a negligent failure to exercise the care that a similarly situated reasonable person would exercise, or it might constitute a failure to protect from health and safety hazards … . The former is the definition of neglect under the Act, and the latter is just one nonexclusive example of neglect under the Act.” (*Fenimore v. Regents of University of California* (2016) 245 Cal.App.4th 1339, 1348−1349 [200 Cal.Rptr.3d 345].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1686–1688

California Elder Law Litigation (Cont.Ed.Bar 2003) §§ 2.70–2.71

3 Levy et al., California Torts, Ch. 31 *Liability of Physicians and Other Medical Practitioners*, § 31.50[4][d] (Matthew Bender)

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.33[3] (Matthew Bender)

3701. Tort Liability Asserted Against Principal—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she] was harmed by [***name of agent***]'s [***insert tort theory, e.g., "negligence"***].**

[*Name of plaintiff***] also claims that [***name of defendant***] is responsible for the harm because [***name of agent***] was acting as [his/her/its] [agent/employee/[***insert other relationship, e.g., "partner"***]] when the incident occurred.**

If you find that [*name of agent***]'s [***insert tort theory***] harmed [***name of plaintiff***], then you must decide whether [***name of defendant***] is responsible for the harm. [***Name of defendant***] is responsible if [***name of plaintiff***] proves both of the following:**

1. **That [***name of agent***] was [***name of defendant***]'s [agent/employee/[***insert other relationship***]]; and**

2. **That [***name of agent***] was acting within the scope of [his/her] [agency/employment/[***insert other relationship***]] when [he/she] harmed [***name of plaintiff***].**

New September 2003

Directions for Use

The term "name of agent," in brackets, is intended in the general sense, to denote the person or entity whose wrongful conduct is alleged to have created the principal's liability.

Under other principles of law, a principal may be directly liable for authorizing or directing an agent's wrongful acts. (See 2 Witkin, Summary of Cal. Law (10th ed. 2005) Agency and Employment, § 163.)

One of the two bracketed first sentences would be used, depending on whether the plaintiff is suing both the principal and the agent or the principal alone.

If there is no issue regarding whether a principal-agent exists, see CACI No. 3703, *Legal Relationship Not Disputed.*

This instruction may not apply if employer liability is statutory, such as under the Fair Employment and Housing Act.

Sources and Authority

- "Agent" Defined. Civil Code section 2295.
  - " 'An agent is one who represents another, called the principal, in dealings with third persons.

Such representation is called agency.' 'An agent for a particular act or transaction is called a special agent. All others are general agents.' 'An agency relationship "may be implied based on conduct and circumstances." ' " (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 262 [225 Cal.Rptr.3d 305], internal citations omitted.)

- "The rule of respondeat superior is familiar and simply stated: an employer is vicariously liable for the torts of its employees committed within the scope of the employment. Equally well established, if somewhat surprising on first encounter, is the principle that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296-297 [48 Cal.Rptr.2d 510, 907 P.2d 358], internal citations and footnote omitted.)

- "It is a settled rule of the law of agency that a principal is responsible to third persons for the ordinary contracts and obligations of his agent with third persons made in the course of the business of the agency and within the scope of the agent's powers as such, although made in the name of the agent and not purporting to be other than his own personal obligation or contract." (*Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1178 [201 Cal.Rptr.3d 390].)

- "The employer is liable not because the employer has control over the employee or is in some way at fault, but because the employer's enterprise creates inevitable risks as a part of doing business." (*Bailey v. Filco, Inc.* (1996) 48 Cal.App.4th 1552, 1559 [56 Cal.Rptr.2d 333], internal citations omitted.)

- "Respondeat superior is based on a 'deeply rooted sentiment' that it would be unjust for an enterprise to disclaim responsibility for injuries occurring in the course of its characteristic activities." (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 208 [285 Cal.Rptr. 99, 814 P.2d 1341], internal citation omitted.)

- "[The Supreme Court has] articulated three reasons for applying the doctrine of respondeat superior: "(1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury." (*Mary M., supra*, 54 Cal.3d at p. 209.)

- "[A] principal is charged only with the knowledge of an agent acquired while the agent was acting in that role and within the scope of his or her authority as an agent." (*RSB Vineyards, LLC v. Orsi* (2017) 15 Cal.App.5th 1089, 1099 [223 Cal.Rptr.3d 458].)

- "[A] relationship of agency always 'contemplates three parties—the principal, the agent, and the third party with whom the agent is to deal.' " (*RSB Vineyards, LLC, supra*, 15 Cal.App.5th at p. 1100.)

- "[A] principal may be liable for the wrongful conduct of its agent, even if that conduct is criminal, in one of three ways: (1) if the ' "principal directly authorizes … [the tort or] crime to be committed" '; (2) if the agent commits the tort 'in the scope of his employment and in performing service on behalf of the principal', 'regardless of whether the wrong is authorized or ratified by [the principal];, and even if the wrong is criminal; or (3) if the principal ratifies its agent's conduct 'after the fact by …

voluntar[ily] elect[ing] to adopt the [agent's] conduct … as its own'." (*Doe v. Roman Catholic Archbishop of Los Angeles* (2016) 247 Cal.App.4th 953, 969 [202 Cal.Rptr.3d 414], internal citations omitted.)

- "[W]here recovery of damages is sought against a principal and an agent, and the negligence of the agent is the cause of the injury, a verdict releasing the agent from liability releases the principal." (*Lehmuth v. Long Beach Unified School Dist.* (1960) 53 Cal.2d 544, 550 [2 Cal.Rptr. 279, 348 P.2d 887].)

- The doctrine of respondeat superior applies equally to public and private employers. (*Mary M.*, *supra*, 54 Cal.3d at p. 209.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 163–168

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, *Theories of Recovery--Vicarious Liability*, ¶ 2:600 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, §§ 8.03-8.04 (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.01 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.14 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts, §§ 3:1–3:4 (Thomson Reuters)

3704. Existence of "Employee" Status Disputed

[*Name of plaintiff***] must prove that [***name of agent***] was [***name of defendant***]'s employee.**

In deciding whether [*name of agent***] was [***name of defendant***]'s employee, the most important factor is whether [***name of defendant***] had the right to control how [***name of agent***] performed the work, rather than just the right to specify the result. One indication of the right to control is that the hirer can discharge the worker [without cause]. It does not matter whether [***name of defendant***] exercised the right to control.**

In deciding whether [*name of defendant***] was [***name of agent***]'s employer, in addition to the right of control, you must consider the full nature of their relationship. You should take into account the following additional factors, which, if true, may show that [***name of defendant***] was the employer of [***name of agent***]. No one factor is necessarily decisive. Do not simply count the number of applicable factors and use the larger number to make your decision. It is for you to determine the weight and importance to give to each of these additional factors based on all of the evidence.**

(a) **[***Name of defendant***] supplied the equipment, tools, and place of work;**

(b) **[***Name of agent***] was paid by the hour rather than by the job;**

(c) **[***Name of defendant***] was in business;**

(d) **The work being done by [***name of agent***] was part of the regular business of [***name of defendant***];**

(e) **[***Name of agent***] was not engaged in a distinct occupation or business;**

(f) **The kind of work performed by [***name of agent***] is usually done under the direction of a supervisor rather than by a specialist working without supervision;**

(g) **The kind of work performed by [***name of agent***] does not require specialized or professional skill;**

(h) **The services performed by [***name of agent***] were to be performed over a long period of time; [and]**

(i) **[***Name of defendant***] and [***name of agent***] believed that they had an employer-employee relationship[./; and]**

(j) **[***Specify other factor***].**

New September 2003; Revised December 2010, June 2015, December 2015

Directions for Use

This instruction is primarily intended for employer-employee relationships. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed.*

Secondary factors (a)–(i) come from the Restatement Second of Agency, section 220. (See also *Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 532 [173 Cal.Rptr.3d 332, 327 P.3d 165]; Rest.3d Agency, § 7.07, com. f,) They have been phrased so that a yes answer points toward an employment relationship. Omit any that are not relevant. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399].) Therefore, an "other" option (j) has been included.

Sources and Authority

- Principal-Agent Relationship. Civil Code section 2295.
- Rebuttable Presumption that Contractor Is Employee Rather Than Independent Contractor; Proof of Independent Contractor Status. Labor Code section 2750.5.
- "[S]ubject to certain policy considerations, a hirer … cannot be held vicariously liable for the negligence of his independent contractors." (*Blackwell v. Vasilas* (2016) 244 Cal.App.4th 160, 168 [197 Cal.Rptr.3d 753].)
- "Whether a common law employer-employee relationship exists turns foremost on the degree of a hirer's right to control how the end result is achieved." (*Ayala, supra,* 59 Cal.4th at p. 528.)
- "However, the courts have long recognized that the 'control' test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the 'most important' or 'most significant' consideration, the authorities also endorse several 'secondary' indicia of the nature of a service relationship." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 350, internal citations omitted.)
- "While the extent of the hirer's right to control the work is the foremost consideration in assessing whether a common law employer-employee relationship exists, our precedents also recognize a range of secondary indicia drawn from the Second and Third Restatements of Agency that may in a given case evince an employment relationship. Courts may consider '(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.' "

(*Ayala, supra,* 59 Cal.4th at p. 532.)

- " 'Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.' " (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 351, internal citations omitted.)

- "[T]he Restatement guidelines heretofore approved in our state remain a useful reference." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 354.)

- "We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the 'right to control the work,' the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- "The trial court's determination of employee or independent contractor status is one of fact if it depends upon the resolution of disputed evidence or inferences. ' "Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact … ." ' The question is one of law only if the evidence is undisputed." (*Linton v. DeSoto Cab Co., Inc.* (2017) 15 Cal.App.5th 1208, 1225 [223 Cal.Rptr.3d 761~~Whether a person is an independent contractor or an employee is a question of fact if dependent upon the resolution of disputed evidence or inferences." (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 297, fn. 4 [111 Cal.Rptr.3d 787~~].)

- The burden of proving the existence of an agency rests on the one affirming its existence. (*Burbank v. National Casualty Co.* (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)

- "The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced." (*S. G. Borello & Sons, Inc., supra,* 48 Cal.3d at p. 342.)

- "It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship." (*Malloy v. Fong* (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)

- "Perhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause, because '[t]he power of the principal to terminate the services of the agent gives him the means of controlling the agent's activities.' " (*Ayala, supra,* 59 Cal.4th at p. 531.)

- "The worker's corresponding right to leave is similarly relevant: ' "An employee may quit, but an independent contractor is legally obligated to complete his contract." ' " (*Ayala, supra,* 59 Cal.4th at p. 531 fn. 2.)

- "A finding of employment is supported where the workers are 'a regular and integrated portion of [the] business operation.' " (*Garcia v. Seacon Logix Inc.* (2015) 238 Cal.App.4th 1476, 1487 [190 Cal.Rptr.3d 400].)

- "Where workers are paid weekly or by the hour, rather than by the job, it suggests an employment relationship." (*Garcia, supra,* 238 Cal.App.4th at p. 1488.)

- "In cases where there is a written contract, to answer that question [the right of control] without full examination of the contract will be virtually impossible. … [¶] … [T]he rights spelled out in a contract may not be conclusive if other evidence demonstrates a practical allocation of rights at odds with the written terms." (*Ayala, supra,* 59 Cal.4th at p. 535.)

- "[T]he right to exercise complete or authoritative control must be shown, rather than mere suggestion as to detail. A worker is an independent contractor when he or she follows the employer's desires only in the result of the work, and not the means by which it is achieved." (*Jackson v. AEG Live, LLC* (2015) 233 Cal.App.4th 1156, 1179 [183 Cal.Rptr.3d 394].)

- " '[T]he owner may retain a broad general power of supervision and control as to the results of the work so as to insure satisfactory performance of the independent contract—including the right to inspect [citation], … the right to make suggestions or recommendations as to details of the work [citation], the right to prescribe alterations or deviations in the work [citation]—without changing the relationship from that of owner and independent contractor … .' " (*Beaumont-Jacques v. Farmers Group, Inc.* (2013) 217 Cal.App.4th 1138, 1143 [159 Cal.Rptr.3d 102], quoting *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 790 [285 P.2d 902].)

- "Agency and independent contractorship are not *necessarily* mutually exclusive legal categories as independent contractor and servant or employee are. In other words, an agent may also be an independent contractor. One who contracts to act on behalf of another and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*Jackson, supra,* 233 Cal.App.4th at p. 1184, original italics, internal citations omitted].)

- "[W]hen a statute refers to an 'employee' without defining the term, courts have generally applied the common law test of employment to that statute." (*Arnold v. Mutual of Omaha Ins. Co.* (2011) 202 Cal.App.4th 580, 586 [135 Cal.Rptr.3d 213].)

- "[A] termination at-will clause for both parties may properly be included in an independent contractor agreement, and is not by itself a basis for changing that relationship to one of an employee." (*Arnold, supra,* 202 Cal.App.4th at p. 589.)

- Restatement Second of Agency, section 220, provides:

  (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the

other's control or right to control.

(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:

(a) the extent of control which, by the agreement, the master may exercise over the details of the work;

(b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 2–42

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, 248.22, 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.13 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.41 et seq. (Matthew Bender)

1 California Civil Practice: Torts §§ 3:5–3:6 (Thomson Reuters)

3725. Going-and-Coming Rule—Vehicle-Use Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.

The drive to and from work may also be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly. The employee's agreement may be either express or implied.

New September 2003; Revised June 2014, May 2017

Directions for Use

This instruction sets forth the vehicle use exception to the going-and-coming rule, sometimes called the required-vehicle exception. (See (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 398, fn. 6 [207 Cal.Rptr.3d 586]; see also *Pierson v. Helmerich & Payne International Drilling Co.* (2016) 4 Cal.App.5th 608, 624–630 [209 Cal.Rptr.3d 222 [vehicle-use exception encompasses two categories; required-vehicle and incidental-use, both of which are expressed within CACI No. 3725].) It may be given with CACI No. 3720, *Scope of Employment*.

Under the going-and-coming rule, commute time is not within the scope of employment. However, commute time is within the scope of employment if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has reasonably come to rely on its use and to expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment. (See *Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301 [105 Cal.Rptr.3d 718].) Whether there is such a requirement or agreement can be a question of fact for the jury. (See *Ducey v. Argo Sales Co.* (1979) 25 Cal.3d 707, 723 [159 Cal. Rptr. 835, 602 P.2d 755].)

Under this exception, the commute itself is considered the employer's business. However, scope of employment may end if the employee substantially deviates from the commute route for personal reasons. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 899, 907–908 [162 Cal.Rptr.3d 280].) If substantial deviation is alleged, give CACI No. 3723, *Substantial Deviation*.

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. … This is based on the concept that the employment relationship is

suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. …' " (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435 [98 Cal.Rptr.3d 837].)

- "The 'required-vehicle' exception to the going and coming rule and its variants have been given many labels. In *Halliburton, supra,* 220 Cal.App.4th 87, we used the phrase 'incidental benefit exception' as the equivalent of the required-vehicle exception. In *Felix v. Asai* (1987) 192 Cal.App.3d 926 [237 Cal. Rptr. 718] (*Felix*), we used the phrase 'vehicle-use exception.' The phrase 'required-use doctrine' also has been used. The 'vehicle-use' variant appears in the title to California Civil Jury Instruction (CACI) No. 3725, 'Going-and-Coming Rule—Vehicle-Use Exception.' The various labels and the wide range of circumstances they cover have the potential to create uncertainty about the factual elements of the exception—a topic of particular importance when reviewing a motion for summary judgment for triable issues of *material* fact. [¶] To structure our analysis of this exception, and assist the clear statement of the factual elements of its variants, we adopt the phrase 'vehicle-use exception' from *Felix* and CACI No. 3725 to describe the exception in its broadest form. Next, under the umbrella of the vehicle-use exception, we recognize two identifiable categories with different factual elements. We label those two categories as the 'required-vehicle exception' and 'incidental benefit exception' because those labels emphasize the factual difference between the two categories." (*Pierson, supra,* 4 Cal.App.5th at pp. 624–625, original italics, internal citations omitted.)

- "Our division of the vehicle-use exception for purposes of this summary judgment motion should not be read as implying that this division is required, or even helpful, when presenting the scope of employment issue to a jury. The broad formulation of the vehicle-use exception in CACI No. 3725 correctly informs the jury that the issue of ultimate fact—namely, the scope of employment—may be proven in different ways." (*Pierson, supra,* 4 Cal.App.5th at p. 625, fn. 4.)

- "The portion of CACI No. 3725 addressing an employer requirement states: '[I]f an employer requires an employee to drive to and from the workplace so that the vehicle is available for the employer's business, then the drive to and from work is within the scope of employment. The employer's requirement may be either express or implied.' " (*Pierson, supra,* 4 Cal.App.5th at p. 625.)

  "Our formulation of the incidental benefit exception is based on the part of CACI No. 3725 that states: 'The drive to and from work may … be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly.' The 'agreement may be either express or implied.' The existence of an express or implied agreement can be a question of fact for the jury." (*Pierson, supra,* 4 Cal.App.5th at p. 629.)

- " '[W]hen a business enterprise requires an employee to drive to and from its office in order to have his vehicle available for company business during the day, accidents on the way to or from the office are statistically certain to occur eventually, and, the business enterprise having required the driving to and from work, the risk of such accidents are risks incident to the business enterprise.' [¶] These holdings are the bases for the CACI instruction, the first paragraph of which tells the jury that the

drive to and from work is within the scope of employment if the "employer requires [the] employee to drive to and from the workplace so that the vehicle is available for the employer's business," and the second paragraph, that the drive may be if 'the use of the employee's vehicle provides some direct or incidental benefit to the employer' and 'there may be a benefit to the employer if, one, the employee has [agreed] to make the vehicle available as an accommodation to the employer, and two, the employer has reasonably come to rely on the vehicle's use and expect the employee to make it available regularly.' (CACI No. 3725.)" (*Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382, 401–402 [207 Cal.Rptr.3d 586], internal citation omitted.)

- " 'A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is whether there is an incidental benefit derived by the employer. [Citation.]' … The exception can apply if the use of a personally owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has 'reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.' " (*Lobo, supra,* 182 Cal.App.4th at p. 297, original italics, internal citations omitted.)

- " 'To be sure, ordinary commuting is beyond the scope of employment … . Driving a required vehicle, however, is a horse of another color because it satisfies the control and benefit elements of respondeat superior. An employee who is required to use his or her own vehicle provides an "essential instrumentality" for the performance of the employer's work. … When a vehicle must be provided by an employee, the employer benefits by not having to have available an office car and yet possessing a means by which off-site visits can be performed by its employees.' " (*Moradi, supra,* 219 Cal.App.4th at p. 899.)

- "When an employer requires an employee to use a personal vehicle, it exercises meaningful control over the method of the commute by compelling the employee to foreswear the use of carpooling, walking, public transportation, or just being dropped off at work." (*Moradi, supra,* 219 Cal.App.4th at p. 899.)

- "The cases invoking the required-vehicle exception all involve employees whose jobs entail the regular use of a vehicle to accomplish the job in contrast to employees who use a vehicle to commute to a definite place of business." (*Tryer v. Ojai Valley School Dist.* (1992) 9 Cal.App.4th 1476, 1481 [12 Cal.Rptr.2d 114].)

- "[N]ot all benefits to the employer are of the type that satisfy the incidental benefits exception. The requisite benefit must be one that is 'not common to commute trips by ordinary members of the work force.' Thus, employers benefit when employees arrive at work on time, but this benefit is insufficient to satisfy the incidental benefits exception. An example of a sufficient benefit is where an employer enlarges the available labor market by providing travel expenses and paying for travel time." (*Pierson, supra,* 4 Cal.App.5th at p. 630.)

- "Where the incidental benefit exception applies, the employee's commute directly between work and home is considered to be within the scope of employment for respondeat superior purposes. Minor deviations from a direct commute are also included, but there is no respondeat superior liability if the

employee substantially departs from the employer's business or is engaged in a purely personal activity at the time of the tortious injury." (*Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 97 [162 Cal.Rptr.3d 752].)

- "Here, the required vehicle exception to the going and coming rule, not the special errand exception, governs our analysis. Accordingly, we have not applied the six factors used in special errand cases to determine whether [employee] was acting within the scope of her employment at the time of the accident. [¶] Rather, we have applied the relevant principles under the required vehicle exception. Those principles differ from the six factors used to determine whether the special errand exception applies. In the present case, [employer] required [employee] to use her personal vehicle to travel to and from the office and other destinations. She also had to use her personal vehicle before, during, and after regular work hours to develop new business. We have properly examined whether [employee]'s use of her personal vehicle conferred an incidental benefit on [employer]—it did; whether her planned stops at the frozen yogurt shop and the yoga studio were an unforeseeable, substantial departure from her commute—they were not; whether they were a foreseeable, minor deviation from her regular commute—they were; whether they were not so unusual or startling that it would be unfair to include the resulting loss among the other costs of the employer's business—they were not; and whether they were necessary for [employee]'s comfort, convenience, health, and welfare—they were." (*Moradi, supra,* 219 Cal.App.4th at pp. 907−908.)

- "One exception to the going and coming rule has been recognized when the commute involves ' "an incidental benefit to the employer, not common to commute trips by ordinary members of the work force." [Citation.]' When the employer incidentally benefits from the employee's commute, that commute may become part of the employee's workday for the purposes of respondeat superior liability. [¶] The incidental benefit exception has been applied when the employer furnishes, or requires the employee to furnish, a vehicle for transportation on the job, and the negligence occurs while the employee is traveling to or from work in that vehicle." (*Halliburton Energy Services, Inc., supra,* 220 Cal.App.4th at p. 96, internal citation omitted.)

- "Public policy would be ill-served by a rule establishing 24-hour employer liability for on-call employees, regardless of the nature of the employee's activities at the time of an accident." (*Le Elder v. Rice* (1994) 21 Cal.App.4th 1604, 1610 [26 Cal.Rptr.2d 749].)

- "[T]he trier of fact remains free to determine in a particular case that the employee's use of his or her vehicle was too infrequent to confer a sufficient benefit to the employer so as to make it reasonable to require the employer to bear the cost of the employee's negligence in operating the vehicle. This is particularly true in the absence of an express requirement that the employee make his or her vehicle available for the employer's benefit or evidence that the employer actually relied on the availability of the employee's car to further the employer's purposes." (*Lobo v. Tamco* (2014) 230 Cal.App.4th 438, 447 [178 Cal.Rptr.3d 515].)

- "Whether the transit is part of the employment relationship tends to be a more subtle issue than whether the transit was between home and work. … 'These are the extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own. When the employer gains that kind of a particular advantage, the job does more than call for routine transport to it; it plays a different role, bestowing a

special benefit upon the employer by reason of the extraordinary circumstances. The employer's special request, his imposition of an unusual condition, removes the transit from the employee's choice or convenience and places it within the ambit of the employer's choice or convenience, restoring the employer-employee relationship.' " (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038-1039 [219 Cal.Rptr.3d 630].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, § 195

Haning, et al., California Practice Guide: Personal Injury, Ch. 2(II)-A, Part II *Theories Of Recovery—Vicarious Liability*, ¶ 2:803 (The Rutter Group)

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

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, § 100A.26 et seq. (Matthew Bender)

1 California Civil Practice: Torts § 3:10 (Thomson Reuters)

3726. Going-and-Coming Rule—Business-Errand Exception

In general, an employee is not acting within the scope of employment while traveling to and from the workplace. But if the employee, while commuting, is on an errand for the employer, then the employee's conduct is within the scope of his or her employment from the time the employee starts on the errand until he or she returns from the errand or until he or she completely abandons the errand for personal reasons.

In determining whether an employee has completely abandoned a business errand for personal reasons, you may consider the following:

a. The intent of the employee;

b. The nature, time, and place of the employee's conduct;

c. The work the employee was hired to do;

d. The incidental acts the employer should reasonably have expected the employee to do;

e. The amount of freedom allowed the employee in performing [his/her] duties; and

f. The amount of time consumed in the personal activity;

g. [*specify other factors, if any***].**

New September 2003; Revised June 2014, June 2017, Revised and Renumbered from CACI No. 3724 November 2017

Directions for Use

This instruction sets forth the business errand exception to the going-and-coming rule, sometimes called the "special errand" or "special mission" exception. (*Sumrall v. Modern Alloys, Inc.* (2017) 10 Cal.App.5th 961, 968, fn. 1 [216 Cal.Rptr.3d 848]; see *Pierson v. Helmerich & Payne Internat. Drilling Co.* (2016) 4 Cal.App.5th 608, 632–633, fn.6 [209 Cal.Rptr.3d 222] [citing this instruction].) It may be given with CACI No. 3720, *Scope of Employment.*

Under the going-and-coming rule, commute time is not within the scope of employment. However, if the employee is engaged in a "special errand" or a "special mission" for the employer while commuting, it will negate the going-and-coming rule and put the employee within the scope of employment. (*Jeewarat v. Warner Brothers Entertainment, Inc.* (2009) 177 Cal.App.4th 427, 435−436 [98 Cal.Rptr.3d 837].)

Scope of employment ends once the employee abandons or substantially deviates from the special errand. The second paragraph sets forth factors that the jury may consider in determining whether there has been abandonment of a business errand. (See *Moradi v. Marsh USA, Inc.* (2013) 219 Cal.App.4th 886, 907

[162 Cal.Rptr.3d 280] [opinion may be read to suggest that for the business-errand exception, CACI No. 3723, *Substantial Deviation,* should not be given].)

Sources and Authority

- " 'An offshoot of the doctrine of respondeat superior is the so-called "going and coming rule." Under this rule, an employee is not regarded as acting within the scope of employment while going to or coming from the workplace. … This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, since the employee is not ordinarily rendering services to the employer while traveling. …' " (*Jeewarat, supra,* 177 Cal.App.4th at p. 435.)

- " 'The *special-errand* exception to the going-and-coming rule is stated as follows: "If the employee is not simply on his way from his home to his normal place of work or returning from said place to his home for his own purpose, but is coming from his home or returning to it on a *special errand* either as part of his regular duties or at a specific order or request of his employer, the employee is considered to be in the scope of his employment from the time that he starts on the errand until he has returned or until he deviates therefrom for personal reasons." ' " (*Moradi, supra,* 219 Cal.App.4th at p. 906, original italics.)

- "When an employee is engaged in a 'special errand' or a 'special mission' for the employer it will negate the 'going and coming rule.' … The employer is 'liable for torts committed by its employee while traveling to accomplish a special errand because the errand benefits the employer. … ' " (*Jeewarat, supra,* 177 Cal.App.4th at p. 436, internal citations omitted.)

- "The term 'special errand' is something of a misnomer because it implies that the employer must make a specific request for a particular errand. However, the 'special errand' can also be part of the employee's regular duties. Thus, we have chosen to use the term 'business errand' throughout this opinion, as it is more precise and descriptive." (*Sumrall, supra,* 10 Cal.App.5th at p. 968 fn.1, internal citation omitted.)

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

- "It is not necessary that the employee is directly engaged in his job duties; included also are errands that incidentally or indirectly benefit the employer. It is essential, however, that the errand be either part of the employee's regular duties or undertaken at the specific request of the employer." (*Morales-Simental v. Genentech, Inc.* (2017) 16 Cal.App.5th 445, 452-453 [224 Cal.Rptr.3d 319], internal citation omitted.)

- "[T]he mere fact that a trip may be related to an employee's job does not impose liability on the employer. … [T]o bring an employee's trip within the special errand exception, the employer must request or at least expect it of the employee." (*Morales-Simental, supra,* 16 Cal.App.5th at p. 455, internal citation omitted.)

- "[Plaintiffs] assert that [employee], as a supervisorial employee tasked with hiring, had authority to

act on [employer]'s behalf and, in essence, request himself to complete a special errand connected to that task. This argument finds no support in the extensive body of going and coming case law, and we decline plaintiffs' invitation to expand the special errand exception in the manner they suggest. What they propose is an invitation to self-serving pretense by anyone with a plausible claim to supervisorial authority." (*Morales-Simental*, *supra*, 16 Cal.App.5th at p. 456.)

- "[I]n determining whether an employee has completely abandoned pursuit of a *business errand* for pursuit of a personal objective, a variety of relevant circumstances should be considered and weighed. Such factors may include [(1)] the intent of the employee, [(2)] the nature, time and place of the employee's conduct, [(3)] the work the employee was hired to do, [(4)] the incidental acts the employer should reasonably have expected the employee to do, [(5)] the amount of freedom allowed the employee in performing his duties, and [(6)] the amount of time consumed in the personal activity. … While the question of whether an employee has departed from his *special errand* is normally one of fact for the jury, where the evidence clearly shows a complete abandonment, the court may make the determination that the employee is outside the scope of his employment as a matter of law." (*Moradi*, *supra*, 219 Cal.App.4th at p. 907, original italics.)

- "Several general examples of the special-errand exception appear in the cases. One would be where an employee goes on a business errand for his employer leaving from his workplace and returning to his workplace. Generally, the employee is acting within the scope of his employment while traveling to the location of the errand and returning to his place of work. The exception also may be applicable to the employee who is called to work to perform a special task for the employer at an irregular time. The employee is within the scope of his employment during the entire trip from his home to work and back to his home. The exception is further applicable where the employer asks an employee to perform a special errand after the employee leaves work but before going home. In this case, as in the other examples, the employee is normally within the scope of his employment while traveling to the special errand and while traveling home from the special errand." (*Felix v. Asai* (1987) 192 Cal.App.3d 926, 931–932 [237 Cal.Rptr. 718], internal citations omitted.)

- "Plaintiffs contend an employee's attendance at an out-of-town business conference authorized and paid for by the employer may be a special errand for the benefit of the employer under the special errand doctrine. [Defendant] asserts that the special errand doctrine does not apply to commercial travel. We conclude that a special errand may include commercial travel such as the business trip in this case." (*Jeewarat*, *supra*, 177 Cal.App.4th at p. 436.)

"An employee who has gone upon a special errand does not cease to be acting in the course of his employment upon his accomplishment of the task for which he was sent. He is in the course of his employment during the entire trip." (*Trejo v. Maciel* (1966) 239 Cal.App.2d 487, 495 [48 Cal.Rptr. 765].)

- "Whether the transit is part of the employment relationship tends to be a more subtle issue than whether the transit was between home and work. … 'These are the extraordinary transits that vary from the norm because the employer requires a special, different transit, means of transit, or use of a car, for some particular reason of his own. When the employer gains that kind of a particular advantage, the job does more than call for routine transport to it; it plays a different role, bestowing a special benefit upon the employer by reason of the extraordinary circumstances. The employer's

special request, his imposition of an unusual condition, removes the transit from the employee's choice or convenience and places it within the ambit of the employer's choice or convenience, restoring the employer-employee relationship.' " (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1038-1039 [219 Cal.Rptr.3d 630].)

- "[W]here an employee is required by the employment to work at both the employer's premises and at home, he is in the course of employment while traveling between the employer's premises and home." (*Zhu*, *supra*, 12 Cal.App.5th at p. 1040.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency, §§ 192–195

Finley, California Summary Judgment and Related Termination Motions § 1:1 et seq. (The Rutter Group)

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

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.11, 248.16 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.22 (Matthew Bender)

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

1 California Civil Practice: Torts § 3:10 (Thomson Reuters)

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

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

New November 2017

Directions for Use

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

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

Sources and Authority

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

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

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

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

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

- "To the same effect are the cases where the employer furnishes transportation to and from work. ' "The essential prerequisite to compensation is that the danger from which the injury results be one to which he is exposed as an employee in his particular employment," and '[t]his requirement is met when, as an employee and solely by reason of his relationship as such to his employer, he enters a vehicle regularly provided by his employer for the purpose of transporting him to or from the place of employment.' Here, again, it is the employer's decision to make the transit part of the employment relationship." (*Zhu v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1031, 1039 [219 Cal.Rptr.3d 630].)

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

Secondary Sources

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

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

2 Wilcox, California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.05 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liablity for Employee's Torts*, § 248.16[4] (Matthew Bender)

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

3903D. Lost Earning Capacity (Economic Damage)

[*Insert number, e.g.,* "4."**] The loss of [***name of plaintiff***]'s ability to earn money.**

To recover damages for the loss of the ability to earn money as a result of the injury, [*name of plaintiff***] must prove:**

1. **That it is reasonably certain that the injury that [***name of plaintiff***] sustained will cause [him/her] to earn less money in the future than [he/she] otherwise could have earned; and**

2. **The reasonable value of that loss to [him/her].**

In determining the reasonable value of the loss, compare what it is reasonably probable that [*name of plaintiff***] could have earned without the injury to what [he/she] can still earn with the injury. [Consider the career choices that [***name of plaintiff***] would have had a reasonable probability of achieving.] It is not necessary that [he/she] have a work history.**

New September 2003; Revised April 2004, April 2008, May 2017

Directions for Use

This instruction is not intended for use in employment cases.

If lost profits are asserted as an element of damages, see CACI No. 3903N, *Lost Profits (Economic Damage).*

If there is a claim for both lost future earnings and lost earning capacity, give also CACI No. 3903C, *Past and Future Lost Earnings (Economic Damage).* The verdict form should ensure that the same loss is not computed under both standards.

In the last paragraph, include the bracketed sentence if the plaintiff is of sufficient age that reasonable probabilities can be projected about career opportunities.

Sources and Authority

- "Before [lost earning capacity] damages may be awarded, a jury must (1) find the injury that the plaintiff sustained will result in a loss of earning capacity, and (2) assign a value to that loss by comparing what the plaintiff could have earned without the injury to what she can still earn with the injury." (*Licudine v. Cedars-Sinai Medical Center* (2016) 3 Cal.App.5th 881, 887 [208 Cal.Rptr.3d 170].)

- "Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money." (*Connolly v. Pre-Mixed*

Concrete Co. (1957) 49 Cal.2d 483, 489 [319 P.2d 343].)

- "Because these damages turn on the plaintiff's earning capacity, the focus is 'not [on] what the plaintiff would have earned in the future[,] but [on] what she could have earned.' Consequently, proof of the plaintiff's prior earnings, while relevant to demonstrate earning capacity, is not a prerequisite to the award of these damages, nor a cap on the amount of those damages. Indeed, proof that the plaintiff had any prior earnings is not required because the 'vicissitudes of life might call upon [the plaintiff] to make avail of her capacity to work,' even if she had not done so previously." (*Licudine, supra,* 3 Cal.App.5th at pp. 893−894, internal citations omitted.)

- "Such damages are '. . . awarded for the purpose of *compensating* the plaintiff for injury suffered, i.e., restoring . . . [her] as nearly as possible to . . . [her] former position, or giving . . . [her] some pecuniary equivalent.' Impairment of the capacity or power to work is an injury separate from the actual loss of earnings." (*Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 412 [196 Cal.Rptr. 117], original italics, internal citations omitted.)

- "[T]he jury must fix a plaintiff's future earning capacity based on what it is 'reasonably probable' she could have earned." (*Licudine, supra,* 3 Cal.App.5th at p. 887.)

- "A plaintiff's earning capacity without her injury is a function of two variables—the career(s) the plaintiff could have pursued and the salaries attendant to such career(s)." (*Licudine, supra,* 3 Cal.App.5th at p. 894.)

- "How is the jury to assess what career(s) are available to the plaintiff? Is the sky the limit? In other words, can a plaintiff urge the jury to peg her earning capacity to the salary of a world-class athlete, neuroscientist, or best-selling author just by testifying that is what she wanted to do? Or must the jury instead determine a plaintiff's earning capacity by reference to the career choices the plaintiff stood a realistic chance of accomplishing? We conclude some modicum of scrutiny by the trier of fact is warranted, and hold that the jury must look to the earning capacity of the career choices that the plaintiff had a reasonable probability of achieving." (*Licudine, supra,* 3 Cal.App.5th at p. 894.)

- "Once the jury has determined which career options are reasonably probable for the plaintiff to achieve, how is the jury to value the earning capacity of those careers? Precedent suggests three methods: (1) by the testimony of an expert witness; (2) by the testimony of lay witnesses, including the plaintiff; or (3) by proof of the plaintiff's prior earnings in that same career. As these options suggest, expert testimony is not always required." (*Licudine, supra,* 3 Cal.App.5th at p. 897.)

- "A trier of fact may draw the inference that the plaintiff has suffered a loss of earning capacity from the nature of the injury, but it is not required to draw that inference." (*Martinez v. State Dept. of Health Care Services* (2017) 19 Cal.App.5th 370, 374 [227 Cal.Rptr.3d 483].)

- " 'Under the prevailing American rule, a tort victim suing for damages for permanent injuries is permitted to base his recovery "on his prospective earnings for the balance of his life expectancy at the time of his injury undiminished by any shortening of that expectancy as a result of the injury." ' " (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 153 [211 Cal.Rptr. 368, 695 P.2d 665], internal citations omitted.)

- "[T]he majority view is that no deduction is made for the injured party's expected living expenses during the lost years." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 175 [87 Cal.Rptr.2d 626], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1666, 1667

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.42

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss,* §§ 52.10, 52.11 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort,* §§ 64.140, 64.175 (Matthew Bender)

1 California Civil Practice: Torts, § 5:15 (Thomson Reuters)

3940. Punitive Damages—Individual Defendant—Trial Not Bifurcated

If you decide that [*name of defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages only if [*name of plaintiff***] proves by clear and convincing evidence that [***name of defendant***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that [*name of defendant***] acted with intent to cause injury or that [***name of defendant***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**
2. **Whether [***name of defendant***] disregarded the health or safety of others;**
3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**
4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**
5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and

[*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given where an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of

wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth

and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction

better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra*, 198 Cal.App.4th at p. 562, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368

[203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "Under the statute, 'malice does not require actual intent to harm. [Citation.] Conscious disregard for the safety of another may be sufficient where the defendant is aware of the probable dangerous

consequences of his or her conduct and he or she willfully fails to avoid such consequences. [Citation.] Malice may be proved either expressly through direct evidence or by implication through indirect evidence from which the jury draws inferences. [Citation.]' " (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299 [164 Cal.Rptr.3d 112].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 725, internal citations omitted.)

- "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.01–54.06, 54.20–54.25 (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3942. Punitive Damages—Individual Defendant—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**
2. **Whether [***name of defendant***] disregarded the health or safety of others;**
3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**
4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**
5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the

conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed … that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- Evidence of Profits or Financial Condition. Civil Code section 3295(d).

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)

- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp*. (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)

- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury

that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to

adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock, supra,* 198 Cal.App.4th at p. 562, internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio

between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … .” (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)

- “Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.” (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)

- “In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered.” (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- “[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]” (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra,* 54 Cal.3d at p. 112.)

- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "We conclude that the rule … that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.37–14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages,* §§ 54.20–54.25 (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3943. Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated

If you decide that [*name of employee/agent***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of defendant***] for [***name of employee/agent***]'s conduct. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages against [*name of defendant***] for [***name of employee/agent***]'s conduct only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of employee/agent***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that [*name of employee/agent***] acted with intent to cause injury or that [***name of employee/agent***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of employee/agent***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of employee/agent***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

[*Name of plaintiff***] must also prove [one of] the following by clear and convincing evidence:**

1. **[That [***name of employee/agent***] was an officer, a director, or a managing agent of [***name of defendant***], who was acting on behalf of [***name of defendant***]; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of defendant***] had advance knowledge of the unfitness of [***name of employee/agent***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That an officer, a director, or a managing agent of [***name of defendant***] authorized [***name of employee/agent***]'s conduct; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of defendant***] knew of [***name of employee/agent***]'s wrongful conduct and adopted or approved the conduct after it occurred.]**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately

determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**
2. **Whether [***name of defendant***] disregarded the health or safety of others;**
3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**
4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**
5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended for use when the plaintiff is seeking to hold only an employer or principal liable for punitive damages based on the conduct of a specific employee or agent. When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated.* When punitive damages are sought against a corporation or other entity for the conduct of its directors, officers, or managing agents,

use CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated.*

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated,* for additional sources and authority.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an

employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The

precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible -- although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an

instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- “[N]et worth is not the only measure of a defendant’s wealth for punitive damages purposes that is recognized by the California courts. ‘Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.’ ” (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- “Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the ‘net’ concept of the net worth metric remains critical. ‘In most cases, evidence of earnings or profit alone are not sufficient “without examining the liabilities side of the balance sheet.” [Citations.]’ ” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)

- “[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- “Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice.” (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- “Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an ‘officer, director, or managing agent.’ ” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization’s representative, not in some other capacity.” (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- The concept of “managing agent” “assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties therein.” (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- “[T]he determination of whether certain employees are managing agents ‘ “does not necessarily hinge on their ‘level’ in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … .” ’ ” (*Powerhouse Motorsports Group, Inc. v. Yamaha*

Motor Corp., U.S.A. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true, … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168, internal citations omitted.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does

not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.20–14.23, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3945. Punitive Damages—Entity Defendant—Trial Not Bifurcated

If you decide that [*name of defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages against [*name of defendant***] only if [***name of plaintiff***] proves that [***name of defendant***] engaged in that conduct with malice, oppression, or fraud. To do this, [***name of plaintiff***] must prove [one of] the following by clear and convincing evidence:**

1. **[That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of [***name of defendant***], who acted on behalf of [***name of defendant***]; [or]]**

2. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [***name of defendant***]; [or]]**

3. **[That one or more officers, directors, or managing agents of [***name of defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that [*name of defendant***] acted with intent to cause injury or that [***name of defendant***]'s conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.**

"Oppression" means that [*name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that [*name of defendant***] intentionally misrepresented or concealed a material fact and did so intending to harm [***name of plaintiff***].**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors in determining the amount:

(a) How reprehensible was [*name of defendant***]'s conduct? In deciding how reprehensible [***name of defendant***]'s conduct was, you may consider, among other factors:**

1. **Whether the conduct caused physical harm;**

2. **Whether [***name of defendant***] disregarded the health or safety of others;**

3. **Whether [***name of plaintiff***] was financially weak or vulnerable and [***name of defendant***] knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**

4. **Whether [***name of defendant***]'s conduct involved a pattern or practice; and**

5. **Whether [***name of defendant***] acted with trickery or deceit.**

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that [***name of defendant***] knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of [*name of defendant***]'s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [***name of defendant***] has substantial financial resources. [Any award you impose may not exceed [***name of defendant***]'s ability to pay.]**

[Punitive damages may not be used to punish [*name of defendant***] for the impact of [his/her/its] alleged misconduct on persons other than [***name of plaintiff***].]**

New September 2004; Revised April 2004, June 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended for use when the plaintiff is seeking punitive damages against a corporation or other entity for the conduct of its directors, officers, or managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated.* When the plaintiff is seeking punitive damages from both the employer/principal and the employee/agent, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated,* for additional sources and authority.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d

525].) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra*, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA,*

Inc. (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra*, 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra*, 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful

conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 987 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)

- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- “[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]” (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra,* 54 Cal.3d at p. 112.)

- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- “It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant’s net worth.” (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- “[N]et worth is not the only measure of a defendant’s wealth for punitive damages purposes that is recognized by the California courts. ‘Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.’ ” (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- “Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the ‘net’ concept of the net worth metric remains critical. ‘In most cases, evidence of earnings or profit alone are not sufficient “without examining the liabilities side of the balance sheet.” [Citations.]’ ” (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)

- “[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization’s representative, not in some other capacity.” (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 723 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- “[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred.” (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- “No purpose would be served by punishing the employer for an employee’s conduct that is wholly unrelated to its business or to the employee’s duties therein.” (*College Hospital, Inc., supra,* 8 Cal.4th

at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha Motor Corp., U.S.A.* (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra*, 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra*, 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3947. Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated

If you decide that [*name of individual defendant***]'s or [***name of entity defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] engaged in that conduct with malice, oppression, or fraud.**

You may award punitive damages against [*name of entity defendant***] only if [***name of plaintiff***] proves that [***name of entity defendant***] acted with malice, oppression, or fraud. To do this, [***name of plaintiff***] must prove [one of] the following by clear and convincing evidence:**

1. **[That the malice, oppression, or fraud was conduct of one or more officers, directors, or managing agents of [***name of entity defendant***], who acted on behalf of [***name of entity defendant***]; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of entity defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of [***name of entity defendant***]; [or]]**

4. **[That one or more officers, directors, or managing agents of [***name of entity defendant***] knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights.**

"Despicable conduct" is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

"Fraud" means that a defendant intentionally misrepresented or concealed a material fact and did so intending to harm [*name of plaintiff***].**

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decisionmaking such that his or her decisions ultimately determine corporate policy.

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether the defendant disregarded the health or safety of others;

3. Whether [*name of plaintiff***] was financially weak or vulnerable and the defendant knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her];**

4. Whether the defendant's conduct involved a pattern or practice; and

5. Whether the defendant acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that the defendant knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish a defendant for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007, October 2008

Directions for Use

This instruction is intended to apply if punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated,* or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not*

Bifurcated. When punitive damages are sought against an individual defendant, use CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*.

For an instruction explaining "clear and convincing evidence," see CACI No. 201, *Highly Probable—Clear and Convincing Proof.*

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word "misrepresentation" is used in the instruction's

definition of "fraud."

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens, supra,* 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.

- "[E]vidence of ratification of [agent's] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence." (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)

- "Subdivision (b) is not a model of clarity, but in light of California's history of employer liability for punitive damages and of the Legislature's reasons for enacting subdivision (b), we have no doubt that it does no more than codify and refine existing law. Subdivision (b) thus authorizes the imposition of punitive damages on an employer in three situations: (1) when an employee was guilty of oppression, fraud or malice, and the employer with advance knowledge of the unfitness of the employee employed him or her with a conscious disregard of the rights or safety of others, (2) when an employee was guilty of oppression, fraud or malice, and the employer authorized or ratified the wrongful conduct, or (3) when the employer was itself guilty of the oppression, fraud or malice." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1151 [74 Cal.Rptr.2d 510].)

- " 'California has traditionally allowed punitive damages to be assessed against an employer (or principal) for the acts of an employee (or agent) only where the circumstances indicate that the employer himself was guilty of fraud, oppression, or malice. Thus, even before section 3294, subdivision (b) was added to the Civil Code in 1980, the courts required evidence that the employer authorized or ratified a malicious act, personally committed such an act, or wrongfully hired or retained an unfit employee.' The 'additional' burden on a plaintiff seeking punitive damages from an employer is to show not only that an employee acted with oppression, fraud or malice, but that the employer engaged in conduct defined in subdivision (b)." (*Weeks, supra,* 63 Cal.App.4th at p. 1154, internal citation omitted.)

- "Civil Code section 3294, subdivision (b) does not authorize an award of punitive damages against an employer for the employee's wrongful conduct. It authorizes an award of punitive damages against an employer for the employer's own wrongful conduct. Liability under subdivision (b) is vicarious only to the extent that the employer is liable for the actions of its officer, director or managing agent in hiring or controlling the offending employee, in ratifying the offense or in acting with oppression, fraud or malice. It is not vicarious in the sense that the employer is liable for the wrongful conduct of the offending employee." (*Weeks, supra,* 63 Cal.App.4th at pp. 1154–1155.)

- " '[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.' We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 419, internal citation omitted.)
- "[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant's conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 562 [131 Cal.Rptr.3d 382], internal citation omitted.)

- "[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … ." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)

- "Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.' The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)

- "In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether

the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered." (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock, supra,* 198 Cal.App.4th at p. 560.)

- "Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … '[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, " ' "a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one." ' " … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.' " (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- "[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions

(Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue." (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- "In light of our holding that evidence of a defendant's financial condition is essential to support an award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)

- "The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant's conduct, the defendant's wealth, and the plaintiff's actual damages." (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- "[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]" (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- "[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." (*Adams, supra,* 54 Cal.3d at p. 112.)

- "[A] punitive damages award is excessive if it is disproportionate to the defendant's ability to pay." (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- "It has been recognized that punitive damages awards generally are not permitted to exceed 10 percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of

determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)

- "An award of punitive damages is not supported by a verdict based on breach of contract, even where the defendant's conduct in breaching the contract was wilful, fraudulent, or malicious. Even in those cases in which a separate tort action is alleged, if there is 'but one verdict based upon contract' a punitive damage award is improper." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 960 [17 Cal.Rptr.2d 242], internal citations omitted.)

- "[P]unitive damages are not assessed against employers on a pure respondeat superior basis. Some evidence of fault by the employer itself is also required." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 724, fn. 11 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- "Subdivision (b) ... governs awards of punitive damages against employers, and permits an award for the conduct described there without an additional finding that the employer engaged in oppression, fraud or malice." (*Weeks, supra,* 63 Cal.App.4th at p. 1137.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 981 P.2d 944].)

- "[I]n performing, ratifying, or approving the malicious conduct, the agent must be acting as the organization's representative, not in some other capacity." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "[T]he concept [of managing agent] assumes that such individual was acting in a corporate or employment capacity when the conduct giving rise to the punitive damages claim against the employer occurred." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 723.)

- "No purpose would be served by punishing the employer for an employee's conduct that is wholly unrelated to its business or to the employee's duties therein." (*College Hospital, Inc., supra,* 8 Cal.4th at pp. 723–724.)

- "[T]he determination of whether certain employees are managing agents ' "does not necessarily hinge on their 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions … ." ' " (*Powerhouse Motorsports Group, Inc. v. Yamaha*

Motor Corp., U.S.A. (2013) 221 Cal.App.4th 867, 886 [164 Cal.Rptr.3d 811].)

- "Although it is generally true … that an employee's hierarchy in a corporation is not necessarily determinative of his or her status as a managing agent of a corporation, evidence showing an employee's hierarchy and job duties, responsibilities, and authority may be sufficient, absent conclusive proof to the contrary, to support a reasonable inference by a trier of fact that the employee is a managing agent of a corporation." (*Davis v. Kiewit Pacific Co.* (2013) 220 Cal.App.4th 358, 370 [162 Cal.Rptr.3d 805].)

- "[W]e conclude the Legislature intended the term 'managing agent' to include only those corporate employees who exercise substantial independent authority and judgment in their corporate decisionmaking so that their decisions ultimately determine corporate policy. The scope of a corporate employee's discretion and authority under our test is therefore a question of fact for decision on a case-by-case basis." (*White, supra,* 21 Cal.4th at pp. 566–567.)

- "In order to demonstrate that an employee is a true managing agent under section 3294, subdivision (b), a plaintiff seeking punitive damages would have to show that the employee exercised substantial discretionary authority over significant aspects of a corporation's business." (*White, supra,* 21 Cal.4th at p. 577.)

- " '[C]orporate policy' is the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations. A 'managing agent' is one with substantial authority over decisions that set these general principles and rules." (*Cruz v. Homebase* (2000) 83 Cal.App.4th 160, 167–168 [99 Cal.Rptr.2d 435].)

- "The key inquiry thus concerns the employee's authority to change or establish corporate policy. The fact that an employee has a supervisory position with the power to terminate employees under his or her control does not, by itself, render the employee a managing agent. Nor does the fact that an employee supervises a large number of employees necessarily establish that status." (*CRST, Inc. v. Superior Court* (2017) 11 Cal.App.5th 1255, 1273 [218 Cal.Rptr.3d 664].)

- " '[R]atification' is the '[c]onfirmation and acceptance of a previous act.' A corporation cannot confirm and accept that which it does not actually know about." (*Cruz, supra,* 83 Cal.App.4th at p. 168.)

- "For purposes of determining an employer's liability for punitive damages, ratification generally occurs where, under the particular circumstances, the employer demonstrates an intent to adopt or approve oppressive, fraudulent, or malicious behavior by an employee in the performance of his job duties." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "Corporate ratification in the punitive damages context requires actual knowledge of the conduct and its outrageous nature." (*College Hospital, Inc., supra,* 8 Cal.4th at p. 726.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does

not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1752–1756

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort*, §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

3949. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase)

You must now decide the amount, if any, that you should award [*name of plaintiff***] in punitive damages. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.**

There is no fixed formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following factors separately for each defendant in determining the amount:

(a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;

2. Whether the defendant disregarded the health or safety of others;

3. Whether [*name of plaintiff***] was financially weak or vulnerable and the defendant knew [***name of plaintiff***] was financially weak or vulnerable and took advantage of [him/her/it];**

4. Whether the defendant's conduct involved a pattern or practice; and

5. Whether the defendant acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff***]'s harm [or between the amount of punitive damages and potential harm to [***name of plaintiff***] that the defendant knew was likely to occur because of [his/her/its] conduct]?**

(c) In view of that defendant's financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

[Punitive damages may not be used to punish a defendant for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff***].]**

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, August 2007, October 2008

Directions for Use

Read the bracketed language at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning "potential harm" might be appropriate, for example, if damages actually caused by the defendant's acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate's recovery of emotional distress damages]), or if the harm caused by defendant's acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra,* 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given if an award of compensatory damages is the "true measure" of the harm or potential harm caused by defendant's wrongful acts. (*Simon, supra,* 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff's loss of the benefit of the bargain if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

Read the optional final sentence if there is a possibility that in arriving at an amount of punitive damages, the jury might consider harm that the defendant's conduct may have caused to nonparties. (See *Philip Morris USA v. Williams* (2007) 549 U.S. 346, 353–354 [127 S.Ct. 1057, 166 L.Ed.2d 940].) Harm to others may be relevant to determining reprehensibility based on factors (a)(2) (disregard of health or safety of others) and (a)(4) (pattern or practice). (See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 419 [123 S.Ct. 1513, 155 L.Ed.2d 585].)

"A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred." (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 422.) An instruction on this point should be included within this instruction if appropriate to the facts.

Courts have stated that "[p]unitive damages previously imposed for the same conduct are relevant in determining the amount of punitive damages required to sufficiently punish and deter. The likelihood of future punitive damage awards may also be considered, although it is entitled to considerably less weight." (*Stevens v. Owens-Corning Fiberglas Corp.* (1996) 49 Cal.App.4th 1645, 1661 [57 Cal.Rptr.2d 525], internal citations omitted.) The court in *Stevens* suggested that the following instruction be given if evidence of other punitive damage awards is introduced into evidence:

> If you determine that a defendant has already been assessed with punitive damages based on the same conduct for which punitive damages are requested in this case, you may consider whether punitive damages awarded in other cases have sufficiently punished and made an example of the defendant. You must not use the amount of punitive damages awarded in other cases to determine the amount of the punitive damage award in this case, except to the extent you determine that a lesser award, or no award at all, is justified in light of the penalties already imposed. (*Stevens,*

supra, 49 Cal.App.4th at p. 1663, fn. 7.)

Sources and Authority

- When Punitive Damages Permitted. Civil Code section 3294.
- Evidence of Profits or Financial Condition. Civil Code section 3295(d).
- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)
- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra*, 29 Cal.App.4th at p. 276, internal citations omitted.)
- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)
- "The purpose of punitive damages is to punish wrongdoers and thereby deter the commission of wrongful acts." (*Neal, supra,* 21 Cal.3d at p. 928, fn. 13.)
- "Punitive damages are to be assessed in an amount which, depending upon the defendant's financial worth and other factors, will deter him and others from committing similar misdeeds. Because compensatory damages are designed to make the plaintiff 'whole,' punitive damages are a 'windfall' form of recovery." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 712 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)
- "It follows that the wealthier the wrongdoing defendant, the larger the award of exemplary damages need be in order to accomplish the statutory objective." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65 [118 Cal.Rptr. 184, 529 P.2d 608].)
- " 'A plaintiff, upon establishing his case, is always entitled of right to compensatory damages. But even after establishing a case where punitive damages are permissible, he is never entitled to them. The granting or withholding of the award of punitive damages is wholly within the control of the jury, and may not legally be influenced by any direction of the court that in any case a plaintiff is entitled to them. Upon the clearest proof of malice in fact, it is still the exclusive province of the jury to say whether or not punitive damages shall be awarded. A plaintiff is entitled to such damages only after the jury, in the exercise of its untrammeled discretion, has made the award.' " (*Brewer v. Second Baptist Church of Los Angeles* (1948) 32 Cal.2d 791, 801 [197 P.2d 713], internal citations omitted.)
- "In light of our holding that evidence of a defendant's financial condition is essential to support an

award of punitive damages, Evidence Code section 500 mandates that the plaintiff bear the burden of proof on the issue. A plaintiff seeking punitive damages is not seeking a mere declaration by the jury that he is entitled to punitive damages in the abstract. The plaintiff is seeking an award of real money in a specific amount to be set by the jury. Because the award, whatever its amount, cannot be sustained absent evidence of the defendant's financial condition, such evidence is 'essential to the claim for relief.' " (*Adams v. Murakami* (1991) 54 Cal.3d 105, 119 [284 Cal.Rptr. 318, 813 P.2d 1348], internal citation omitted.)

- "A defendant is in the best position to know his or her financial condition, and cannot avoid a punitive damage award by failing to cooperate with discovery orders. [¶] A number of cases have held that noncompliance with a court order to disclose financial condition precludes a defendant from challenging the sufficiency of the evidence of a punitive damages award on appeal." (*Fernandes v. Singh* (2017) 16 Cal.App.5th 932, 942 [224 Cal.Rptr.3d 751].)

- "[W]e are afforded guidance by certain established principles, all of which are grounded in the purpose and function of punitive damages. One factor is the particular nature of the defendant's acts in light of the whole record; clearly, different acts may be of varying degrees of reprehensibility, and the more reprehensible the act, the greater the appropriate punishment, assuming all other factors are equal. Another relevant yardstick is the amount of compensatory damages awarded; in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small. Also to be considered is the wealth of the particular defendant; obviously, the function of deterrence will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort. By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and the gravity of the particular act, exceeds the level necessary to properly punish and deter." (*Neal, supra,* 21 Cal.3d at p. 928, internal citations and footnote omitted.)

- "[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." (*Philip Morris USA, supra,* 549 U.S. at p. 353.)

- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." (*Philip Morris USA, supra,* 549 U.S. at p. 355.)

- " 'Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis … . Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct … .' This does not mean, however, that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages." (*Bullock v. Philip Morris USA, Inc.* (2011) 198 Cal.App.4th 543, 560 [131 Cal.Rptr.3d 382].)

- “Though due process does not permit courts or juries, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis, this does not mean that the defendant's similar wrongful conduct toward others should not be considered in determining the amount of punitive damages. … ‘[T]o consider the defendant's entire course of conduct in setting or reviewing a punitive damages award, even in an individual plaintiff's lawsuit, is not to punish the defendant for its conduct toward others. An enhanced punishment for recidivism does not directly punish the earlier offense; it is, rather, “ ‘ “a stiffened penalty for the last crime, which is considered to be an aggravated offense because a repetitive one.” ’ ” … By placing the defendant's conduct on one occasion into the context of a business practice or policy, an individual plaintiff can demonstrate that the conduct toward him or her was more blameworthy and warrants a stronger penalty to deter continued or repeated conduct of the same nature.’ ” (*Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 986, fn. 10 [180 Cal.Rptr.3d 382], internal citations omitted.)

- “[A] specific instruction encompassing both the permitted and prohibited uses of evidence of harm caused to others would be appropriate in the new trial if requested by the parties. We believe that an instruction on these issues should clearly distinguish between the permitted and prohibited uses of such evidence and thus make clear to the jury the purposes for which it can and cannot consider that evidence. A jury may consider evidence of harm caused to others for the purpose of determining the degree of reprehensibility of a defendant's conduct toward the plaintiff in deciding the amount of punitive damages, but it may not consider that evidence for the purpose of punishing the defendant directly for harm caused to others. In our view, Judicial Council of California Civil Jury Instructions (Aug. 2007 rev.) CACI Nos. 3940, 3942, 3943, 3945, 3947, and 3949 could convey this distinction better by stating more explicitly that evidence of harm caused to others may be considered for the one purpose but not for the other, and by providing that explanation together with the reprehensibility factors rather than in connection with the reasonable relationship issue.” (*Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 695, fn. 21 [71 Cal.Rptr.3d 775], internal citation omitted.)

- “ ‘[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct.’ We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)

- “[I]n a case involving physical harm, the physical or physiological vulnerability of the target of the defendant’s conduct is an appropriate factor to consider in determining the degree of reprehensibility, particularly if the defendant deliberately exploited that vulnerability.” (*Bullock, supra*, 198 Cal.App.4th at p. 562, internal citation omitted.)

- “[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or

potential harm, to the plaintiff and the punitive damages award. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. … [A]n award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. … While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 … .” (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at pp. 424–425, internal citation omitted.)

- “Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where ‘a particularly egregious act has resulted in only a small amount of economic damages.’ The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.” (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 425, internal citation omitted.)

- “In determining whether a punitive damages award is unconstitutionally excessive, *Brandt* fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the trier of fact as part of its verdict or are determined by the trial court after the verdict has been rendered.” (*Nickerson v. Stonebridge Life Ins. Co.* (2016) 63 Cal.4th 363, 368 [203 Cal.Rptr.3d 23, 371 P.3d 242].)

- “The decision to award punitive damages is exclusively the function of the trier of fact. So too is the amount of any punitive damage award. The relevant considerations are the nature of the defendant’s conduct, the defendant’s wealth, and the plaintiff’s actual damages.” (*Gagnon v. Continental Casualty Co.* (1989) 211 Cal.App.3d 1598, 1602 [260 Cal.Rptr. 305], internal citations omitted.)

- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra,* 538 U.S. at p. 427, internal citation omitted.)

- “[I]n some cases, the defendant's financial condition may combine with high reprehensibility and a low compensatory award to justify an extraordinary ratio between compensatory and punitive damages. [Citation.]” (*Nickerson v. Stonebridge Life Ins. Co.* (*Nickerson II*) (2016) 5 Cal.App.5th 1, 26 [209 Cal.Rptr.3d 690].)

- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra,* 54 Cal.3d at p. 112.)

- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra,* 54 Cal.3d at p. 112, internal citations omitted.)

- “It has been recognized that punitive damages awards generally are not permitted to exceed 10

percent of the defendant's net worth." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1166 [74 Cal.Rptr.2d 510].)

- "[N]et worth is not the only measure of a defendant's wealth for punitive damages purposes that is recognized by the California courts. 'Indeed, it is likely that blind adherence to any one standard [of determining wealth] could sometimes result in awards which neither deter nor punish or which deter or punish too much.' " (*Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68, 79 [139 Cal.Rptr.3d 849].)

- "Evidence of the defendant's net worth is the most commonly used, but that metric is too susceptible to manipulation to be the sole standard for measuring a defendant's ability to pay. Yet the 'net' concept of the net worth metric remains critical. 'In most cases, evidence of earnings or profit alone are not sufficient "without examining the liabilities side of the balance sheet." [Citations.]' " (*Soto v. BorgWarner Morse TEC Inc.* (2015) 239 Cal.App.4th 165, 194 [191 Cal.Rptr.3d 263], internal citations omitted.)

- "In light of our discussion, we conclude that even where, as here, punitive but not compensatory damages are available to the plaintiff, the defendant is entitled to an instruction that punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff and proved at trial. Consequently, the trial court erred in failing to so instruct the jury." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "We conclude that the rule ... that an award of exemplary damages must be accompanied by an award of compensatory damages [or its equivalent] is still sound. That rule cannot be deemed satisfied where the jury has made an express determination not to award compensatory damages." (*Cheung v. Daley* (1995) 35 Cal.App.4th 1673, 1677 [42 Cal.Rptr.2d 164], footnote omitted.)

- "With the focus on the plaintiff's injury rather than the amount of compensatory damages, the ['reasonable relation'] rule can be applied even in cases where only equitable relief is obtained or where nominal damages are awarded or, as here, where compensatory damages are unavailable." (*Gagnon, supra,* 211 Cal.App.3d at p. 1605.)

- "The high court in *TXO* [*TXO Production Corp., supra*] and *BMW* [*BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559 [116 S.Ct. 1589, 134 L.Ed.2d 809]] has refined the disparity analysis to take into account the *potential* loss to plaintiffs, as where a scheme worthy of punitive damages does not fully succeed. In such cases, the proper ratio would be the ratio of punitive damages to the potential harm to plaintiff." (*Sierra Club Found. v. Graham* (1999) 72 Cal.App.4th 1135, 1162, fn. 15 [85 Cal.Rptr.2d 726], original italics.)

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6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-E, *Punitive Damages*, ¶¶ 3:255–3:281.15 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar 2d ed.) Punitive Damages, §§ 14.1–14.12, 14.21, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages,* §§ 54.07, 54.24[4][d] (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort,* §§ 64.141 et seq., 64.174 et seq. (Matthew Bender)

4000. Conservatorship—Essential Factual Elements

[*Name of petitioner*] claims that [*name of respondent*] is gravely disabled due to [a mental disorder/impairment by chronic alcoholism] and therefore should be placed in a conservatorship. In a conservatorship, a conservator is appointed to oversee, under the direction of the court, the care of persons who are gravely disabled due to a mental disorder or chronic alcoholism. To succeed on this claim, [*name of petitioner*] must prove beyond a reasonable doubt all of the following:

1. That [*name of respondent*] [has a mental disorder/is impaired by chronic alcoholism]; [and]

2. That [*name of respondent*] is gravely disabled as a result of the [mental disorder/chronic alcoholism][; and/.]

[3. That [*name of respondent*] is unwilling or unable voluntarily to accept meaningful treatment.]

New June 2005; Revised June 2016

Directions for Use

There is a split of authority as to whether element 3 is required. (Compare *Conservatorship of Symington* (1989) 209 Cal.App.3d 1464, 1467 [257 Cal.Rptr. 860] ["[M]any gravely disabled individuals are simply beyond treatment."] with *Conservatorship of Davis* (1981) 124 Cal.App.3d 313, 328 [177 Cal.Rptr. 369] [jury should be allowed to consider all factors that bear on whether person should be on LPS conservatorship, including willingness to accept treatment].)

Sources and Authority

- Right to Jury Trial. Welfare and Institutions Code section 5350(d).
- "Gravely Disabled" Defined. Welfare and Institutions Code section 5008(h).
- "The Lanterman-Petris-Short Act (the act) governs the involuntary treatment of the mentally ill in California. Enacted by the Legislature in 1967, the act includes among its goals ending the inappropriate and indefinite commitment of the mentally ill, providing prompt evaluation and treatment of persons with serious mental disorders, guaranteeing and protecting public safety, safeguarding the rights of the involuntarily committed through judicial review, and providing individualized treatment, supervision and placement services for the gravely disabled by means of a conservatorship program." (*Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008–1009 [36 Cal.Rptr.2d 40, 884 P.2d 988].)
- "The clear import of the LPS Act is to use the involuntary commitment power of the state sparingly

and only for those truly necessary cases where a ‘gravely disabled’ person is incapable of providing for his basic needs either alone or with help from others.” (*Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1280 [221 Cal.Rptr.3d 622].)

- “The right to a jury trial upon the establishment of conservatorship is fundamental to the protections afforded by the LPS. As related, that right is expressly extended to the reestablishment of an LPS conservatorship.” (*Conservatorship of Benvenuto* (1986) 180 Cal.App.3d 1030, 1037 [226 Cal.Rptr. 33], internal citations omitted.)

- “[T]he trial court erred in accepting counsel's waiver of [conservatee]’s right to a jury trial … . (*Estate of Kevin A.* (2015) 240 Cal.App.4th 1241, 1253 [193 Cal.Rptr.3d 237].)

- “ ‘The due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act.’ An LPS commitment order involves a loss of liberty by the conservatee. Consequently, it follows that a trial court must obtain a waiver of the right to a jury trial from the person who is subject to an LPS commitment.” (*Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378, 382−383 [199 Cal.Rptr.3d 689].)

- “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, supra*, 124 Cal.App.3d at p. 328.)

- “The jury should determine if the person voluntarily accepts meaningful treatment, in which case no conservatorship is necessary. If the jury finds the person will not accept treatment, then it must determine if the person can meet his basic needs on his own or with help, in which case a conservatorship is not justified.” (*Conservatorship of Walker* (1987) 196 Cal.App.3d 1082, 1092–1093 [242 Cal.Rptr. 289].)

- “Our research has failed to reveal any authority for the proposition [that] without a finding that the proposed conservatee is unable or unwilling to voluntarily accept treatment, the court must reject a conservatorship in the face of grave disability. ... Some persons with grave disabilities are beyond treatment. Taken to its logical conclusion, they would be beyond the LPS Act’s reach, according to the argument presented in this appeal.” (*Conservatorship of Symington, supra,* 209 Cal.App.3d at p. 1469.)

- “The party seeking imposition of the conservatorship must prove the proposed conservatee’s grave disability beyond a reasonable doubt and the verdict must be issued by a unanimous jury.” (*Conservatorship of Susan T., supra,* 8 Cal.4th at p. 1009, internal citation omitted.)

Secondary Sources

14 Witkin, Summary of California Law (10th ed. 2005) Wills and Probate, § 945

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

2 California Conservatorship Practice (Cont.Ed.Bar) Ch. 23

32 California Forms of Pleading and Practice, Ch. 361A, *Mental Health and Mental Disabilities: Judicial Commitment, Health Services, and Civil Rights*, § 361A.30 et seq. (Matthew Bender)

4120. Affirmative Defense—Statute of Limitations

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date four years before complaint was filed***] unless [***name of plaintiff***] proves that before [***insert date four years before complaint was filed***], [he/she/it] did not discover, and did not know of facts that would have caused a reasonable person to suspect, [***name of defendant***]'s wrongful act or omission.**

New April 2007; Renumbered from CACI No. 4106 December 2007; Revised December 2012

Directions for Use

Read this instruction only for a cause of action for breach of fiduciary duty. For a statute-of-limitations defense to a cause of action for personal injury or wrongful death due to wrongful or negligent conduct, see CACI No. 454, *Affirmative Defense—Statute of Limitations*, and CACI No. 455, *Statute of Limitations—Delayed Discovery*.

This instruction assumes that the four-year "catch-all" statute of limitations of Code of Civil Procedure section 343 applies to claims for breach of fiduciary duty. (See *Stalberg v. Western Title Ins. Co.* (1991) 230 Cal.App.3d 1223, 1230 [282 Cal.Rptr. 43].) There is, however, language in several cases supporting the proposition that if the breach can be characterized as constructive fraud, the three-year limitation period of Code of Civil Procedure section 338(d) applies. (See *William L. Lyon & Associates, Inc. v. Superior Court* (2012) 204 Cal.App.4th 1294, 1312 [139 Cal.Rptr.3d 670].) If the court determines that the claim is actually for constructive fraud, a date three years before the complaint was filed may be used instead of a four-year date. It is not clear, however, when a breach of fiduciary duty might constitute constructive fraud for purposes of the applicable statute of limitations. (Compare *Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 607 [129 Cal.Rptr.3d 525] [suggesting that breach of fiduciary duty founded on concealment of facts would be subject to three-year statute] with *Stalberg, supra*, 230 Cal.App.3d at p. 1230 [applying four-year statute to breach of fiduciary duty based on concealment of facts].)

Do not use this instruction in an action against an attorney. For a statute-of-limitations defense to a cause of action, other than actual fraud, against an attorney acting in the capacity of an attorney, see CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*. One cannot avoid a shorter limitation period for attorney malpractice (see Code Civ. Proc., § 340.6) by pleading the facts as a breach of fiduciary duty or constructive fraud. (See *Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 67−68 [72 Cal.Rptr.2d 359]; see also *Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 322 [166 Cal.Rptr.3d 116] [constructive fraud].)

Sources and Authority

- Four-Year Statute of Limitations. Code of Civil Procedure section 343.

- "The statute of limitations for breach of fiduciary duty is four years. (§ 343.)" (*Stalberg, supra,* 230 Cal.App.3d at p. 1230, internal citation omitted.)

- " '[W]here the gravamen of the complaint is that defendant's acts constituted actual or constructive fraud, the applicable statute of limitations is the [Code of Civil Procedure section 338, subdivision (d) three-year] limitations period,' governing fraud even though the cause of action is designated by the plaintiff as a claim for breach of fiduciary duty." (*Thomson, supra,* 198 Cal.App.4th at p. 607.)

- "Defendants argue on appeal that the gravamen of plaintiff's complaint is that defendants' acts constituted actual or constructive fraud, and thus should be governed by the fraud statute of limitations. We disagree. Plaintiff's claim is not founded upon the concealment of facts but upon defendants' alleged failure to draft documents necessary to the real estate transaction in which they represented plaintiff. The allegation is an allegation of breach of fiduciary duty, not fraud." (*Thomson, supra,* 198 Cal.App.4th at p. 607.)

- "Breach of fiduciary duty not amounting to fraud or constructive fraud is subject to the four-year 'catch-all statute' of Code of Civil Procedure section 343 … . Fraud is subject to the three-year statute of limitations under Code of Civil Procedure section 338. … [¶][¶] However, a breach of a fiduciary duty usually constitutes constructive fraud." (*William L. Lyon & Associates, Inc., supra,* 204 Cal.App.4th at pp. 1312, 1313.)

- "The statute of limitations for breach of fiduciary duty is three years or four years, depending on whether the breach is fraudulent or nonfraudulent." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1479 [171 Cal.Rptr.3d 548].)

- "A breach of fiduciary duty claim is based on concealment of facts, and the statute begins to run when plaintiffs discovered, or in the exercise of reasonable diligence could have discovered, that facts had been concealed." (*Stalberg, supra,* 230 Cal.App.3d at p. 1230, internal citation omitted.)

- "We also are not persuaded by [defendant]'s contention breach of fiduciary duty can only be characterized as constructive fraud (which does not include fraudulent intent as an element). This simply is not true: 'A misrepresentation that constitutes a breach of a fiduciary or confidential a [*sic*] relationship may, depending on whether an intent to deceive is present, constitute either actual or constructive fraud. However, the issue is usually discussed in terms of whether the misrepresentation constitutes constructive fraud, because actual fraud can exist independently of a fiduciary or confidential relationship, while the existence of such a relationship is usually crucial to a finding of constructive fraud.' " (*Worthington v. Davi* (2012) 208 Cal.App.4th 263, 283 [145 Cal.Rptr.3d 389].)

- " 'Where a fiduciary obligation is present, the courts have recognized a postponement of the accrual of the cause of action until the beneficiary has knowledge or notice of the act constituting a breach of fidelity. [Citations.] The existence of a trust relationship limits the duty of inquiry. "Thus, when a potential plaintiff is in a fiduciary relationship with another individual, that plantiff's burden of discovery is reduced and he is entitled to rely on the statements and advice provided by the fiduciary." ' " (*WA Southwest 2, LLC v. First American Title Ins. Co.* (2015) 240 Cal.App.4th 148, 157 [192 Cal.Rptr.3d 423].)

- "Delayed accrual due to the fiduciary relationship does not extend beyond the bounds of the discovery rule, which operates to protect the plaintiff who ' "despite diligent investigation … is blamelessly ignorant of the cause of his injuries" ' and should not be barred from asserting a cause of action for wrongful conduct ' "before he could reasonably be expected to discover its existence." ' " (*Choi v. Sagemark Consulting* (2017) 18 Cal.App.5th 308, 334 [226 Cal.Rptr.3d 267].)

- "The distinction between the rules excusing a late discovery of fraud and those allowing late discovery in cases in the confidential relationship category is that in the latter situation, the duty to investigate may arise later because the plaintiff is entitled to rely upon the assumption that his fiduciary is acting on his behalf. However, once a plaintiff becomes *aware* of facts which would make a reasonably prudent person suspicious, the duty to investigate arises and the plaintiff may then be charged with knowledge of the facts which would have been discovered by such an investigation." (*Hobbs v. Bateman Eichler, Hill Richards, Inc.* (1985) 164 Cal.App.3d 174, 202 [210 Cal.Rptr. 387], original italics, internal citations omitted.)

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

- "[T]he statute of limitations for aiding and abetting a breach of fiduciary duty is the same as the statute of limitations for breach of fiduciary duty." (*American Master Lease LLC, supra*, 225 Cal.App.4th at p. 1479].)

- " 'Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.' [Citation.] [¶] '[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud. …' " (*Mark Tanner Constr. v. Hub Internat. Ins. Servs.* (2014) 224 Cal.App.4th 574, 588 [169 Cal.Rptr.3d 39].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 677–679

Vapnek et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶ 6:425.4 (The Rutter Group)

3 Levy et al., California Torts, Ch. 32, *Liability of Attorneys*, § 32.60 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, § 76.170 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.19[4] (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.29 (Matthew Bender)

4203. Constructive Fraudulent Transfer—Insolvency—Essential Factual Elements (Civ. Code, § 3439.05)

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] and was unable to pay [***name of plaintiff***] money that was owed. [This is called "constructive fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**
2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**
3. **That [***name of debtor***] did not receive a reasonably equivalent value in exchange for the [transfer/obligation];**
4. **That [***name of plaintiff***]'s right to payment from [***name of debtor***] arose before [***name of debtor***] [transferred property/incurred an obligation];**
5. **That [***name of debtor***] was insolvent at that time or became insolvent as a result of the transfer or obligation;**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of debtor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

If you decide that [*name of plaintiff***] has proved all of the above, [he/she/it] does not have to prove that [***name of debtor***] intended to defraud creditors.**

New June 2006; Revised June 2016

Directions for Use

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation. (Civ. Code, § 3439.05.)

This instruction assumes the defendant is a transferee of the debtor. This instruction may be used along with CACI No. 4202, *Constructive Fraudulent Transfer—No Reasonably Equivalent Value Received—Essential Factual Elements,* if it is alleged that the plaintiff became a creditor before the transfer was made or the obligation was incurred. Read the bracketed second sentence if the plaintiff is

asserting causes of action for both actual and constructive fraud. Also give CACI No. 4205, *"Insolvency" Explained,* and CACI No. 4206, *Presumption of Insolvency*.

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523].) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even if a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made" (Civ. Code, § 3439.08(b)(1)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Sources and Authority

- Voidable Transaction Involving Insolvency. Civil Code section 3439.05.

- When Value Is Given. Civil Code section 3439.03.

- "There are two forms of constructive fraud under the UFTA. Civil Code section 3439.04 … provides that a transfer is fraudulent if the debtor did not receive reasonably equivalent consideration and either '(1) Was engaged or about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (2) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.' ~~Civil Code section 3439.05 provides that a transfer is fraudulent as to an existing creditor if the debtor does not receive reasonably equivalent value and 'was insolvent at that time or ... became insolvent as a result of the transfer ... .'~~ " (*Mejia v. Reed* (2003) 31 Cal.4th 657, 669–670 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

- "Even without actual fraudulent intent, a transfer may be fraudulent as to present creditors if the debtor did not receive 'a reasonably equivalent value in exchange for the transfer' and 'the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.' " (*PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 169 [221 Cal.Rptr.3d 353].)

- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)

Secondary Sources

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Fraud--Fraudulent Transfers--Elements of Claim*, ¶ 5:545 et seq. (The Rutter Group)

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and*

Mistake, §§ 215.70[5], 215.111[2][c] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.42, 270.191, 270.192 (Matthew Bender)

4204. "Transfer" Explained

"Transfer" means every method of parting with a debtor's property or an interest in a debtor's property.

[*Read one of the following options:***]**

[A transfer may be direct or indirect, absolute or conditional, voluntary or involuntary. A transfer includes [the payment of money/a release/a lease/a license/ [and] the creation of a lien or other encumbrance].]

[In this case, [*describe transaction***] is a transfer.]**

New June 2006; Revised June 2016

Directions for Use

This instruction sets forth the statutory definition of a "transfer" within the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act). (See Civ. Code, § 3439.01(m).) Read the second bracketed option for the second sentence if the transaction has been stipulated to or determined as a matter of law. Otherwise, read the first bracketed option. Include only the bracketed terms at the end of the first option that are at issue in the case.

Sources and Authority

- "Transfer" Defined. Civil Code section 3439.01(m).

- "On its face, the UFTA applies to all transfers. Civil Code, section § 3439.01, subdivision (i) defines '[t]ransfer' as 'every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset ... .' The UFTA excepts only certain transfers resulting from lease terminations or lien enforcement." (*Mejia v. Reed* (2003) 31 Cal.4th 657, 664 [3 Cal.Rptr.3d 390, 74 P.3d 166], internal citations omitted.)

- "Transfers to bogus corporations that are wholly owned and controlled by the debtor are 'transfers' for purposes of the UFTA." (*PGA West Residential Assn., Inc. v. Hulven Internat., Inc.* (2017) 14 Cal.App.5th 156, 173 [221 Cal.Rptr.3d 353].)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:319 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[1], 270.37 (Matthew Bender)

4551. Affirmative Defense—Statute of Limitations—Latent Construction Defect (Code Civ. Proc., § 337.15)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that the date on which the [construction project/survey of real property/[***specify project, e.g., roof replacement***]] was substantially complete was more than 10 years before [***insert date***], the date on which this action was filed.**

New December 2011

Directions for Use

Give this instruction if the defendant asserts the running of the statute of limitations in Code of Civil Procedure section 337.15 as a defense. This section provides a 10-year outside limitation period for harm caused by a latent construction defect regardless of delayed discovery.

The jury may also be instructed on the limitations periods for the particular theories of recovery alleged. (See, e.g., Code Civ. Proc., §§ 338 [three years for injury to real property], 337 [four years for breach of written contract].) However, for latent defects, delayed discovery (see CACI No. 455, *Statute of Limitations—Delayed Discovery*) generally defeats that otherwise applicable statute.

The most likely question of fact for the jury is the date of substantial completion. The statute provides four possible events, the earliest of which may constitute substantial completion of an improvement. (See Code Civ. Proc., § 337.15(g).) The latest date is one year from cessation of all work on the improvement. However, substantial completion of an improvement may occur before any of these dates. (See *Nelson v. Gorian & Assocs.* (1998) 61 Cal.App.4th 93, 97 [71 Cal.Rptr.2d 345].) The statute of limitations may start to run at a later date against the developer if the development includes many improvements. (*Id.* at p. 99; cf. *Schwetz v. Minnerly* (1990) 220 Cal.App.3d 296, 298 [269 Cal.Rptr. 417] ["developer" can be an "improver" and a "development" is a "work of improvement" for purposes of subsection (g)].) For further discussion of substantial completion, see the Directions for Use to CACI No. 4532, *Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay*. See also CACI No. 4524, *Contractor's Claim for Compensation Due Under Contract—Substantial Performance*.

Sources and Authority

- Statute of Limitations: Latent Defects. Code of Civil Procedure section 337.15.

- "The purpose of section 337.15 has been stated as 'to protect developers of real estate against liability extending indefinitely into the future.' … [We have] noted that '[a] contractor is in the business of constructing improvements and must devote his capital to that end; the need to provide reserves against an uncertain liability extending indefinitely into the future could seriously impinge upon the conduct of his enterprise.' " (*Martinez v. Traubner* (1982) 32 Cal.3d 755, 760 [187 Cal.Rptr. 251, 653 P.2d 1046], internal citations omitted.)

- “A ‘latent’ construction defect is one that is ‘not apparent by reasonable inspection.’ As to a latent defect that is alleged in the context of the challenged causes of action here—negligence, breach of warranty, and breach of contract—three statutes of limitations are in play: sections 338, 337 and 337.15. ‘The interplay between these [three] statutes sets up a two-step process: (1) actions for a latent defect must be filed within three years (§ 338 [injury to real property]) or four years (§ 337 [breach of written contract]) of discovery, but (2) in any event must be filed within ten years (§ 337.15) of substantial completion.’ ” (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 257–258 [99 Cal.Rptr.3d 258], internal citations omitted.)

- “The test to determine whether a construction defect is patent is an objective test that asks ‘whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.’ This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment).” (*Creekridge Townhome Owners Assn., Inc., supra,* 177 Cal.App.4th at p. 256, internal citations omitted.)

- “Our reading of the express words of section 337.15, our giving consideration to its legislative history, and harmonizing that section in the context of the statutory framework as a whole, leads us to conclude that section 337.15 does not limit the time within which direct actions for personal injury damages or wrongful death may be brought against the persons specified in the statute.” (*Martinez, supra,* 32 Cal.3d at p. 759.)

- “The 10-year period commences to run in respect to a person who has contributed towards ‘an improvement’ when such improvement has been substantially completed irrespective of whether or not the improvement is part of a development.” (*Liptak v. Diane Apartments, Inc.* (1980) 109 Cal.App.3d 762, 772 [167 Cal.Rptr. 440].)

- “In 1981, the Legislature codified the holding in *Liptak* by adding subdivision (g) to section 337.15. ‘The Senate Committee on Judiciary and the Senate Republican Caucus digests for the bill that became Code of Civil Procedure section 337.15, subdivision (g) state in pertinent part: “ ‘In [*Liptak*], the [C]ourt of [A]ppeal held that with respect to a developer, the ten-year limitation period does not commence until the development is substantially completed. [¶] With respect to a person who has contributed to an improvement on the developed property, the court held that the period commences when that particular improvement has been substantially completed, regardless of the completion time of the development itself. [¶] AB 605 would codify the *Liptak* holding on these issues.’ ” [Citation.]’ ” (*Nelson, supra,* 61 Cal.App.4th at pp. 96–97, internal citations omitted.)

- “Turning to the plain meaning of the statute as well as the legislative intent of enactment of section 337.15, subdivision (g), it is clear the intent was to define what event triggered the 10-year period and not what label is used to define the person who performed the work of improvement. The particular development or work of improvement can be one ‘improvement’ such as grading. It can also be a ‘particular development,’ i.e., a completed structure or dwelling. When the work of improvement meets one of the four criteria of section 337.15, subdivision (g), the ‘improver’—

whether an architect, engineer, subcontractor, contractor, or developer—is entitled to raise the provisions of section 337.15, subdivision (g), as a bar to an action which seeks damages for latent defects after the 10-year period has passed." (*Schwetz, supra,* 220 Cal.App.3d at p. 308.)

- "Appellants claim that the 10-year period is calculated pursuant to section 337.15, subdivision (g)(1)–(4), which describes four events: (1) a final inspection, (2) the notice of completion, (3) use or occupancy of the property, or (4) termination or cessation of work for one year. Subdivision (g), however, states that the 10-year period '*shall commence upon substantial completion of the improvement,* but not later than' the occurrence of any one of the four events described in subdivision (g)(1) through (g)(4). … [¶] The trial court correctly ruled that the notice of completion date (§ 337.15, subd. (g)(2)) did not control if the improvement was substantially completed at an earlier date." (*Nelson, supra,* 61 Cal.App.4th at p. 97, original italics.)

- " 'As used in section 337.15 "an improvement" is in the singular and refers separately to each of the individual changes or additions to real property that qualifies as an "improvement" irrespective of whether the change or addition is grading and filling, putting in curbs and streets, laying storm drains or of other nature.' " (*Nelson, supra,* 61 Cal.App.4th at p. 97.)

- "The purpose of section 337.15 and its definition of the 'substantial completion' that begins the running of the 10-year period make clear that the statute's protection applies to claims for damage due to defects in how an improvement was designed and constructed, not to claims based on how the improvement was used *after* its construction is complete and independent of the manner in which it was designed and constructed." (*Estuary Owners Assn. v. Shell Oil Co.* (2017) 13 Cal.App.5th 899, 915 [221 Cal.Rptr.3d 190], original italics.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, § 488

12 California Real Estate Law and Practice, Ch. 441, *Consumer's Remedies*, § 441.08A (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.25, 104.267 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions*, § 143.49 (Matthew Bender)

4601. Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements (Gov. Code, § 8547.8(c))

[*Name of plaintiff***] claims that [he/she] made a protected disclosure in good faith and that [***name of defendant***] [discharged/***specify other adverse action***] [him/her] as a result. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***specify protected disclosure, e.g., reported waste, fraud, abuse of authority, violation of law, threats to public health, bribery, misuse of government property***];**

2. **That [***name of plaintiff***]'s communication [disclosed/ [or] demonstrated an intention to disclose] evidence of [an improper governmental activity/ [or] a condition that could significantly threaten the health or safety of employees or the public];**

3. **That [***name of plaintiff***] made this communication in good faith [for the purpose of remediating the health or safety condition];**

4. **That [***name of defendant***] [discharged/***specify other adverse action***] [***name of plaintiff***];**

5. **That [***name of plaintiff***]'s communication was a contributing factor in [***name of defendant***]'s decision to [discharge/***other adverse action***] [***name of plaintiff***];**

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

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

New December 2014; Renumbered from CACI No. 2442 and Revised June 2015

Directions for Use

Under the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.) (the Act), a state employee or applicant for state employment has a right of action against any person who retaliates against him or her for having made a "protected disclosure." The statute prohibits a "person" from intentionally engaging in acts of reprisal, retaliation, threats, coercion, or similar acts against the employee or applicant. (Gov. Code, § 8547.8(c).) A "person" includes the state and its agencies. (Gov. Code, § 8547.2(d).)

The statute prohibits acts of reprisal, retaliation, threats, coercion, or similar acts against a state employee or applicant for state employment. (See Gov. Code, § 8547.8(b).) If the case involves an adverse employment action other than termination, specify the action in elements 4 and 5. These elements may also be modified if constructive discharge is alleged. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 2 alleges a protected disclosure. (See Gov. Code, § 8547.2(e) ["protected disclosure" defined].)

If an "improper governmental activity" is alleged in element 2, it may be necessary to expand the instruction with language from Government Code section 8547.2(c) to define the term. If the court has found that an improper governmental activity is involved as a matter of law, the jury should be instructed that the issue has been resolved.

If a health or safety violation is alleged in element 2, include the bracketed language at the end of element 3.

The statute addresses the possibility of a mixed-motive adverse action. If the plaintiff can establish that a protected disclosure was a "contributing factor" to the adverse action (see element 5), the employer may offer evidence to attempt to prove by clear and convincing evidence that it would have taken the same action for other permitted reasons. (Gov. Code, § 8547.8(e); see CACI No. 4602, *Affirmative Defense—Same Decision*.)

The affirmative defense includes refusing an illegal order as a second protected matter (along with engaging in protected disclosures). (See Gov. Code, § 8547.8(e); see also Gov. Code, § 8547.2(b) [defining "illegal order"].), However, Government Code section 8547.8(c), which creates the plaintiff's cause of action under the Act, mentions only making a protected disclosure; it does not expressly reference refusing an illegal order. But arguably, there would be no need for an affirmative defense to refusing an illegal order if the refusal itself is not protected. Therefore, whether a plaintiff may state a claim based on refusing an illegal order may be unclear; thus the committee has not included refusing an illegal order as within the elements of this instruction.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Civil Action Under California Whistleblower Protection Act. Government Code section 8547.8(c).
- "Improper Governmental Activity" Defined. Government Code section 8547.2(c).
- "Person" Defined. Government Code section 8547.2(d).
- "Protected Disclosure" Defined. Government Code section 8547.2(e).
- Governmental Claims Act Not Applicable. Government Code section 905.2(h).
- "The [Whistleblower Protection Act] prohibits improper governmental activities, which include interference with or retaliation for reporting such activities." (*Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 939 [163 Cal.Rptr.3d 530].)
- "The CWPA 'prohibits retaliation against state employees who "report waste, fraud, abuse of

authority, violation of law, or threat to public health" [citation].' A protected disclosure under the CWPA is 'a good faith communication, including a communication based on, or when carrying out, job duties, that discloses or demonstrates an intention to disclose information that may evidence (1) an improper governmental activity, or (2) a condition that may significantly threaten the health or safety of employees or the public if the disclosure or intention to disclose was made for the purpose of remedying that condition.' " (*Levi v. Regents of University of California* (2017) 15 Cal.App.5th 892, 902 [223 Cal.Rptr.3d 577], internal citation omitted.)

- "[Government Code] Section 8547.8 requires a state employee who is a victim of conduct prohibited by the [Whistleblower Protection] Act to file a written complaint with the Personnel Board within 12 months of the events at issue and instructs, 'any action for damages shall not be available to the injured party …' unless he or she has filed such a complaint. The Legislature could hardly have used stronger language to indicate its intent that compliance with the administrative procedure of sections 8547.8 and 19683 is to be regarded as a mandatory prerequisite to a suit for damages under the Act than to say a civil action is 'not … available' to persons who have not complied with the procedure." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1112−1113 [150 Cal.Rptr.3d 405], internal citations omitted.)

- "Exposing conflicts of interest, misuse of funds, and improper favoritism of a near relative at a public agency are matters of significant public concern that go well beyond the scope of a similar problem at a purely private institution. State employees should be free to report violations of those policies without fear of retribution." (*Levi*, *supra*, 15 Cal.App.5th at p. 905.)

- "Complaints made 'in the context of internal administrative or personnel actions, rather than in the context of legal violations' do not constitute protected whistleblowing." (*Levi*, *supra*, 15 Cal.App.5th at p. 904.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 284 et seq.

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, Employment Torts And Related Claims: Other Statutory Claims (WPA), ¶ 5:894 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 118, *Civil Service*, § 118.56 (Matthew Bender)

3 California Points and Authorities, Ch. 36, *Civil Service*, § 36.40 (Matthew Bender)

4603. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her] in retaliation for [his/her] [disclosure of information of/refusal to participate in] an unlawful act. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s employer;**

2. **[That [***name of defendant***] believed that [***name of plaintiff***] [had disclosed/might disclose] to a [government agency/law enforcement agency/person with authority over [***name of plaintiff***]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [***specify information disclosed***];]**

   [*or***]**

   [That [*name of plaintiff***] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;]**

   [*or***]**

   [That [*name of plaintiff***] refused to [***specify activity in which plaintiff refused to participate***];]**

3. **[That [***name of plaintiff***] had reasonable cause to believe that the information disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***]'s participation in [***specify activity***] would result in [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

4. **That [***name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***];**

5. **That [***name of plaintiff***]'s [disclosure of information/refusal to [***specify***]] was a contributing factor in [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***];**

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

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

[The disclosure of policies that an employee believes to be merely unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [*name of plaintiff***] must have reasonably believed that [***name of defendant***]'s policies violated federal, state, or local statutes, rules, or regulations.]**

[It is not [*name of plaintiff***]'s motivation for [his/her] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]**

[A disclosure is protected even though disclosing the information may be part of [*name of plaintiff***]'s job duties.]**

New December 2012; Revised June 2013, December 2013, Revoked June 2014; Restored and Revised December 2014; Renumbered from CACI No. 2730 and Revised June 2015; Revised June 2016

Directions for Use

The whistleblower protection statute of the Labor Code prohibits retaliation against an employee who, or whose family member, discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c), (h).) Liability may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)−(d).) Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant. Modifications will also be required if the retaliation is against an employee whose family member engaged in the protected activity.

Select the first option for elements 2 and 3 for disclosure of information; select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity. In the first option for element 2, choose "might disclose" if the allegation is that the employer believed that the employee might disclose the information in the future. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648−649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].)

Select any of the optional paragraphs explaining what disclosures are and are not protected as appropriate to the facts of the case. It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].) Another court, however, has cast doubt on this limitation and held that protection is not limited to the first public employee to report unlawful acts to the employer. (*Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548−1553 [176 Cal.Rptr.3d 268]; see Lab. Code, § 1102.5(e).)

"Adverse employment action" is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113]; see CACI No. 2505, *Retaliation—Essential Factual Elements*.) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for

instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 4604, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.

- Affirmative Defense: Same Decision. Labor Code section 1102.6.

- "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra,* 134 Cal.App.4th at p. 1384, internal citations omitted.)

- "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)

- "[T]he purpose of … section 1102.5(b) 'is to 'encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation.' " (*Diego v. Pilgrim United Church of Christ* (2014) 231 Cal.App.4th 913, 923 [180 Cal.Rptr.3d 359].)

- "As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute 'disclosing

information' or a 'protected disclosure' under the California statutes." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 847.)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman, supra,* 202 Cal.App.4th at pp. 852–853.)

- "[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 852, original italics.)

- "[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, … , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results." (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)

- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)

- "We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 858.)

- "The report of 'publicly known' information or 'already known' information is distinct from a rule in which only the first employee to report or disclose unlawful conduct is entitled to protection from whistleblower retaliation." (*Hager, supra,* 228 Cal.App.4th at p. 1552.)

- "Protection only to the first employee to disclose unlawful acts would defeat the legislative purpose of protecting workplace whistleblowers, as employees would not come forward to report unlawful conduct for fear that someone else already had done so. The 'first report' rule would discourage whistleblowing. Thus, the [defendant]'s interpretation is a disincentive to report

unlawful conduct. We see no such reason to interpret the statute in a manner that would contradict the purpose of the statute." (*Hager, supra*, 228 Cal.App.4th at p. 1550.)

- "Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site. … ' " (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

- " 'A wrongful termination action is viable where the employee alleges he [or she] was terminated for reporting illegal activity which could cause harm, not only to the interests of the employer but also to the public.' 'An action brought under the whistleblower statute is inherently such an action.' To preclude a whistleblower from revealing improper conduct by the government based on confidentiality would frustrate the legislative intent underlying the whistleblower statutes. For reasons of public policy, actions against a public entity for claims of discharge from or termination of employment grounded on a whistleblower claim are not barred by governmental immunity." (*Whitehall v. County of San Bernardino* (2017) 17 Cal.App.5th 352, 365 [225 Cal.Rptr.3d 321], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 349

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Employment Torts And Related Claims: Other Statutory Claims*, ¶ 5:894 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42 et seq. (Matthew Bender)

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

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

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

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

New November 2017

Directions for Use

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

Sources and Authority

- Consumers Legal Remedies Act: Defenses. Civil Code section 1784.

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

- "[Defendants] also contend [plaintiff] cannot avoid the safe harbor provided for a reasonable correction offer under the CLRA by recasting her claim as a violation of the UCL. This is incorrect. [Plaintiff] 's UCL claim was based directly on evidence of fraudulent advertising practices and was not dependent on finding an underlying violation of the CLRA. The CLRA expressly states that the effect of a reasonable correction offer is to prevent the consumer from maintaining an action for damages under Civil Code section 1780, but the remedies of the CLRA are cumulative and the consumer may assert other common law or statutory causes of action under the procedures and with the remedies provided for in those laws." (*Flores v. Southcoast Automotive Liquidators, Inc.* (2017) 17 Cal.App.5th 841, 852 [226 Cal.Rptr.3d 12].)

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. 14(II)-C, *Consumers Legal Remedies Act—Particular Defenses*, ¶¶ 14:321 to 14:505 (The Rutter Group)

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

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

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

Item number:03

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: May 1, 2018

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

Committee or other entity submitting the proposal:
Civil and Small Claims Advisory Committee

Staff contact (name, phone and e-mail): Susan R. McMullan, 415-865-7990, susan.mcmullan@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 24, 2017
Project description from annual agenda: Assembly Bill 688 provides for a new exemption, for contributions to ABLE bank accounts, which will need to be added to the forms which list exemptions and amounts of exemptions.

If requesting July 1 or out of cycle, explain:
The proposal implements legislation effective January 1, 2018

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

JUDICIAL COUNCIL OF CALIFORNIA

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

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on May 24–25, 2018

Title
Forms: Enforcement of Judgment Exemption

Rules, Forms, Standards, or Statutes Affected
Revise form EJ-155

Recommended by
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2018

Date of Report
April 25, 2018

Contact
Susan R. McMullan, 415-865-7990
susan.mcmullan@jud.ca.gov

Executive Summary

Assembly Bill 688 (Calderon; Stats. 2017, ch. 529) amended Welfare and Institutions Code section 4880 to provide an exemption from enforcement of judgments for funds in special savings accounts for persons with disabilities. The amount exempted is $100,000. To assist court users and to help implement this legislation, the exemption must be added to the Judicial Council form that lists exemptions to enforcement of judgments.

Recommendation

The Civil and Small Claims Advisory Committee recommends that that Judicial Council, effective September 1, 2018, revise *Exemptions From the Enforcement of Judgments* (form EJ-155) to add an exemption from enforcement of judgments, not to exceed $100,000, for funds in savings accounts established under the federal Stephen Beck, Jr., Achieving a Better Life Experience Act of 2014 (ABLE Act); to update the information box on amounts of exemptions; and to make the form a mandatory form.

The revised form is attached at pages 5–6.

Previous Council Action

The Judicial Council initially approved *Exemptions From the Enforcement of Judgments* (form EJ-155) effective July 1, 1983. The form has been revised many times as the exemptions have changed; the most recent revision was effective April 1, 2016.

Rationale for Recommendation

The federal ABLE Act encourages and assists individuals and families to save private funds in a tax-advantaged savings account to support persons with disabilities to maintain their health, independence, and quality of life by excluding from gross income money used for disability expenses by a beneficiary of a qualified ABLE program established and maintained by a state.

California has a qualified ABLE program (CalABLE) to implement the federal ABLE Act. Effective September 1, 2018, Welfare and Institutions Code section 4880(c) will provide that "moneys in an ABLE account, not to exceed one hundred thousand dollars ($100,000), shall be exempt from enforcement of a money judgment without making a claim."

Exemptions From the Enforcement of Judgments (form EJ-155) is currently an optional form that lists assets that may be exempt from levy on a judgment, including the type of property and the particular statute that provides the exemption. Form EJ-155 would be revised to add ABLE accounts, consistent with the recent legislation. Revising this form to add ABLE accounts will inform individuals holding these accounts, judges, court personnel, and other parties of this exemption without the need for the person claiming the exemption to file a claim of exemption. (New Welfare and Institutions Code section 4880(c) provides for the exemption up to $100,000 without the need to file a claim of exemption.)

The form would also be revised to update information in a box discussing the amount of exemptions. It would reference another form, *Current Dollar Amounts of Exemptions From Enforcement of Judgments* (form EJ-156), which lists the amount of exemptions under certain statutes and provides information on amounts that are amended every three years. The current version of the form states the amount of the exemptions is available from the clerk of the court and on the California Courts website. The revision to this box would remove that statement, as the information is now contained in form EJ-156.

In addition, because Code of Civil Procedure section 700.010(a)(3) has been amended to require that a levying officer must serve form EJ-155, as well as a claim of exemption form and other documents with the notice of levy, the form will be revised to refer to "the claim of exemption form that you received from the levying officer."

Comments, Alternatives Considered, and Policy Implications

External comments

The proposal circulated for public comment from December 15, 2017, to February 9, 2018. Three comments were received. Commenters included two superior courts and the legislative

chairperson of the California Association of Judgment Professionals. Two of the commenters agreed with the proposal and one did not state a position but suggested modifications. One of the superior courts that responded suggested changes to the information box to make it clearer and more concise. One such a change has been made.

Another commenter suggested a change to language in the first sentence of the form to more accurately reflect that assets are levied in enforcing a judgment, rather than a "levy on a judgment." This change has been made. The commenter also noted that Code of Civil Procedure section 700.010(a)(3) requires a levying officer to serve form EJ-155, among other documents, on the judgment debtor. Thus, the existing form language stating that the judgment debtor may get a claim of exemption form from the levying officer is no longer accurate and has been revised. Because the form must be served, it has been changed from an optional form to a mandatory form. Rule 1.31 of the California Rules of Court addresses mandatory forms and provides in subdivision (a) that "[f]orms adopted by the Judicial Council for mandatory use are forms prescribed under Government Code section 68511. Wherever applicable, they must be used by all parties and must be accepted for filing by all courts." Government Code section 68511 provides in part: "The Judicial Council may prescribe by rule the form and content of forms used in the courts of this state. When any such form has been so prescribed by the Judicial Council, no court may use a different form which has as its aim the same function as that for which the Judicial Council's prescribed form is designed." Though form EJ-155 is not to be filed with a court, it must be served in enforcing judgments and therefore it seems appropriate that it be a mandatory form.

The invitation to comment for this proposal asked whether ABLE accounts should be listed in two places on the form (as some other types of property are)—under both a standalone category (ABLE Accounts) and as a subcategory under Deposit Accounts.[1] Two commenters believed it should be so listed but provided no further comment. The other commenter, from the California Association of Judgment Professionals, pointed out that an ABLE account will most likely *not* be kept in a deposit account because of the relatively large amount of money involved and the extended period of time over which it will be needed. Instead, an ABLE account may be kept with an investment manager, brokerage house, or in another financial vehicle, none of which are deposit accounts. The commenter suggested listing ABLE accounts solely as a standalone category and the committee agreed.

Alternatives

Because of the need to assist court users by providing accurate information on exemptions from enforcement of judgments and the enactment of legislation that adds ABLE accounts to the assets that are exempt, the advisory committee did not consider alternatives. The committee

[1] At the time this proposal circulated for comment, the State Treasurer's website stated that the CalABLE Board was considering the following features for ABLE accounts: "ability to contribute automatically through routine deductions from a bank account," "ability to invite friends and family to contribute directly an account," "deposit online or by check," and "diverse investment options."

determined that revising this form to refer court users to form EJ-156 for a list of the amount of certain exemptions was preferable to leaving a statement on the form that such a list is available from the clerk of the court and on the California Courts website.

Implementation Requirements, Costs, and Operational Impacts

Implementation requirements and operational impacts would be minimal. One of the two courts that commented said there would be none while the other said that court clerks, courtroom assistants, judicial officers, and judicial assistants would need to be familiarized with the updated form and with ABLE accounts.

Attachments and Links

1. Form EJ-155, at pages 5–6
2. AB 688 (Stats. 2017, ch. 529), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB688*

DRAFT - Not Approved by the Judicial Council

EXEMPTIONS FROM THE ENFORCEMENT OF JUDGMENTS

EJ-155

The following is a list of assets that may be exempt from levy in enforcing a judgment.

Exemptions are found in the United States Code **(USC)** and in the California codes, primarily the Code of Civil Procedure (**CCP**).

Because of periodic changes in the law, the list may not include all exemptions that apply in your case. The exemptions may not apply in full or under all circumstances. Some are not available after a certain period of time. You or your attorney should read the statutes.

If you believe the assets that are being levied on are exempt, file the claim of exemption form that you received from the levying officer.

AMOUNT OF EXEMPTIONS: For the exemption amount, please refer to the code section listed below for each type of property. The current amounts of certain exemptions are listed in *Current Dollar Amounts of Exemptions From Enforcement of Judgments* (form EJ-156). The amounts of some of the exemptions are amended every three years and become effective immediately on April 1 under the provisions of Code of Civil Procedure section 703.150.

Type of Property	Code and Section
ABLE Accounts	Welf & I C § 4880(c)
Accounts *(See Deposit Accounts)*	
Appliances	CCP § 704.020
Art and Heirlooms	CCP § 704.040
Automobiles	CCP § 704.010
BART District Benefits	CCP § 704.110 Pub Util C § 28896
Benefit Payments:	
BART District Benefits	CCP § 704.110 Pub Util C § 28896
Charity	CCP § 704.170
Civil Service Retirement Benefits (Federal)	5 USC § 8346
County Employees Retirement Benefits	CCP § 704.110 Govt C § 31452
Disability Insurance Benefits	CCP § 704.130
Fire Service Retirement Benefits	CCP § 704.110 Govt C § 32210
Fraternal Organization Funds Benefits	CCP § 704.130 CCP § 704.170
Health Insurance Benefits	CCP § 704.130
Irrigation System Retirement Benefits	CCP § 704.110
Judges Survivors Benefits (Federal)	28 USC § 376(n)
Legislators Retirement Benefits	CCP § 704.110 Govt C § 9359.3
Life Insurance Benefits:	
Group	CCP § 704. 100
Individual	CCP § 704. 100
Lighthouse Keepers Widows Benefits	33 USC § 775
Longshore & Harbor Workers Compensation or Benefits	33 USC § 916
Military Benefits:	
Retirement	10 USC § 1440
Survivors	10 USC § 1450
Municipal Utility District Retirement Benefits	CCP § 704.110 Pub Util C § 12337
Peace Officers Retirement Benefits	CCP § 704.110 Govt C § 31913
Pension Plans (and Death Benefits):	
Private	CCP § 704.115
Public	CCP § 704.110
Public Assistance	CCP § 704.170 Welf & I C § 17409

Type of Property	Code and Section
Benefit Payments *(cont.)*	
Relocation Benefits	CCP § 704.180
Retirement Benefits and Contributions:	
Private	CCP § 704.115
Public	CCP § 704.110
Segregated Benefit Funds	Ins C § 10498.5
Social Security Benefits	42 USC § 407
Strike Benefits	CCP § 704.120
Transit District Retirement Benefits (Alameda and Contra Costa Counties)	CCP § 704.110 Pub Util C § 25337
Unemployment Benefits and Contributions	CCP § 704.120
Veterans Benefits	38 USC § 3101
Veterans Medal of Honor Benefits.	38 USC § 562
Welfare Payments	CCP § 704.170 Welf & I C § 17409
Workers Compensation	CCP § 704.160
Boats	CCP § 704.060 CCP § 704.710
Books	CCP § 704.060
Building Materials (Residential)	CCP § 704.030
Business:	
Licenses	CCP § 695.060 CCP § 699.720(a)(1)
Tools of Trade.	CCP § 704.060
Cars and Trucks (including proceeds)	CCP § 704.010
Cash	CCP § 704.070
Cemeteries:	
Land Proceeds	Health & SC § 7925
Plots	CCP § 704.200
Charity	CCP § 704.170
Claims, Actions and Awards:	
Personal Injury	CCP § 704.140
Worker's Compensation	CCP § 704.160
Wrongful Death	CCP § 704.150
Clothing	CCP § 704.020
Condemnation Proceeds	CCP § 704.720(b)
County Employees Retirement Benefits	CCP § 704.110 Govt C § 31452
Damages (*See Personal Injury and Wrongful Death)*	
Deposit Accounts:	
Escrow or Trust Funds	Fin C § 17410
Social Security Direct Deposits	CCP § 704.080

Form Adopted for Mandatory Use
Judicial Council of California
EJ-155 [Revised September 1, 2018]

Code of Civil Procedure, §§ 681.030(c), 700.010
www.courts.ca.gov

EXEMPTIONS FROM THE ENFORCEMENT OF JUDGMENTS

(Continued)

Type of Property	Code and Section
Direct Deposit Account:	
Social Security	CCP § 704.080
Disability Insurance Benefits	CCP § 704.130
Dwelling House	CCP § 704.740
Earnings	CCP § 704.070 CCP § 706.050 15 USC § 1673(a)
Educational Grant	Ed C § 21116
Employment Bonds	Lab C § 404
Financial Assistance:	
Charity	CCP § 704.170
Public Assistance	CCP § 704.170 Welf & I C § 17409
Student Aid	CCP § 704.190
Welfare *(See Public Assistance)*	
Fire Service Retirement	CCP § 704.110 Govt C § 32210
Fraternal Organizations Funds and Benefits	CCP § 704.130 CCP § 704.170
Fuel for Residence	CCP § 704.020
Furniture	CCP § 704.020
General Assignment for Benefit of Creditors	CCP § 1801
Health Aids	CCP § 704.050
Health Insurance Benefits	CCP § 704.130
Home:	
Building Materials	CCP § 704.030
Dwelling House	CCP § 704.740
Homestead	CCP § 704.720 CCP § 704.730
Housetrailer	CCP § 704.710
Mobilehome	CCP § 704.710
Homestead	CCP § 704.720 CCP § 704.730
Household Furnishings	CCP § 704.020
Insurance:	
Disability Insurance	CCP § 704.130
Fraternal Benefit Society	CCP § 704.110
Group Life	CCP § 704.100
Health Insurance Benefits	CCP § 704.130
Individual	CCP § 704.100
Insurance Proceeds—Motor Vehicle	CCP § 704.010
Irrigation System Retirement Benefits	CCP § 704.040 CCP § 704.110
Jewelry	
Judges Survivors Benefits (Federal)	28 USC § 376(n)
Legislators Retirement Benefits	CCP § 704.110 Govt C § 9359.3
Licenses	CCP § 695.060 CCP § 720(a)(1)
Lighthouse Keepers Widows Benefits	33 USC § 775
Longshore and Harbor Workers Compensation or Benefits	33 USC § 916
Military Benefits:	
Retirement	10 USC § 1440
Survivors	10 USC § 1450
Military Personnel—Property	50 USC § 523(b)
Motor Vehicle (Including Proceeds)	CCP § 704.010 CCP § 704.060

Type of Property	Code and Section
Municipal Utility District Retirement Benefits	CCP § 704.110 Pub Util C § 12337
Peace Officers Retirement Benefits	CCP § 704.110 Govt C § 31913
Pension Plans:	
Private	CCP § 704.115
Public	CCP § 704.110
Personal Effects	CCP § 704.020
Personal Injury Actions or Damages	CCP § 704.140
Prisoner's Funds	CCP § 704.090
Property Not Subject to Enforcement of Money Judgments	CCP § 704.210
Prosthetic and Orthopedic Devices	CCP § 704.050
Provisions (for Residence)	CCP § 704.020
Public Assistance	CCP § 704.170 Welf & I C § 17409
Public Employees:	
Death Benefits	CCP § 704.110
Pension	CCP § 704.110
Retirement Benefits	CCP § 704.110
Vacation Credits	CCP § 704.113
Railroad Retirement Benefits	45 USC § 2281
Railroad Unemployment Insurance	45 USC § 352(e)
Relocation Benefits	CCP § 704.180
Retirement Benefits and Contributions:	
Private	CCP § 704.115
Public	CCP § 704.110 Ins C § 10498.5
Segregated Benefit Funds	Ins C § 10498.6
Servicemembers Property	50 USC § 523(b)
Social Security	42 USC § 407
Social Security Direct Deposit Account	CCP § 704.080
Strike Benefits	CCP § 704.120
Student Aid	CCP § 704.190
Tools of Trade	CCP § 704.060
Transit District Retirement Benefits (Alameda and Contra Costa Counties)	CCP § 704.110 Pub Util C § 25337
Travelers Check Sales Proceeds	Fin C § 1875
Unemployment Benefits and Contributions	CCP § 704.120
Uniforms	CCP § 704.060
Vacation Credits (Public Employees)	CCP § 704.113
Veterans Benefits	38 USC § 3101
Veterans Medal of Honor Benefits	38 USC § 562
Wages	CCP § 704.070 CCP § 706.050
Welfare Payments	CCP § 706.051 CCP § 704.170 Welf & I C § 17409
Workers Compensation Claims or Awards	CCP § 704.160
Wrongful Death Actions or Damages	CCP § 704.150

W18-02
Enforcement of Judgment Form (revise form EJ-155)

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

	Commentator	Position	Comment	Committee Response
1.	Susan Ryan Chief Deputy of Legal Services Riverside Superior Court, County of Riverside Comment on Behalf of Org.: Yes	A	• Does the proposal appropriately address the stated purpose? Yes. • Should ABLE accounts be listed in two places on the form, including under the heading "Deposit Accounts" as shown in this proposal? Yes, the duplicate listing is consistent with the treatment of other types of accounts listed in the form such as Social Security. • Does the box on "Amount of Exemptions" provide sufficient information about where to find information on the amount of certain exemptions? Yes. However, the paragraph is wordy. Consider revising the paragraph as follows: "For the exemption amount, please refer to the code section listed for each type of property. Current Dollar Amounts of Exemptions From Enforcement of Judgments (form EJ-156) lists current amounts for several exemptions. Those exemptions amended every three years become effective immediately on April 1 under the provisions of Code of Civil Procedure section 703.150." • What would the implementation requirements be for courts? The court clerks, courtroom assistants, judicial officers, and judicial assistants would need to be familiarized with the updated form and on ABLE accounts.	The committee appreciates the comments to the specific questions posed in the invitation to comment. In response to comment 2, the committee decided to list ABLE accounts in only one place on the form, alphabetically. The committee changed the form to use the first sentence suggested by the commenter (beginning with "For the exemption amount") in place of the first sentence on the form that circulated for comment.

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

W18-02
Enforcement of Judgment Form (revise form EJ-155)

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

	Commentator	Position	Comment	Committee Response
			• Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.	
2.	Gretchen D. Lichtenberger Legislative Chairperson California Association of Judgment Professionals		1) First line of page 1 on the form: This currently reads "*The following is a list of assets that may be exempt from levy on a judgment*." A levy is not typically done "*on*" a judgment, the levy is done "on" assets of the judgment debtor. For clarity and to avoid confusion, we would like to suggest replacing the word "on" with the word "in enforcing" so that sentence reads "*The following is a list of assets that may be exempt from levy in enforcing a judgment*." 2) Fifth line of page 1 on the form: This currently reads "*If you believe the assets that are being levied on are exempt, file a claim of exemption form, which you can get from the levying officer*." The law changed in 2014 [CCP §700.010(a)(3)] so that now when a levy is done, the judgment debtor must be served a blank *Claim of Exemption* form, as well as the exemption forms EJ-155 and EJ-156, along with the *Notice of Levy*. This new law relieved the Levying Officers of having to field calls and walk-ins from judgment debtors looking for the *Claim of Exemption* form. So now, every judgment debtor receives the *Claim of Exemption* form in the mail along with the *Notice of Levy* form. Your form EJ-155 cites to CCP §700.010 in the lower right-hand corner, as	The committee has made this change. The committee has made the change suggested by the commenter, instructing the form user to file the claim of exemption form that he or she received from the levying officer.

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

	Commentator	Position	Comment	Committee Response
			it did previously, however now that statute requires the *Claim of Exemption* form to be served on the debtor. Therefore, we would like to suggest changing that sentence to read "*If you believe the assets that are being levied on are exempt, file the Claim of Exemption form you received with the levying officer. All judgment enforcement forms can be found at http://www.courts.ca.gov/forms.htm/?filter=EJ* ". 3) Regarding "*Optional Use*": In the lower left corner of page 1, the EJ-155 form states "*Form Approved for Optional Use*". Since CCP §700.010 mandates that the judgment debtor be served with this form, shouldn't the EJ-155 form be considered a "*Mandatory Use*" form now? This would also be true for "*Mandatory Use*" for form EJ-156. 4) Regarding placing ABLE Accounts in two locations on the form: You provided an example of other types of property that are listed twice using the "*Building Materials*" example however a better analogy would be Social Security, which is listed under "*Deposit Account*", "*Direct Deposit Account*" and also under "*Social Security Direct Deposit*"; it is found in three separate places on the EJ-155. Social Security is typically direct deposited into a deposit account at a financial institution and not typically kept in any other type of financial	Though the form isn't one that is filed in court, it must be served on judgment debtors, as the commenter notes. The committee therefore agrees that it should be changed from "optional" to "mandatory." The committee will consider recommending that form EJ-156 be made a mandatory form through a technical amendment.

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

	Commentator	Position	Comment	Committee Response
			vehicle. Whereas an ABLE account will most likely NOT be kept in a "deposit account" because of the size of the amount of money kept there and the extended period of time the money will be needed. A "deposit account" is defined as "*a demand, time, savings, passbook, or similar account maintained with a bank. The term does not include investment property or accounts evidenced by an instrument*" [CCP §680.170, Commercial Code §9102(a)(29)]. A certificate of deposit, commonly referred to as a "CD", though usually held at a bank, is not, by legal definition, a "deposit account". A CD is considered a "Security" [CCP §680.345; Commercial Code §8102(a)(15)] because the depositor's interest is represented by the certificate given to the depositor. In some cases, a CD may be considered an "Instrument" [CCP §682.220, Commercial Code §9102(a)(47)]. "Deposit Accounts" are levied upon under CCP §700.140 whereas a "Security" is levied upon under CCP §700.130 and an "Instrument" is levied upon under CCP §700.110. An ABLE account will most probably be put wherever the account is likely to draw the most interest, which could be with an investment manager or a brokerage house and then the ABLE account would fall under the title of a "Security", not a "Deposit Account".	

W18-02
Enforcement of Judgment Form (revise form EJ-155)

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

	Commentator	Position	Comment	Committee Response
			We think that listing ABLE Accounts under "Deposit Accounts" will cause confusion because that listing may lead the third-person applying the exemption to read that listing such that the only ABLE Accounts that are exempt are those in "Deposit Accounts". The statute Welfare & Institutions Code §4875 et seq specifically calls the accounts "ABLE Accounts", not "ABLE Deposit Accounts" recognizing that those types of accounts can be established in many different types of financial vehicles without limiting those accounts to just deposit accounts. Because ABLE Accounts will most likely be maintained in financial vehicles *other than* "deposit accounts", we suggest that ABLE Accounts only be listed alphabetically as "ABLE Accounts", shown as the first item on your proposed new form EJ-155, without listing ABLE Accounts under "Deposit Accounts".	The committee agreed with this comment and listed ABLE accounts in only one place on the form, alphabetically.
3.	Mike Roddy Executive Officer Superior Court of California, County of San Diego	A	Q: Does the proposal appropriately address the stated purpose? Yes. Q: Should ABLE accounts be listed in two places on the form, including under the heading "Deposit Accounts" as shown in this proposal?	The committee appreciates the comments to the specific questions posed in the invitation to comment.

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

W18-02
Enforcement of Judgment Form (revise form EJ-155)

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

	Commentator	Position	Comment	Committee Response
			Yes. Q: Does the box on ”Amount of Exemptions” provide sufficient information about where to find information on the amount of certain exemptions? Yes. Q: What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? None. Q: Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes.	Based on comment 2, the committee decided to list ABLE accounts in only one place on the form, alphabetically.

Item number:04

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: May 1, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Civil Forms: Name Change and Gender Change Forms (Revise forms NC-100, NC-110, NC-130, NC-130G, NC-200, NC-230, NC-300, and NC-330; adopt forms NC-125/NC-225, NC-500, and NC-520; approve forms NC-100-INFO, NC-150, and NC-500-INFO; and revoke forms NC-210/NC-310, NC-220, and NC-320)

Committee or other entity submitting the proposal:
Civil and Small Claims 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: 10/24/17
Project description from annual agenda:
Gender Identity and Name Change Forms Priority 1(a)

Project Summary Senate Bill 179 adds a third gender alternative for California residents: nonbinary in addition to male or female, and amends the procedures for seeking name changes to conform to gender (Code Civ. Proc. § 1277.5) and the procedures and legal requirements for seeking changes of gender on birth certificates (Health and Safety Code § 103430). The new law will require revisions to several of the council's Name Change forms, both to add the nonbinary option and to reflect the amendments to procedures for obtaining name changes to reflect gender and changes to birth certificates. Senate Bill 310 will also require amending Name Change forms, to remove the items re status of petitioner being under jurisdiction of Department of Corrections and Rehabilitation and to add information about the additional service of documents that will now be required of those under that jurisdiction.

Pending issues regarding Name Change forms that the committee will consider at the same time, include the following:
- Whether form NC-220 should be revised to include language from Code of Civil Procedure section 1277(a)(1) directing interested persons to file in writing any objections to the granting of the petition (suggested by court research attorney)
- Whether form NC-110 should be revised to correct an ambiguity in the declaration box, to address a recurring problem for clerks in processing the form (suggested by judicial officer)
- Whether date of birth should be removed from the petition form, addressing privacy concerns (suggested by an attorney).

If requesting July 1 or out of cycle, explain:
These forms are on an early cycle due to effective date of new statutes, September 1, 2018. As noted in the report, the committee expects some legislative clean-up to fix some inconsistencies in the bill, so further revisions may be necessary for some of these forms most likely the information sheets and the orders to show cause, as soon as that legislation goes into effect.

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

JUDICIAL COUNCIL OF CALIFORNIA

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

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: May 24, 2018:

Title
Forms: Civil Name Change and Gender Change Forms

Rules, Forms, Standards, or Statutes Affected
Revise forms NC-100, NC-110, NC-130, NC-130G, NC-200, NC-230, NC-300, and NC-330; adopt forms NC-125/NC-225, NC-500, and NC-520; approve forms NC-100-INFO, NC-150, and NC-500-INFO; and revoke forms NC-210/NC-310, NC-220, and NC-320

Recommended by
Civil and Small Claims Advisory Committee
Hon. Ann I. Jones, Chair

Agenda Item Type
Action Required

Effective Date
September 1, 2018

Date of Report
April 27, 2018

Contact
Anne M. Ronan, 415-865-8933
anne.ronan@jud.ca.gov

Executive Summary

The Civil and Small Claims Advisory Committee recommends adopting, revising, or revoking various Judicial Council name change forms to reflect recently enacted legislative amendments. Senate Bill 179 changed the process for seeking name changes to conform to gender (new Code Civ. Proc., § 1277.5); changed the process for adults seeking recognition of a gender change, including by adding "nonbinary" as one of the genders that can be recognized (amended Health & Saf. Code, §§ 103425 and 103430(a)–(b)); and added a new process for minors seeking recognition of gender changes (new Health & Saf. Code, § 103430(e)). In addition, Senate Bill 310 eliminated the prohibition on name changes for persons under the jurisdiction of the Department of Corrections and Rehabilitation (those in state prison or on parole) and those in county jail, while at the same time adding a service requirement for such petitions.

Recommendation

In order to implement statutory changes enacted in Senate bills 179 and 310, the Civil and Small Claims Advisory Committee recommends the following actions be taken, effective September 1, 2018.

1. The advisory committee recommends that the following forms be revised:

    - *Petition for Change of Name* (form NC-100), to reflect the change in procedures for name changes to conform to gender identity and update some of the language on the form;
    - *Attachment to Petition for Change of Name* (form NC-110), to update certain language on the form;
    - *Decree Changing Name* (form NC-130) and *Decree Changing Name of Minor (By Guardian*) (form NC-130G), to reflect the elimination of the prohibition on name changes for persons under the jurisdiction of the Department of Corrections and Rehabilitation and those in county jail,
    - *Petition for Change of Name, Recognition of Change of Gender, and Issuance of New Birth Certificate* (form NC-200), to reflect the change in procedures for name changes to conform to gender identity and the change of procedures for recognition of gender change, and to update some of the language on the form;
    - *Decree Changing Name and Order Recognizing Change of Gender and for Issuance of New Birth Certificate* (form NC-230), to reflect the change in procedures for name changes to conform to gender identity and the change of procedures for recognition of gender change, to reflect the elimination of the prohibition on name changes for persons under the jurisdiction of the Department of Corrections and Rehabilitation and those in county jail, and to update some of the language on the form; and
    - *Petition for Recognition of Change of Gender and for Issuance of New Birth Certificate* (form NC-300) and *Order Recognizing Change of Gender and for Issuance of New Birth Certificate* (form NC-330), to reflect the change in procedures for recognition of gender change, and to update some of the language on the forms.

2. The advisory committee recommends that the following forms be adopted:

    - *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125/NC-225), to implement the change in procedures for name changes to conform to gender identity; and
    - *Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (Name Change)* (form NC-500) and *Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (and Change of Name)* (form NC-520), to implement the change in procedures for name changes to conform to gender identity and the change of procedures for recognition of gender change by a minor.

3. The advisory committee proposes that the following forms be approved:

   - *Instructions for Filing a Petition for Change of Name* (form NC-100-INFO), moving the current instructions from the back of the petition for change of name to a new form, and revising them to reflect the change in procedures for name changes to conform to gender, to reflect the elimination of the prohibition on name changes for persons under the jurisdiction of the Department of Corrections and Rehabilitation and those in county jail, and to update some of the language on the form;
   - *Notice of Hearing on Petition* (form NC-150), a new form to implement the change in procedures for name changes to conform to gender; and
   - *Instructions for Filing Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (and Change of Name)* (form NC-500-INFO), a new information sheet to implement the change in procedures for name changes to conform to gender identity and the change of procedures for recognition of gender change by minors;

4. The advisory committee proposes that the following forms be revoked:

   - *Declaration of Physician—Attachment to Petition* (form NC-210/NC-310) and *Setting of Hearing on Petition for Change of Gender and Issuance of New Birth Certificate* (form NC-320), which are no longer required under the new procedures for recognition of gender change; and
   - *Order to Show Cause for Change of Name* (form NC-220), which will be replaced by form NC-150 to implement the changes in the procedures for name changes to conform to gender identity.

The text of the new, revised, and revoked forms are attached at pages 17–38.

Relevant Previous Council Action

The council first adopted name change forms effective January 2001 to standardize procedures used for name change proceedings throughout the state. These forms have received minor modifications through the years since then. Along with revisions to the set, new forms were adopted to implement the confidential name change program run by the Secretary of State, "Safe at Home." The most recent changes were made in 2014 to reflect statutory amendments eliminating the publication requirement for petitioners seeking to change their names to conform to their gender identity.

In 2003, the Judicial Council adopted a set of forms for persons to petition for recognition of a gender change and issuance of a new birth certificate reflecting that change. In 2006, the council adopted an additional set of forms to petition for a change of gender and issuance of a new birth certificate, without a name change. Changes were made to those forms (1) in 2011 to reflect the change in venue requirements for petitioners who are California-born, transgender individuals residing outside the state; (2) in 2012 to reflect the statutory change in the evidence required to

support such requests; and (3) in 2014 to add information about the administrative process that may be used as an alternative to the court proceedings.

Analysis/Rationale

Background

The newly enacted legislation changes current name change and gender change statutes in several ways. The primary changes that affect Judicial Council forms are described below. The legislation:

1. Alters the process for changing names to conform to gender so that it no longer parallels the process for other name changes.[1] The petitions for name changes to conform to gender are not to be set automatically for a hearing, but instead set for hearing only if objections are filed showing good cause to oppose the name change, within six weeks of issuance of an order to show cause (OSC). Therefore, a new OSC form and new instructions about it are needed for these name change petitions, and for name change petitions combined with petitions for recognition of gender change. As is currently the law, there is no requirement to publish this OSC or to serve it on anyone.

2. Allows name change petitions by prisoners in county jail or state prison as well as those on parole (i.e., those under jurisdiction of the California Department of Corrections and Rehabilitation (CDCR)).[2] The statute also adds service requirements for those petitions. This amendment requires changes to the final name change orders—which no longer require finding that a petitioner is not under CDCR jurisdiction—and to the instructions for name change forms.

3. Adds a third gender—nonbinary—to the genders to which a court may issue an order recognizing a change of gender.[3] This amendment requires revisions to the petitions and orders that address court recognition of gender change, to add this third gender.

4. Changes the process for obtaining an order recognizing a change of gender and for issuance of a new birth certificate. There is no longer a requirement for a declaration from a doctor stating that a party has undergone clinically appropriate treatment for a gender transition; instead, all that is required is an affidavit from the petitioner seeking the order stating that the change is not for fraudulent reasons.[4] In addition, the court is no longer to set a hearing on all such petitions; instead, a hearing is to be set only if timely

[1] See new Code Civ. Proc., § 1277.5.

[2] See new Code Civ. Proc., § 1279.5.

[3] See new Health & Saf. Code, §§ 103425 and 103430(a).

[4] See new Health & Saf. Code, §§ 103430(a).

objections are filed, within 28 days of the filing of the petition.[5] These changes require revisions to the gender change recognition petitions and orders (to add the third gender), and revocation of the forms for the doctor's declaration. In addition, the notice of hearing is revised so that it may be issued by the court after timely objections have been filed, should the court choose to use the form.

5. Adds a process for a minor requesting an order recognizing a change of gender and for issuance of a new birth certificate.[6] The text of the statute assumes that a minor can bring the petition,[7] but also requires the petition to be signed either by one or both parents or the minor's guardian, or, if there is no living parent and no guardian, then by a near relative or friend. If not signed by all living parents, the petition must be served on any living parent who did not sign it. The OSC on these petitions is to include a hearing date.

The revisions recommended to reflect these changes are described generally below.[8]

Forms for name change only

- *Petition for Change of Name* (form NC-100). This form was revised in only minor ways. Item 3, the request for an OSC, was revised to encompass the new OSCs on petitions to change names to conform to gender, which order the filing of objections by a certain deadline rather than an appearance at a hearing. In item 5, the phrasing of "mother only" or "father only" was changed to a single item "one parent," to eliminate confusion for families in which there are two mothers or two fathers. The term "both parents" in that same item has been changed to "two parents" to reflect the reality of some children who do not have relationships with "both" biological parents. In item 6, a space was added for the name of a minor or ward whose name is being changed to conform to the person's gender identity (for petitions brought by a parent or guardian) and the wording was revised to be inclusive of nonbinary-gendered individuals.

- *Instructions for Filing a Petition for Change of Name* (form NC-100-INFO). This new form is comprised primarily of the text currently on the back of form NC-100, made into a separate information sheet, as the instructions have become too extensive to fit on a single page. References to and instructions for filing the new OSC form to be used for name changes to conform to gender have been added. A note has been added in item 8 that the service provisions set out there for petitions for minors do not apply to petitions

[5] See new Health & Saf. Code, §§ 103430(b).

[6] See new Health & Saf. Code, §§ 103430(e).

[7] Currently, minors generally cannot file an action on their own in civil proceedings. See Code Civ. Proc., § 372(a), requiring guardian ad litem, and (b) providing for certain exceptions.

[8] While making these changes, some additional nonsubstantive changes were made to the forms, to clarify the text. For example, the parenthetical instruction to insert the petitioner's "name" was changed in several items to "present name."

to conform name to gender.[9] New item 9 has been added with instructions for individuals who are within the jurisdiction of the Department of Corrections and Rehabilitation (CDCR) or are in county jail, and may now file petitions for name change. Finally, several items have been revised so that the voice (second person) is consistent throughout the instructions.

- *Attachment to Petition for Change of Name* (form NC-110) is attached to all name change petitions, with information about the petitioner and about any minors or others whose names are to be changed. Only minor changes have been made, including changing "Father" and "Mother" to "Parent" in item 7e.

- *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125/NC-225) is a new OSC form, developed for proceedings for a name change request for conforming name to gender. It is similar to the *Order to Show Cause for Change of Name* (form NC-120)—which is not being revised—but without any notice of hearing. Instead, it orders that any objections be filed within a certain time frame and, as required by statute, it warns that if no timely objections showing good cause are filed, no hearing may be held. It also includes the statement from the statute that objections based on concern over gender identity do not constitute good cause.

- *Decree Changing Name* (form NC-130) and *Decree Changing Name of Minor (By Guardian)* (form NC-130G). Each have only a minor revision, removing the finding currently on the forms that each person whose name is being changed is not within the jurisdiction of the CDCR. (Currently in item 2b on form NC-130 and item 2(f) in form NC-130G.) That finding is no longer required, because even those under that department's jurisdiction may now change their names. The advisory committee concluded that there was no need to develop a separate decree form for name changes to conform to gender, as there are no additional findings required on such petitions, and the *Decree Changing Name* (form NC-130) may be used.

- *Notice of Hearing on Petition* (form NC-150) is a new, optional form that courts may use for providing notice of a hearing to petitioners and objectors, should a hearing be needed on a petition for change of name to conform to gender. (No hearing is set at the time of the filing of the petition; the court sets one only if timely objections are received.) This form will be available for courts to use if they do not send out their own notice of hearing via a computerized case management system or in some other fashion. It may also be used for setting hearings on petitions seeking recognition of gender change and issuance of new birth certificates, which, like petitions for change of name to conform to gender, do not have a hearing date set at the time the petition is filed.

[9] New Code of Civil Procedure, section 1277.5, does not require any service of these petitions, even for minors.

Forms for recognition of gender change

Health and Safety Code section 103430 et seq. provide a process for seeking court recognition of a change of gender and an order to amend the birth certificate to reflect that change (referred to hereafter as "gender change recognition"). In addition, Health and Safety Code section 103435 mandates that requests for gender change recognition may be made jointly with requests for name change, with a single petition for both requests. Therefore, there are currently two sets of forms for those seeking gender change recognition: one set for proceedings seeking that recognition alone (the group of forms beginning with form NC-300), and another set for those seeking a name change along with the gender change recognition (the group of forms beginning with NC-200).

Both sets of forms are being revised to reflect the new nonbinary gender option and the new procedures set out in the amended laws. In addition to revising those forms, a parallel set of forms (beginning with form NC-500) has been developed for minors seeking recognition of a change of gender, because the new provisions for petitions by minors (1) provide for different procedures, such as mandating that the court issue an OSC setting a hearing date if there are nonconsenting parents; and (2) present an issue of how the minor should appear in the pleadings.[10]

Forms for Gender Change Recognition Petitions by Adults

The NC-200 form series, now expressly for adult individuals seeking both name change and gender change recognition at the same time (combined petition), is revised as follows:

- *Petition for Change of Name, Recognition of Change of Gender, and Issuance of New Birth Certificate* (form NC-200). The title has been revised[11] to more correctly reflect the purpose of the petition as stated in the statute. Item 1 and the instructions have been revised to provide that the petition is for use by adults only. Item 3 has been revised to add nonbinary as an option for changed gender, and to eliminate the assumption of only two genders.[12] The item in the current form regarding an attached doctor's declaration has been removed, and instead there is now a declaration by the petitioner affirming the change in gender—and that it is not for fraudulent purposes—based on the text from Health and Safety Code section 103430(a).

  There is also a minor revision to item 2, to clarify that a request for a name change made as part of this petition is for the purpose of changing one's name to conform to one's gender identity. The instructions on these forms have always been based on this interpretation of the statute: that any name change request brought combined with a

[10] The new statute assumes that the minor will be the person bringing the petition. See new Health & Saf. Code, § 103435(e).

[11] The form is currently called "Petition for Change of Name and Gender."

[12] Currently this item provides choices of changing from "from male to female" or "from female to male"; the proposed form simply indicates a change to female, male, or nonbinary.

petition for gender change recognition is for the purpose of conforming the name to gender identity. However, a statement to that effect has now been expressly included as part of the petition.

In addition, the instructions on the back of the form have been revised to reflect the change in procedures.

- *Declaration of Physician—Attachment to Petition* (form NC-210/NC-310) will be revoked, as it is no longer necessary.

- *Order to Show Cause for Change of Name* (form NC-220), which sets a hearing date for petitions for name changes to conform to gender, will also be revoked, to be replaced with a new *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125/NC-225). The new form does not set a hearing date; it just sets a deadline for objections. Form NC-225 is identical to form NC-125, the OSC form to be used on a petition for name change to conform to gender identity, because Health and Safety Code section 103435 provides that the procedures for the name change request on the combined petition should be the same as for other name change petitions.[13]

- *Decree Changing Name and Order Recognizing Change of Gender and for Issuance of New Birth Certificate* (form NC-230). The title of the form has been revised to match the revised title of the petition. The first item has been revised to allow for issuance without a hearing. The finding currently in item 2b that a party is or is not under the jurisdiction of the Department of Corrections has been removed, and nonbinary has been added to the list of genders in item 4. Finally, new item 6 has been added to make this order parallel the current order on form NC-330: a direction that if the petitioner was born in California, the order should be filed with the Secretary of State within 30 days and the Secretary of State is to issue a new birth certificate.

The form series beginning at NC-300, for adults seeking only gender change recognition (with no name change order requested) is revised as follows:

- *Petition for Recognition of Change of Gender and for Issuance of New Birth Certificate* (form NC-300) has been revised parallel to the revisions to form NC-200: a minor change in title, addition of a statement that the petitioner is 18 years or older, addition of nonbinary to the list of genders, deletion of a reference to a doctor's declaration, and addition of the declaration containing statutory language for the petitioner to affirm changed gender under penalty of perjury.

[13] Two numbers are assigned to the form, NC-125 and NC-225, to make it easier for clerks and parties to know it can be issued on both types of petitions, a form NC-100 petition, or a form NC-200 petition. Note that for combined petitions, there has only ever been an OSC issued regarding the name change part of the petition, and not for the gender change portion, because the law expressly states that the OSC for the combined petitions shall not include the petition for change of gender. Health & Saf. Code, § 103435.

- *Declaration of Physician—Attachment to Petition* (form NC-210/NC-310) will be revoked, as it is no longer necessary.

- *Setting of Hearing on Petition for Change of Gender and Issuance of New Birth Certificate* (form NC-320) will be revoked because no hearing is to be set at the time of filing the petition. Courts will either issue their own notice of hearing if objections have been received and a hearing is to be set, or they may use the new *Notice of Hearing on Petition* (form NC-150) should they want to use a Judicial Council form for the notice.

- *Order Recognizing Change of Gender and for Issuance of New Birth Certificate* (form NC-330) has been revised to allow for the situation of no hearing prior to issuance (previously, a hearing was required) and to add the nonbinary gender to the list in item 3. As with form NC-230, a phrase has been added to the last item of the form, directing only those parties born in California to file the order with the Secretary of State's office to obtain a new birth certificate.

Forms for Gender Change Recognition Petitions by Minors

The advisory committee recommends a single set of forms (starting with form NC-500) for minors seeking gender change recognition: a new petition, OSC, and information sheet. The orders to be issued will be the same as those issued for adults, so no new order forms are required. The following form set is for proceedings in which a minor is seeking a gender change recognition order, either by itself or with an accompanying name change decree:

- *Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (Name Change)* (form NC-500). The instructions at the top of the form indicate which items on the form must be completed by all petitioners, and which additional items (including an additional form) are to be completed only by those who are seeking a name change along with the gender change recognition.

  Because the amended statute assumes that minors themselves may bring petitions seeking recognition of change of gender and issuance of birth certificates (see Health & Saf. Code, § 103430(e)),[14] item 1 calls for two (or more) individuals to be named as petitioners: the minor and one or more adults. The list of potential adults is taken from the statute, which is the same as the list of possible petitioners in the name change statute.

[14] Generally, minors cannot file an action on their own in civil proceedings. (See Code Civ. Proc., § 372(a), requiring filing by a guardian ad litem, and § 372(b), providing for certain exceptions, none of which covers these petitions.) It is unclear whether the new law will be amended, either to add a further exception in the Code of Civil Procedure to the general rule, and allow minors to file these petitions on their own, or to amend the new Health and Safety Code provision to state that it is directed to petitions brought on behalf of—rather than by—minors. Because the new provision does require an adult signature, the committee believes the proposed form, which requires that an adult be named as the petitioner along with the minor, will meet the current legal requirements.

Items 2 through 5 are applicable to all petitioners, as the items address the gender change recognition order. Item 5 requires either identifying all living parents who did not sign, or indicating that all living parents signed the petition, or that the minor has no living parents. This information will be needed by the court to determine whether an order to show cause (OSC)—which is directed only to living parents who did not sign the petition—should be issued on the petition for gender change recognition and a hearing date set.

As noted in the box at the top of the form, items 6 through 8 are applicable only if a name change is sought along with the gender change recognition. These are the same items that would be required for a standalone name change petition, along with the supplemental form that must be attached to each name change petition, *Name and Information About the Person Whose Name is to Be Changed* (form NC-110); and, if a guardian is a petitioner, *Supplemental Attachment to Petition for Change of Name (Declaration of Guardian)* (form NC-110G). The instruction box at the top of the form, item 7, and the new information sheet all note that form NC-110 and possibly form NC-110G must be completed and attached.

At the end of the form is the declaration regarding gender change required by statute, to be signed by the minor, as well as signature lines for the adult or adults joining in the petition.

- O*rder to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (and Change of Name)* (form NC-520). While the combined petition allowing the option of a name change request at the same time as a gender change request is fairly straightforward, the OSC form for a combined petition is a bit more complex. The statute regarding the OSC for the petition for gender change recognition requires that, if the minor has a living parent who did not sign the petition, the nonsigning parent must be served with an OSC with a hearing date, in the manner of service set out in the statute. (See Health & Saf. Code, § 103430(e)(1)(A); the instructions for service are included in form NC-500-INFO.) The OSC is to be set from 6 to 12 weeks in the future, and any objections must be made at least two days before the hearing date. The OSC also warns the nonsigning parent that if objections are not timely filed or if the objecting parent does not appear, the court may grant the petition without further hearing. (See Health & Saf. Code, § 103430(e)(1)(B) and (2).)

  First, an issue arises in that the statute actually states that service shall be "no less than 30 days after the petition was filed." That provision does not make sense, because it could result in no meaningful notice whatsoever. If the petition is served 90 days after the petition is filed (which is "no less than 30 days after the petition was filed"), it may well be served after the date of the OSC hearing. Because this appears to be a drafting error, this point has been included in suggestions for urgent clean-up legislation. In the meantime, the instructions for serving the OSC do not include a time frame for such

service. When the time frame for service in the statute is amended, as expected, the form will be revised to reflect that.

Second, while current law provides that a party may bring a single petition for both name change and gender change recognition, it expressly states that the OSC issued in such a joint proceeding "shall not include the petition for change of gender." (Health & Saf. Code, § 103435.) This statute was not amended as part of the recent amendments, even though the new law expressly calls for issuance of an OSC on certain petitions for gender change. The advisory committee has construed the new amendment as controlling on petitions for gender change by minors, as the law is the later of the two provisions and is more specific, expressly calling for OSCs to issue on certain petitions for gender change by minors. If the older statute should control—mandating no gender change OSCs on combined petitions—the newer one mandating OSCs on certain gender change petitions would be impossible to implement.

Finally, the time period for objections is different (1) for gender change recognition petitions by minors: up to 2 days before the hearing, which is to be set 6 to 12 weeks from the date of the OSC; and (2) for petitions by minors, or anyone, for a name change to conform to gender identity: within 6 weeks from the date of the OSC.[15] If the hearing on the gender change petition is set out farther than 6 weeks after the filing, as permitted by statute, the time for objections on the name change will have run before the time for objections on the gender change is up. Therefore, the OSC to be issued on the minor's petition has two separate orders in it: one directed to nonconsenting parents in regard to the gender change petitions (with a hearing date set), and one—with an optional checkbox in front of it, to be issued only if a name change has been requested[16]—directed to all interested persons in regard to the name change petition (with a deadline for filing objections but no hearing date set). The different time frames for objecting are highlighted in bold in both orders.

- *Instructions for Filing Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (and Change of Name)* (form NC-500-INFO*).* A new information sheet has been developed to assist parties in completing the petition for minors and, if necessary, having an OSC issued and served. It is directed to the petitioning minor, and sets out where the petition may be filed, who should complete or sign it, and how to complete it. The instructions tell petitioners seeking a name change to

[15] This time frame for the name change portion of the petition is because a name change being sought as part of a petition for gender change recognition is a name change to conform to gender identity, and so falls within Code of Civil Procedure, section 1277.5. As noted earlier, there are no separate provisions regarding minors on such petitions—no different OSC or service requirements than those for adults.

[16] If no OSC is required on the minor's gender change petition because there is no nonsigning parent living, and a name change is requested, a different OSC is to be used for the name change (form NC-125/NC-225, the OSC for a name change to conform to gender), which does not mention gender change and so will be in compliance section 103435.

complete items 6, 7, and 8, as well as an additional form or forms with information about the person whose name is to be changed. It also has instructions about the OSCs, when needed, and how to serve.

Policy implications

While the new legislation has numerous policy implications, such as eliminating hearings on certain name change proceedings and adult gender recognition change proceedings, allowing more prisoners and parolees to obtain name changes, removing the requirement of doctor certificates in gender change recognition proceedings, and establishing new procedures for minor gender change requests, those are not implications that the judicial branch has any purview over. The recommendations here are simply to implement the legislative changes.

Comments

This proposal was circulated for comments from December 15, 2017, through February 12, 2018. Eight comments were received: from the Orange County Bar Association; three courts (Orange, Riverside, and San Diego Counties); the Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee, through their joint rules subcommittee (Joint Rules Subcommittee); and three public interest groups (American Civil Liberties Union–California, TGI Justice, and the Transgender Law Center).

All comments are generally favorable, with each requesting minor modifications of the forms. The public interest commenters also made some general comments applicable to all the forms, and the Joint Rules Subcommittee and one court sought development of an additional form.

A chart with the full text of the comments and the committee's responses is attached beginning at page 38. The advisory committee accepted many of the suggestions made, modifying the forms to address the points made in the comments. The principle comments are discussed here.

Proposals to use different wording

Public interest commenters at the ACLU and TCI Justice both expressed similar concerns about certain language used throughout the forms relating to name changes. They acknowledged that the references to changes of name "to conform to gender" tracked the relevant language in the Code of Civil Procedure, but asserted that it "risks confusing the impacted community, as the term 'conform to gender' is sometimes colloquially used to indicate efforts to repress a transgender person's identity." (See ACLU comment.) Both commenters also note that many in the community filling out these forms do not identify as nonbinary, but rather as "gender nonconforming," meaning that their gender expression and/or identity do not conform to cultural assumptions and stereotypes associated with their sex assigned at birth. The commenters believe that for this reason also, the use of the phrase name change "to conform to gender" may cause confusion. Both public interest groups asked for global replacement of the phrase "to conform to gender" with another, such as "related to gender", "to match gender", or "because of gender transition".

The advisory committee considered these comments, and understands the concerns raised. New Code of Civil Procedure, section 1277.5 expressly provides for the different procedures (with no publication of the name change request and no hearing set as a matter of course) in proceedings "for a name change to conform the petitioner's name to the petitioner's gender identity." The language in the recommended forms tracks the statute very closely.[17] The committee believes that tracking the statute is the best way to avoid any confusion as to which petitions for name changes come within these special procedures, and which must follow the other procedures, requiring publication of the intended name change. In light of the comments, however, the language in all the forms have been further reviewed to make sure that the phrase used is "conform to gender identity" rather than the shortened "conform to gender" that had previously been used in some places. The committee believes any concerns as to the language used in the statute should be addressed to the Legislature.

Similarly, the committee considered but rejected the suggestion by these public interest groups relating to the instructions for item 2 in the minor's combined petition (form NC-500) regarding what gender the minor is seeking to be recognized by the courts, to replace the phrase "what gender you (the minor) have changed to" with "your gender" or "select your gender" as a "more clear, accurate, and respectful characterization." Again, while the committee appreciates the concern raised, it concluded that tracking the statute, which authorizes petitions for court orders "to recognize a *change* in the petitioner's gender" (Health & Saf. Code, § 103430(a)), is a better way to proceed. Moreover, the proposed instructions would actually be more confusing, as it would be unclear whether the minor is supposed to indicate the gender on the minor's birth certificate at the time of the petition, or the gender they want on the reissued birth certificate.

Most of the other suggestions to clarify or improve the text of the forms were suggested by the public interest groups have been adopted by the committee and are reflected in the recommended forms. For example, references to "both parents" on several forms were changed to "two parents." All the suggestions were reviewed, and committee responses to each are provided in the comment chart.

Other comments

- The Joint Rules Subcommittee and the Superior Court of Riverside County suggested that an item regarding attached materials was confusing. The committee agreed and has modified the item (see form NC-100, item 7).

[17] The proposed language in form NC-100 states, at item 6: "The petition seeks to change name of [petitioner or minor] to conform to that person's gender identity." The combined petition (for name change and recognition of gender change) for adults, form NC-200, states at item 2: "Petitioner requests that the court decree that petitioner's name is changed, in order to conform to petitioner's gender identity, to . . ." And similarly, in form NC-500, the combined petition for minors, item 6 states: "Petitioners request that the court decree that the petitioning minor's name is changed to conform to petitioner's gender identity to . . ."

- The Superior Court of San Diego County noted that the name change information sheet (form NC-100-INFO) was confusing because some of it was in second person ("you" should do this or that), and some in third person ("the petitioner" should do this or that). That form is now all in second person.

- Several commenters suggested more information be added to the new instruction for petitioners who are in jail or prison. (See NC-100-INFO at item 9.) The information available regarding the new service requirements has been provided.[18] An additional paragraph has been added in light of the comments, noting that the declaration on form NC-110 regarding whether a petition is in jail or prison is now only applicable to whether this service is required, and not for determining eligibility for a name change.

- Several commenters asked who would be responsible for serving the new *Notice of Hearing on Petition* (form NC-150), the notice to be sent out only if timely objections are received on a petition for name change to conform to gender identity or a petition for recognition of gender change. The Superior Court of San Diego County asked that, if the court is responsible, a clerk's certificate of mailing be added to the form. This form is indeed to be sent out by the court, as it is only after the court has received objections, and determined they were timely under the statute, that a hearing is to be set and noticed. Most courts will choose to use their own case management system for issuing a notice, but optional form NC-150 is being provided for those courts who choose to use it. The form has now been modified to include a clerk's certificate of mailing to make it clear that the form is to be sent out by the court.

- Some commenters noted that form NC-230, the order on combined name change and gender change petitions by adults, did not include the final item on form NC-330, which directs that the order for reissuance of a birth certificate should be served on the office of the State Registrar within 30 days; and that this office is to issue a new birth certificate reflecting the change in gender. That item has now been included on the order on the combined petition. (See form NC-230 at item 6 and form NC-330 at item 5.)

- TGI Justice suggested that the first item of form NC-330, the order for recognition of gender change and issuance of a new birth certificate, be amended to "add an opportunity for petitioner to say if they were born in California since birth certificates will not be reissued for people born out of state." The committee notes, however, that there is no requirement for one seeking an order recognizing change of gender to have been born in California. (See Health & Saf. Code, §§ 103425 and 103430.) The statute does provide that "if the judgment includes an order for a new birth certificate *and* if the petitioner was

[18] The California Department of Corrections and Rehabilitation is in the process of developing regulations regarding service of name change petitions on the department, but does not expect to have those regulations finalized before September. More detailed instructions and a reference to the regulations will be added to these forms the next time they are revised.

born in this state, the order shall be served on the State Registrar within 30 days." (Health & Saf. Code, § 103430(c) [emphasis added]). Therefore, the committee has added the phrase "if the petitioner was born in California" to the directive on the order forms described in the bullet above. The instruction forms have all also been modified to make it clear to petitioners early on that it is only California-born petitioners who will be able to get a new birth certificate from the registrar's office.

- The Joint Rules Subcommittee and the Superior Court of Riverside County suggested that a form be developed for making objections to the new *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125/NC-225). There are currently no forms for objecting to name change petitions, and the committee did not, and would not, consider developing such a form solely for the purpose of objecting to name changes to conform to gender identity. The committee will, as time and resources allow, consider the possibility of developing a form that could be used generally for raising objections to any petition for name changes, but that is outside the scope of this proposal.

Alternatives considered

As discussed above, the advisory committee considered all the alternatives raised by commenters.

In addition, the advisory committee considered not including the new form for *Notice of Hearing on Petition* (form NC-150), for hearings set following receipt of timely objections responsive to orders to show cause where no hearing had been set. Some on the committee questioned the necessity for such a form, because most courts would simply issue a hearing notice from their case management system. The committee concluded, however, that including it as an optional form was a better option, thus making it available for circumstances when a court preferred issuing a notice manually.

The advisory committee did not consider the possibility of not revising the forms, because the current forms are not in compliance with the new legislation.

Fiscal and Operational Impacts

The new law, as reflected in these recommended form revisions, will have an impact on court case management systems: new case categories and filing and minute codes may need to be created. Mechanisms will need to be developed to track the time frames for filing objections on the proceedings in which the statute no longer allows hearing dates to be set at time of filing, in order for the judicial officers to be able to determine whether to schedule matters for hearing. There will need to be training for clerks, judicial officers, and court legal services and self-help offices on the new statutory requirements and how these new forms reflect those changes. New training materials and internal procedures will need to be developed.

Because the current forms and the current procedures of the courts will not be in compliance with the new law once it goes into effect in September 2018, these operational impacts cannot be avoided.

Attachments and Links

1. Forms NC-100, NC-100-INFO, NC-110, NC-125/NC-225, NC-130, NC-130G, NC-150, NC-200, NC-210/NC-310, NC-220, NC-230, NC-300, NC-320, NC-330, NC-500, NC-500-INFO, and NC-520, at pages 17–38
2. Chart of comments, at pages 39–69
3. SB 179 at *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB179*
4. SB 310 at *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB310*

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*):	**DRAFT** **04/23/18** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(name of each petitioner):*	
PETITION FOR CHANGE OF NAME	CASE NUMBER:

Before you complete this petition, you should read the *Instructions for Filing a Petition for Change of Name* (form NC-100-INFO). You must answer all questions and check all boxes that apply to you on this petition. You must file this petition in the superior court of the county where the person whose name is to be changed resides.

1. Petitioner *(present name):* resides in this county.
2. Petitioner requests that the court decree the following name changes *(list every name that you are seeking to change):*

	Present name		Proposed name
a.		changed to	
b.		changed to	
c.		changed to	
d.		changed to	

☐ Continued *(if you are seeking to change additional names, you must prepare a list and attach it to this petition as Attachment 2.)*

3. Petitioner requests that the court issue an order directing all interested persons to appear or file objections to show cause why this petition for change of name of the persons identified in item 2 should not be granted.
4. The number of persons under 18 years of age whose names are to be changed is *(specify):*
5. If this petition requests the change of name of any person or persons under 18 years, this request is being made by
   a. ☐ two parents.
   b. ☐ one parent.
   c. ☐ near relative *(name and relationship):*
   d. ☐ guardian *(name):*
   e. ☐ other *(specify):*
6. ☐ This petition seeks to change name of *(check one)* ☐ petitioner ☐ (name): to conform to that person's gender identity.
7. For each person whose name is to be changed, petitioner provides the following information *(you must attach a completed copy of the attachment* Name and Information About the Person Whose Name Is to Be Changed (form NC-110) *for each person identified in item 2):*
   a. The number of attachments included in this petition is *(specify number):*
   b–f. *(These are the items on the attached page or pages of Form NC-110.)*

Form Adopted for Mandatory Use
Judicial Council of California
NC-100 [Rev. September 1, 2018]

Code of Civil Procedure, § 1275 et seq.
www.courts.ca.gov

INSTRUCTIONS FOR FILING A PETITION FOR CHANGE OF NAME

NC-100-INFO

1. **Where to File**

   The petition for change of name must be filed in the superior court of the county where the person whose name is to be changed is a resident.

2. **Whose Name May Be Changed**

   The petition may be used to change your own name and, under certain circumstances, the names of others (e.g., children under 18 years of age).

3. **Confidentiality of Certain Names**

   If you are a participant in the Secretary of State's address confidentiality program (Safe at Home), your current and proposed names may be kept confidential. (Code Civ. Proc., § 1277(b).) See *Information Sheet for Name Change Proceedings Under Address Confidentiality Program (Safe at Home)* (form NC-400-INFO) for additional instructions.

4. **What Forms Are Required**

   Prepare an original and two copies of each of the following documents:

   a. *Petition for Change of Name* (form NC-100)

   b. *Name and Information About the Person Whose Name Is to Be Changed (Attachment to Petition For Change of Name)* (form NC-110) (attach as many copies as necessary)

   c. *Order to Show Cause for Change of Name* (form NC-120) or, if applicable, *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125)

   d. *Decree Changing Name* (form NC-130 or, for guardians, form NC-130G)

   e. *Civil Case Cover Sheet* (form CM-010)

   In addition, a guardian must prepare and attach a *Declaration of Guardian (Supplemental Attachment to Petition)* (form NC-110G) for each child whose name is to be changed.

5. **Filing and Filing Fee**

   Prepare an original *Civil Case Cover Sheet* (form CM-010). File the original petition and *Civil Case Cover Sheet* with the clerk of the court and obtain two filed-endorsed copies of the petition. A filing fee will be charged unless you qualify for a fee waiver. (If you want to apply for a fee waiver, see *Request to Waive Court Fees* (form FW-001) and *Information Sheet on Waiver of Court Fees and Costs* (form FW-001-INFO).

6. **Requesting a Court Hearing Date and Obtaining the Order to Show Cause**

   You should request a date for the hearing on the *Order to Show Cause for Change of Name* (form NC-120) at least six weeks in the future. Take the completed form to the clerk's office. The clerk will provide the hearing date and location, obtain the judicial officer's signature, file the original, and give you a copy.

   If you are changing your name to conform to gender identity, you need not request a hearing date. Instead, complete the *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125) and take the completed form to the clerk's office. The clerk will obtain the judicial officer's signature, file the original, and give you a copy.

7. **Publishing the Order to Show Cause**

   In most cases, a copy of the *Order to Show Cause* must be published in a local newspaper of general circulation once a week for **at least four consecutive weeks** before the date of the hearing. You must select the newspaper from among those newspapers legally qualified to publish orders and notices. The newspaper used must file a Proof of Publication with the superior court before the hearing. If no newspaper of general circulation is published in the county, the court may order the *Order to Show Cause* to be posted by the clerk. But you **do not have to publish** the order if you are seeking to change a name to conform to your gender identity or are a participant in (1) the State Witness Program, or (2) the address confidentiality program, and the petition alleges that you are (a) petitioning to avoid domestic violence, or (b) petitioning to avoid stalking, or (c) a victim of sexual assault or petitioning on behalf of one.

8. **Name Change for Children**

   a. If you are a petitioning parent requesting the name change for a child under 18 years of age, and one of the parents, if living, does not join in consenting to the name change, the petitioning parent must have a copy of the *Order to Show* Cause or notice of the time and place of the hearing served on the nonconsenting parent. Service must be made **at least 30 days prior to the hearing** under Code of Civil Procedure sections 413.10, 414.10, 415.10, or 415.40.

   b. If the nonconsenting parent resides in California, the order or notice must be personally served on the nonconsenting parent. You cannot personally serve this document.

   c. If the nonconsenting parent resides outside California, that parent may be served by sending a copy of the order or notice by first-class mail, postage prepaid, return receipt requested.

   d. If you are the guardian of a minor and filing a petition to change the name of that child, you must (1) provide notice of the hearing to any living parent of the child by personal service at least 30 days before the hearing, or (2) if either or both parents are deceased or cannot be located, serve notice of the hearing on the child's grandparents, if living, not less than 30 days before the hearing under Code of Civil Procedure sections 413.10, 414.10, 415.10, or 415.40.

   If you have served a parent or grandparents, file a copy of the completed *Proof of Service of Order to Show Cause* (form NC-121) with the court before the hearing.

   If the minor's name is being changed to conform to gender, these notices and orders need not be completed or served.

9. **Name Change for Person in Jail or Prison or on Parole**

   If you are a person in county jail, or under the jurisdiction of the Department of Corrections and Rehabilitation (in state prison, or on parole) you may file a petition to change your name, but must serve the petition on a government agency.

   - If in county jail, you must provide a copy of the petition to the county sheriff's department. Check with the department as to how that should be done.
   - If in state prison, you must provide a copy of the petition to the warden. Check with the warden's office as to how that should be done.
   - If on parole, you must provide a copy of the petition to the regional parole administrator. Check with the administrator's office as to how that should be done.

   After you have provided a copy to the sheriff, warden, or regional parole administrator, file a copy of the completed *Proof of Service By Mail* (form POS-030) with the court.

   Note that the declaration on form NC-110 as to whether the petitioner is in jail or under jurisdiction of the California Department of Corrections and Rehabilitation is only for purposes of determining if service of the petition is required.

10. **Court Hearing**

    If no written objection is filed at least two court days before the scheduled hearing, the court may grant the petition and sign the decree without a hearing. Check with the court to find out if a hearing will be held. If there is a hearing, bring copies of all documents to the hearing. If the judge grants the petition, the judge will sign the original decree.

    If you filed a petition for name change to conform to gender identity, and timely objections were filed, the court may set a hearing date after receiving the objections. If it does, you will be sent a notice of the hearing date. Check with the court after the deadline for filing objections to see if a hearing date has been set. If there are no objections, the court will grant the petition and sign the decree without a hearing.

11. If you were born in California and want to amend a birth certificate to show the name change, you should contact the following office:

    California Department of Public Health
    Vital Records - MS 5103
    P.O. Box 997410
    Sacramento, CA 95899-7410

    Phone: 916-445-2684
    website: *www.cdph.ca.gov*

Local courts may supplement these instructions. Check with the court to determine whether supplemental information is available. For instance, the court may provide you with additional written information identifying the department that handles name change petitions, the times when petitions are heard, and the newspapers that may be used to publish the *Order to Show Cause.*

NC-110

PETITION OF *(Name of petitioner or petitioners):* FOR CHANGE OF NAME	CASE NUMBER:

NAME AND INFORMATION ABOUT THE PERSON WHOSE NAME IS TO BE CHANGED

Attachment of

Attachment to *Petition* (form NC-100, form NC-200, or form NC-500)

*(You must use a **separate** attachment for **each person** whose name is to be changed. If petitioner is a guardian of a minor, a supplemental attachment,* Declaration of Guardian *(form NC-110G), must also be completed and attached for each minor whose name is to be changed.)*

7. *(Continued)* Petitioner applies for a decree to change the name of the following person:
   b. ☐ Self ☐ Other
      (1) Present name *(specify):*
      (2) Proposed name *(specify):*
      (3) Born on *(date of birth):*
      and presently ☐ under 18 years of age ☐ over 18 years of age
      (4) Born at *(place of birth):*
      (5) Sex *(as stated on original birth certificate):* ☐ Male ☐ Female
      (6) Current residence address *(street, city, county, and zip code):*

   c. Reason for name change *(explain):*

   d. Relationship of the petitioner to the person whose name will be changed:
      (1) ☐ self (4) ☐ near relative *(indicate relationship):*
      (2) ☐ parent (5) ☐ Other (specify):
      (3) ☐ guardian

   e. If the person whose name will be changed is under 18 years of age, provide the names and addresses, if known, of the following persons:
      (1) Parent *(name):* *(address):*
      (2) Parent *(name):* *(address):*
      (3) *(Only if neither parent is living)* Near relatives *(names, relationships, and addresses):*

   f. If the person whose name will be changed is 18 years of age or older, that person must sign the following declaration:

DECLARATION

I declare under penalty of perjury under the laws of the State of California that *(check one)* ☐ I am not ☐ I am under the jurisdiction of the California Department of Corrections and Rehabilitation (in state prison or on parole) or in county jail **and** *(check one)* ☐ I am not ☐ I am required to register as a sex offender under Penal Code section 290.

Date:

(TYPE OR PRINT NAME OF PERSON WHOSE NAME IS TO BE CHANGED) ▶ (SIGNATURE OF PERSON WHOSE NAME IS TO BE CHANGED)

(If petitioner is represented by an attorney, the attorney's signature follows):

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF ATTORNEY)

(Each petitioner must sign this petition in the space provided below or, if additional pages are attached, at the end of the last attachment.) I declare under penalty of perjury under the laws of the State of California that the information in the foregoing petition is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PETITIONER)

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF PETITIONER)

☐ ADD ADDITIONAL SIGNATURE LINES FOR ADDITIONAL PETITIONERS ☐ SIGNATURE OF PETITIONERS FOLLOWS LAST ATTACHMENT

Form Adopted for Mandatory Use
Judicial Council of California
NC-110 [Rev. September 1, 2018]

ATTACHMENT TO PETITION FOR CHANGE OF NAME

Code of Civil Procedure, § 1275 et seq.
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. : E-MAIL ADDRESS: ATTORNEY FOR (*Name*):	**DRAFT** **04/23/18** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(Name of each petitioner):* FOR CHANGE OF NAME	
ORDER TO SHOW CAUSE FOR CHANGE OF NAME TO CONFORM TO GENDER IDENTITY	CASE NUMBER:

TO ALL INTERESTED PERSONS:

1. Petitioner *(name):* filed a petition with this court for a decree changing name as follows:

	Present name		Proposed name
a.		to	
b.		to	
c.		to	
d.		to	

2. THE COURT ORDERS that any person objecting to the name changes described above must file a written objection that includes the reasons for the objection within six weeks of the date this order is issued. If no written objection is timely filed, the court will grant the petition without a hearing.

3. A hearing date may be set only if an objection is timely filed and shows good cause for opposing the name change. Objections based solely on concerns over the petitioner's actual gender identity shall not constitute good cause. (See Code Civ. Proc., § 1277.5(b).)

Date:

JUDGE OF THE SUPERIOR COURT

Form Adopted for Mandatory Use
Judicial Council of California
NC-125/NC-225 [New September 1, 2018]

Code of Civil Procedure, § 1277.5
www.courts.ca.gov

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*):	**DRAFT** **04/23/18** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(name of each petitioner):* FOR CHANGE OF NAME	
DECREE CHANGING NAME	CASE NUMBER:

1. The petition was duly considered:
   a. ☐ at the hearing on *(date)*: in Courtroom: of the above-entitled court.
   b. ☐ without hearing.

THE COURT FINDS

2. a. All notices required by law have been given.
   b. Each person whose name is to be changed identified in item 3 below
   ☐ is not ☐ is required to register as a sex offender under section 290 of the Penal Code.
   This determination was made *(check one)*: ☐ by using CLETS/CJIS ☐ based on information provided to the clerk of the court by a local law enforcement agency.

   c. ☐ No objections to the proposed change of name were made.
   d. ☐ Objections to the proposed change of name were made by *(name)*:
   e. It appears to the satisfaction of the court that all the allegations in the petition are true and sufficient and that the petition should be granted.
   f. ☐ Other findings *(if any)*:

THE COURT ORDERS

3. The name of

	Present name		New name
a.		is changed to	
b.		is changed to	
c.		is changed to	
d.		is changed to	

☐ Additional name changes are listed on Attachment 3.

Date:

JUDGE OF THE SUPERIOR COURT

☐ SIGNATURE OF JUDGE FOLLOWS LAST ATTACHMENT

Form Adopted for Mandatory Use
Judicial Council of California
NC-130 [Rev. September 1, 2018]

Code of Civil Procedure, §§ 1278, 1279
www.courts.ca.gov

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*):	**DRAFT** **04-23-18** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(name of each petitioner):* FOR CHANGE OF NAME	
DECREE CHANGING NAME OF MINOR (BY GUARDIAN)	CASE NUMBER:

1. The petition was duly considered:
   a. ☐ at the hearing on *(date):* in Courtroom: of the above-entitled court.
   b. ☐ without hearing.

THE COURT FINDS

2. a. All notices required by law have been given.
   b. The person whose name is to be changed *(specify present name)*: is a minor.
   c. The petition for change of name was filed on behalf of the minor by the minor's guardian *(name):*
   d. The minor whose name is to be changed is likely to remain in the guardian's care until the age of majority.
   e. The minor whose name is to be changed is not likely to be returned to the custody of his or her parents.
   f. The minor whose name is to be changed
      ☐ is not ☐ is required to register as a sex offender under section 290 of the Penal Code.
      This determination was made *(check one):* ☐ by using CLETS/CJIS ☐ based on information provided to the clerk of the court by a local law enforcement agency.
   g. ☐ No objections to the proposed change of name were made.
   h. ☐ Objections to the proposed change of name were made by *(name):*
   i. It appears to the satisfaction of the court that all the allegations in the petition are true and sufficient, that the proposed name change is in the best interest of the minor, and that the petition should be granted.
   j. ☐ Other findings *(if any):*

THE COURT ORDERS

3. The name of *(present name):* is changed to *(new name):*

Date: _____

_____
JUDGE OF THE SUPERIOR COURT

☐ SIGNATURE OF JUDGE FOLLOWS LAST ATTACHMENT

Form Adopted for Mandatory Use
Judicial Council of California
NC-130G [Rev. September 1, 2018]

Code of Civil Procedure, §§ 1278, 1279
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **04/23/18** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(name):*	
NOTICE OF HEARING ON PETITION	CASE NUMBER:

Objections having been filed to petitioner's request for:

- ☐ a decree changing name to conform to gender.
- ☐ an order for the issuance of a new birth certificate reflecting the change of petitioner's gender.
- ☐ both of the above.

A hearing will take place at the time and place below, at which time the court may consider the objections that have been filed.

(To be completed by clerk.)

a. Date:	Time:	Dept.:	Room:

b. The address of the court is
- ☐ same as noted above
- ☐ other

(specify):

Date: Clerk, by _____, Deputy

Form Approved for Optional Use
Judicial Council of California
NC-150 [New September 1, 2018]

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. : E-MAIL ADDRESS: ATTORNEY FOR (*Name*):	**DRAFT** **04/23/18** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(Name):*	
PETITION FOR CHANGE OF NAME, RECOGNITION OF CHANGE OF GENDER, AND ISSUANCE OF NEW BIRTH CERTIFICATE	CASE NUMBER:

Before you complete this petition, you should read the *Instructions for Filing* on the next page. You must answer all questions and check all boxes that apply to you on this petition. You must file this petition in the superior court of the county where the person whose name is to be changed resides.

1. Petitioner *(present name):* is 18 years old or older
   and a resident of this county.
2. Petitioner requests that the court decree that petitioner's name is changed, in order to conform to petitioner's gender identity, to *(proposed name):*
3. Petitioner requests a decree recognizing that the petitioner's gender is changed to:
   a. ☐ female.
   b. ☐ male.
   c. ☐ nonbinary.
4. Petitioner requests that the court order that a new birth certificate be issued reflecting the gender and name changes sought by this petition.
5. Petitioner requests that the court issue an order directing any interested persons to file written objections to show cause why the petition for change of name should not be granted.
6. Petitioner provides the following information in support of this petition:
   a. The declaration below.
   b–f. The information contained in the attachment *(attach a completed copy of the attachment* Name and Information About the Person Whose Name Is to Be Changed *(form NC-110)).*

DECLARATION

I *(present name):* declare under penalty of perjury under the laws of the state of California that the request for a change in gender to *(check one)* ☐ female ☐ male ☐ nonbinary is to conform my legal gender to my gender identity and is not for any fraudulent purpose.

Date:

(TYPE OR PRINT NAME OF PETITIONER) (SIGNATURE OF PETITIONER)

(Instructions on next page)

Form Adopted for Mandatory Use
Judicial Council of California
NC-200 [Rev. September 1, 2018]

Code of Civil Procedure, § 1275 et seq.;
Health and Safety Code, §§ 103430, 103435
www.courts.ca.gov

INSTRUCTIONS FOR FILING A PETITION FOR CHANGE OF NAME AND GENDER

1. **Where to File**
   The petition for change of name and gender must be filed in the superior court in the county where the petitioner is a resident.

2. **Whose Name May Be Changed**
   The petition may be used to change your name and to obtain a court order recognizing a change of gender and for issuance of a new birth certificate, if you are 18 or older. (Minors must use form NC-500.) If you were born in California, you may file the order with the State Registrar and obtain a new birth certificate.

3. **What Forms Are Required**
   You need an original and two copies of each of the following documents:
   a. *Petition for Change of Name, Recognition of Change of Gender, and Issuance of New Birth Certificate* (form NC-200)
   b. *Name and Information About the Person Whose Name Is to Be Changed (Attachment to Petition)* (form NC-110)
   c. *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125/NC-225)
   d. *Decree Changing Name and Order Recognizing Change of Gender Identity and for Issuance of New Birth Certificate* (form NC-230)
   e. *Civil Case Cover Sheet* (form MC-010)

4. **Filing and Filing Fee**
   Prepare an original *Civil Case Cover Sheet* (form CM-010). File the original petition and *Civil Case Cover Sheet* with the clerk of the court and obtain two filed-endorsed copies of the petition. A filing fee will be charged unless you qualify for a fee waiver. (If you want to apply for a fee waiver, see *Request to Waive Court Fees* (form FW-001) and *Information Sheet on Waiver of Superior Court Fees and Costs* (form FW-001–INFO).)

5. **Filing the Order to Show Cause**
   Ask the court clerk to obtain a judge's signature on the *Order to Show Cause,* then file the original order in the clerk's office and obtain filed-endorsed copies of the order.

6. **Domestic Violence Confidentiality Program**
   In cases where the petitioner is a participant in the state address confidentiality program (Safe at Home), the petition, the order to show cause, and the decree should, instead of giving the proposed name, indicate that the name is confidential and on file with the Secretary of State. See *Information Sheet for Name Change Proceedings Under Address Confidentiality Program* (Safe at Home) (form NC-400-INFO).

7. **Court Hearing**
   If no objections are filed, the court will grant the petition without a hearing. A hearing date will be set if timely objections have been filed. If there is a hearing, you will be sent a notice by the court. You may also check with the court after the deadline to see if a hearing date has been set. Bring copies of all documents to the hearing. If the judge grants the name and gender change petition, the judge will sign the original decree.

8. **Birth Certificate**
   If you were born in California, to obtain a new birth certificate reflecting the change of gender, file a certified copy of the order within 30 days with the Secretary of State and the State Registrar and pay the applicable fees. You may write or contact the State Registrar at:

California Department of Public Health
Vital Records – MS 5103
P.O. Box 997410
Sacramento, CA 95899-7410

Phone: 916-445-2684
Website: *www.cdph.ca.gov*

Local courts may supplement these instructions. Check with the court to determine whether supplemental information is available. For instance, the court may provide you with additional written information identifying the department that handles name and gender change petitions, and the times when petitions are heard.

PETITION OF *(Name):*	CASE NUMBER:

DECLARATION OF PHYSICIAN DOCUMENTING CHANGE OF GENDER THROUGH CLINICALLY APPROPRIATE TREATMENT UNDER HEALTH AND SAFETY CODE SECTIONS 103425 AND 103430

Attachment to *Petition for Change of Name and Gender* (form NC-200) or *Petition for Change of Gender and Issuance of New Birth Certificate* (form NC-300)

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

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME OF PHYSICIAN) (SIGNATURE OF PHYSICIAN)

Form Approved for Optional Use
Judicial Council of California NC-210/
NC-310 [Rev. January 1, 2012]

DECLARATION OF PHYSICIAN—ATTACHMENT TO PETITION
(Change of Name and Gender/Change of Gender)

Health and Safety Code, §§ 103425, 103430, 103435, 103440 www.courts.ca.gov

PETITIONER OR ATTORNEY *(Name, State Bar number, and address):* STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. : E-MAIL ADDRESS: ATTORNEY FOR (*Name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(Name of petitioner):* FOR CHANGE OF NAME AND GENDER	
ORDER TO SHOW CAUSE FOR CHANGE OF NAME	CASE NUMBER:

TO ALL INTERESTED PERSONS:

1. Petitioner *(present name):* has filed a petition with this court for a decree changing petitioner's name to *(proposed name):*

2. THE COURT ORDERS that all persons interested in this matter shall appear before this court at the hearing indicated below to show cause, if any, why the petition should not be granted.

NOTICE OF HEARING

a. Date: Time: ☐ Dept.: ☐ Room:

b. The address of the court is ☐ same as noted above ☐ other *(specify):*

3. ☐ Other *(specify):*

Date:

JUDGE OF THE SUPERIOR COURT

Form Adopted for Mandatory Use
Judicial Council of California
NC-220 [Rev. July 1, 2014]

Code of Civil Procedure, § 1275 et seq.,t
Health and Safety Code, §§ 103430, 103435
www.courts.ca.gov

PETITIONER OR ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **04/04/18** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(Name of petitioner):* FOR CHANGE OF NAME AND GENDER	
DECREE CHANGING NAME AND ORDER RECOGNIZING CHANGE OF GENDER AND FOR ISSUANCE OF NEW BIRTH CERTIFICATE	CASE NUMBER:

1. The petition was duly considered:
   a. ☐ at the hearing on *(date)*: in Courtroom: of the above-entitled court.
   b. ☐ without hearing.

THE COURT FINDS

2. a. All notices required by law have been given.
   b. Each person whose name is to be changed identified in item 3 below
      ☐ is not ☐ is required to register as a sex offender under section 290 of the Penal Code.
      This determination was made ☐ by using CLETS/CJIS ☐ based on information provided to the clerk of the court by a local law enforcement agency.
   c. ☐ No objections to the proposed change of name were made.
   d. ☐ Objections to the proposed change of name were made by *(name)*:
   e. It appears to the satisfaction of the court that all the allegations in the petition are true and sufficient and that the petition should be granted.
   f. ☐ Other findings *(if any):*

THE COURT ORDERS

3. The name of *(present name):*
   is changed to *(new name):*

THE COURT FURTHER ORDERS

4. The gender of *(new name):*
   is changed to:
   a. ☐ female.
   b. ☐ male.
   c. ☐ nonbinary.

THE COURT FURTHER ORDERS

5. A new birth certificate shall be issued reflecting the changes in name and gender.
6. If petitioner was born in California, a certified copy of this order shall be filed by petitioner within 30 days with the State Registrar. When the State Registrar receives a certified copy of this order and payment of the applicable fees, the State Registrar shall establish for the petitioner a new birth certificate reflecting the new name and the gender of the petitioner as it has been altered.

Date:

JUDGE OF THE SUPERIOR COURT

☐ SIGNATURE OF JUDGE FOLLOWS LAST ATTACHMENT

Form Adopted for Mandatory Use
Judicial Council of California
NC-230 [Rev. September 1, 2018]

Code of Civil Procedure, §§ 1278, 1279;
Health & Safety Code, §§ 103430, 103435

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*):	**DRAFT** **04/23/18** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(name):*	
PETITION FOR RECOGNITION OF CHANGE OF GENDER AND FOR ISSUANCE OF NEW BIRTH CERTIFICATE	CASE NUMBER:

Before you complete this petition, you should read the instructions on the next page. Note: if you were born in California, you do not need to file this petition or to obtain a court order in order for the State Registrar to issue a new birth certificate reflecting a change of gender. See Health and Safety Code section 103426.

1. Petitioner *(present name):* is 18 years old or older and requests an order recognizing the change of petitioner's gender to
   a. ☐ female.
   b. ☐ male.
   c. ☐ nonbinary.

2. ☐ Petitioner requests an order for the issuance of a new birth certificate reflecting the change of petitioner's gender.

3. Petitioner ☐ has ☐ has not already obtained a decree of change of name. *(If petitioner has obtained a decree of change of name, attach a certified copy of the decree to this petition.)*

4. I declare under penalty of perjury under the laws of the state of California that the request for a change in gender to *(check one)* ☐ female ☐ male ☐ nonbinary is to conform my legal gender to my gender identity and is not for any fraudulent purpose.

Date:

(TYPE OR PRINT NAME OF PETITIONER)

(SIGNATURE OF PETITIONER)

Form Approved for Optional Use
Judicial Council of California
NC-300 [Rev. September 1, 2108]

Health and Safety Code, §§ 103425, 103430, 103435, 103440
www.courts.ca.gov

INSTRUCTIONS FOR FILING PETITION FOR RECOGNITION OF CHANGE OF GENDER AND FOR ISSUANCE OF NEW BIRTH CERTIFICATE

(This instruction page is for the information of petitioner seeking a court order. It is not part of the petition and does not need to be filed.)

1. Where to File

The petition for a court order recognizing a change of gender and for the issuance of a new birth certificate reflecting that change may be filed in the superior court of any county in California. **Note that if you were born in California you do not need to file this petition or obtain a court order in order for the State Registrar to issue a new birth certificate reflecting a change of gender.** See Health and Safety Code section 103426. You may make the request directly to the State Registrar at the California Department of Public Health. (See contact information below.)

2. Who May File

This petition form may only be used by individuals 18 years old or older. (Minors must use form NC-500.) If you were born in California, you may file the order you receive with the State Registrar and obtain a new birth certificate.

3. What Forms Are Required

You will need an original and a copy of each of the following documents:

a. *Petition for Recognition of Change of Gender and for Issuance of New Birth Certificate* (form NC-300)

b. *Order Recognizing Change of Gender and for Issuance of New Birth Certificate* (form NC-330)

c. *Civil Case Cover Sheet* (form CM-010)

In addition, if you have already obtained a decree of change of name, attach a certified copy of the decree to the petition.

4. Filing

Prepare an original *Civil Case Cover Sheet* (form CM-010). Complete the original petition and file that form and the *Civil Case Cover Sheet* with the clerk of the court and obtain a filed-endorsed copy of the petition. A filing fee will be charged unless you qualify for a fee waiver. (If you want to apply for a fee waiver, see *Request to Waive Court Fees* (form FW-001) and *Information Sheet on Waiver of Superior Court Fees and Costs* (form FW-001–INFO).)

5. Court Hearing

A hearing date will only be set if timely objections have been filed. If there is a hearing, you will be sent a notice by the court. Bring copies of all documents to the hearing. If the judge grants the petition, the judge will sign the original order and decree. Bring copies of all documents to the hearing. If the judge grants the petition, the judge will sign the *Order Recognizing Change of Gender and for Issuance of New Birth Certificate* (form NC-330).

If there are no timely objections filed, the court will grant the petition and sign the order without a hearing.

6. New Birth Certificate

If you were born in California, to obtain a new birth certificate reflecting the change of gender, file a certified copy of the order within 30 days with the State Registrar and pay the applicable fees. You may write or contact the State Registrar at:

California Department of Public Health
Vital Records – MS 5103
P.O. Box 997410
Sacramento, CA 95899-7410

Phone: 916-445-2684
Website: *www.cdph.ca.gov*

Local courts may supplement these instructions. Check with the court to determine whether supplemental information is available. For instance, the court may provide you with additional written information identifying the department that handles these petitions and the times when petitions are heard.

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	FOR COURT USE ONLY
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
PETITION OF *(Name):*		
SETTING OF HEARING ON PETITION FOR CHANGE OF GENDER AND ISSUANCE OF NEW BIRTH CERTIFICATE		CASE NUMBER:

Petitioner having filed a petition requesting an order for the issuance of a new birth certificate reflecting the change of petitioner's gender, a hearing will take place at the time and place below, at which time the court may examine the petitioner and any other person having knowledge of facts relevant to this petition.

(To be completed by clerk)

a. Date:	Time:	Dept.:	Room:

b. The address of the court is
- ☐ same as noted above
- ☐ other

(specify):

Date: Clerk, by _____, Deputy

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **04/23/18** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(name):*	
ORDER RECOGNIZING CHANGE OF GENDER AND FOR ISSUANCE OF NEW BIRTH CERTIFICATE	CASE NUMBER:

1. The petition was duly considered:
   a. ☐ at the hearing on *(date)*: in Courtroom: of the above-entitled court.
   b. ☐ without hearing.

THE COURT FINDS

2. a. It appears to the satisfaction of the court that all the allegations in the petition are true and sufficient and that the petition should be granted.

   b. ☐ Other findings *(if any):*

THE COURT ORDERS

3. The gender of the petitioner has been changed to:
   a. ☐ female.
   b. ☐ male.
   c. ☐ nonbinary.

THE COURT FURTHER ORDERS

4. ☐ A new birth certificate reflecting the change of gender described in item 3 shall be issued.
5. If petitioner was born in California, a certified copy of this order shall be filed by the petitioner within 30 days with the State Registrar. When the State Registrar receives a certified copy of this order and payment of the applicable fees, the State Registrar shall establish for the petitioner a new birth certificate reflecting the gender of the petitioner as it has been altered.

Date:

JUDICIAL OFFICER

Form Approved for Optional Use
Judicial Council of California
NC-330 [Rev. September 1, 2018]

Health and Safety Code, §§ 103425, 103430, 103435, 103440
www.courts.ca.gov

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*):	**DRAFT** **04-23-18** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(name of each petitioner):*	
PETITION FOR RECOGNITION OF MINOR'S CHANGE OF GENDER AND ISSUANCE OF NEW BIRTH CERTIFICATE ☐ **and CHANGE OF NAME**	CASE NUMBER:

Use this form only for a petition relating to a minor. (Petitioners 18 years or older must use form NC-200 or NC-300.) Before you complete this petition, read the *Instructions for Filing* (form NC-500-INFO). Everyone must complete items 1 through 5 and the affidavit on the back. If you are seeking a name change in addition to recognition of gender change, you must also complete items 6, 7, and 8, and form NC-110 or NC-110G.

1. This request is being made by *(minor's present name):* and *(check one of the following)*
   a. ☐ two parents *(names):*
   b. ☐ one parent *(name):*
   c. ☐ near relative *(name and relationship):*
   d. ☐ guardian *(name):*
   e. ☐ other *(specify):*

2. Petitioning minor requests a decree recognizing that petitioning minor's gender is changed to:
   a. ☐ female.
   b. ☐ male.
   c. ☐ nonbinary.

3. Petitioners request the court to order that a new birth certificate be issued reflecting the gender change sought by this petition.

4. Petitioners request that the court issue an order directing any living parent who did not sign this petition to file written objections and appear to show cause why the petition for change of name should not be granted.

5. Living parents of petitioning minor who did not sign this petition are (*specify names and addresses, or check a box below*):

   ☐ Petitioner has no living parent. ☐ Petitioner has no living parent other than the parent or parents who signed this petition.

6. ☐ Petitioners request that the court decree that the petitioning minor's name is changed to conform to petitioner's gender identity to *(proposed name):*

   (If petitioner has already obtained a decree of change of name, attach a certified copy of the decree to this petition. If no name change is requested, skip items 6, 7, and 8, and go to Affidavit.)

7. Petitioners provide the following information in support of this petition:
   a. The affidavit on page 2 of this form.
   ☐ b–f. The information contained in the attachment. *(If seeking a name change, you must attach a completed copy of the attachment* Name and Information About the Person Whose Name Is to Be Changed *(form NC-110). If adult petitioner is a guardian, also attach form NC-110G.)*

(Continued on next page)

PETITION OF *(name of each petitioner):*	CASE NUMBER:

8. ☐ Petitioning minor is a resident of this county. *(This must be checked if a name change is requested.)*

DECLARATION

I *(minor's present name):* declare under penalty of perjury under the laws of the state of California that the request for a change in gender to *(check one):* ☐ female ☐ male ☐ nonbinary is to conform my legal gender to my gender identity and is not for any fraudulent purpose.

Date:

(TYPE OR PRINT NAME OF PETITIONING MINOR)

▶ (SIGNATURE OF PETITIONING MINOR)

Date:

(TYPE OR PRINT NAME OF PETITIONING PARENT/GUARDIAN)

▶ (SIGNATURE OF PETITIONING PARENT/GUARDIAN)

Date:

(TYPE OR PRINT NAME OF PETITIONING PARENT/GUARDIAN)

▶ (SIGNATURE OF PETITIONING PARENT/GUARDIAN)

Date:

(TYPE OR PRINT NAME OF PETITIONING PARENT/GUARDIAN)

▶ (SIGNATURE OF PETITIONING PARENT/GUARDIAN)

Date:

(TYPE OR PRINT NAME OF PETITIONING PARENT/GUARDIAN)

▶ (SIGNATURE OF PETITIONING PARENT/GUARDIAN)

INSTRUCTIONS FOR FILING PETITION FOR RECOGNITION OF MINOR'S CHANGE OF GENDER AND ISSUANCE OF NEW BIRTH CERTIFICATE (AND CHANGE OF NAME)

1. **Where to File**
   You may file a petition for a court order for recognition of a change of gender and issuance of a new birth certificate reflecting that change in the superior court of any county in California. (If you were born in California, you may file the order with the State Registrar and obtain a new birth certificate.) If your petition **includes a request to change your name**, you must file in the superior court of the county where you (the minor whose name is to be changed) presently reside.

2. **What Forms Are Required**
   You need an original and two copies of each of the following forms:
   a. *Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate* (form NC-500)
   b. *Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate* (form NC-520) (see item 5 below).
   c. *Order Recognizing Change of Gender and for Issuance of New Birth Certificate* (form NC-330)
   d. *Civil Case Cover Sheet* (form CM-010)

   If you are also seeking a name change, you also need an original and two copies of the forms listed at e, f, and possibly g below.
   e. *Name and Information About the Person Whose Name Is to Be Changed (Attachment to Petition for Change of Name)* (form NC-110 and, if a guardian is signing the petition, form NC-110G).
   f. *Order to Show Cause for Change of Name to Conform to Gender Identity* (form NC-125/NC-225) (see item 5 below).
   g. *Decree Changing Name and Order Recognizing Change of Gender and for Issuance of New Birth Certificate* (form NC-230)

3. **Completing the Petition**
   Use form NC-500 only if you are under 18. (Adults seeking an order recognizing change of gender must use form NC-200 or NC-300.)
   - Fill out the top left side of the form with your name, address, phone, and e-mail address (or your attorney's, if you have one) and the name and address of the court in which you are filing the form.
   - In item 1, put your name (the name of the minor asking for the court order) and the name and relationship of the adult who is also signing the petition. One or both of your parents or your guardian should sign. If neither parent is alive, and you do not have a guardian, a near relative or friend can sign. Check one of the boxes to show whether the person signing is a parent, guardian, near relative, or other (and describe what the "other" relationship is).
   - Item 2 asks the court for a decree reflecting your new gender. Check the box to indicate what gender you (the minor) have changed to.
   - Item 3 asks the court for an order that a new birth certificate be issued to reflect your change of gender.
   - Item 4 asks the court to issue an order that will give notice to any living parent who did not sign the petition that any objections must be filed with the court. (This order is required by Health & Saf. Code, § 103435(e).)
   - In item 5, put the name and address of any living parent you (the minor) have who is not signing the petition. If you have no parents living, or none other than the person or persons signing the petition, check the appropriate box in item 5.
   - If you are **not asking to change your name**, you can skip items 6, 7, and 8 on the form and go to the Declaration and signatures required at the end of the form. (See Declaration and Signatures instructions below.)
   - If you are asking the court to **change your name** in this petition, you must complete the following items also:
     - You should check the box in the title of the form, in front of "and CHANGE OF NAME."
     - You must check item 6, and put your proposed new name in that item. (If you have already obtained a name change decree from a court that you want to have reflected in your new birth certificate, you do not need to get another decree or to check this box, but must attach a certified copy of that name change decree to this form.)
     - You must check the box in item 7 and you must also complete an additional form, form NC-110 and, if a guardian is the adult signing the petition, form NC-110G. That form must be signed by the same adult signing this petition.
     - You must check item 8, stating that you (the minor whose name is to be changed) are a resident of the county in which you are filing the petition.
   - Declaration and Signatures. You (the minor) must complete (check the box identifying your new gender) and sign the Declaration on the second page of the petition. Be sure to read it carefully, because you are signing under penalty of perjury. The adult named in item 1 must also sign the form.

Form Approved for Optional Use
Judicial Council of California
NC-500-INFO [New September 1, 2018]

4. **Filing and Filing Fee**
Prepare an original *Civil Case Cover Sheet* (form CM-010). File the original petition (with attached form NC-110 or NC-110G if you are seeking a name change) and *Civil Case Cover Sheet* with the clerk of the court and obtain two filed-endorsed copies of the petition. A filing fee will be charged unless you qualify for a fee waiver. If you want to apply for a fee waiver, see *Request to Waive Court Fees* (form FW-001) and *Information Sheet on Waiver of Court Fees and Costs* (form FW-001–INFO).

5. **Requesting a Court Hearing Date and Serving the Order to Show Cause**

A. Petition not signed by all living parents.
If any of your parents now living has not signed the petition, that parent has to be given notice and the right to object to the petition. You should request a date for a hearing on the *Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (and Change of Name)* (form NC-520) at least six weeks in the future. Take the completed form to the clerk's office. The clerk will provide the hearing date and location, obtain the judicial officer's signature, file the original, and give you a copy. You must have a copy of the completed *Order to Show Cause* showing the time and place of the hearing served on the nonsigning parent after you file the petition, and you must file a Proof of Service with the court (see form POS-040). **If a nonsigning parent lives in California, the form must be served on the parent in person. If a nonsigning parent lives outside California, the form may be served either in person or by first-class mail requiring return receipt. If such service is not possible or if a nonsigning parent lives outside the United States, then you may ask the court that service be done in another way.**

B. Petition signed by all living parents, or none of your parents are living
If all your parents now living have signed the petition, or if neither of your parents is alive and another adult signed, then you need not request a hearing date and one of the following will apply:

- **If you are not requesting a name change**, you need not do anything further unless the court asks you to. The court will make the decision based on the petition you filed.

- **If you are requesting a name change in this petition**, you must complete the *Order to Show Cause for Change of Name to Conform to Gender* Identity (form NC-125/NC-225), take it to the clerk's office to obtain the judicial officer's signature, and file the original. You do not need to serve this form on anyone. If objections are filed within six weeks of the issuance of that form, the court will set a hearing date and send you and the objectors notice of the date, time, and place. If no objections are filed, the court will make the decision based on the petition you filed.

6. **Court Hearing**
If a hearing date was set, but no written objection is filed at least two court days before the hearing, the court may grant the petition without a hearing. Check with the court to find out if a hearing will be held. If a hearing is held, bring copies of all documents to the hearing. If the judge grants the petition, the judge will sign the original order: form NC-230 if your petition included a request for a name change and form NC-330 if it did not ask for a name change.

7. **Domestic Violence Confidentiality Program**
In cases where the petitioner is a participant in the state address confidentiality program (Safe at Home), the petition, the order to show cause, and the decree should, instead of giving the proposed name, indicate that the name is confidential and on file with the Secretary of State. See *Information Sheet for Name Change Proceedings Under Address Confidentiality Program (Safe at Home)* (form NC-400-INFO).

8. **Birth Certificate**
If you were born in California, to obtain a new birth certificate reflecting the change of gender or name, file a certified copy of the order within 30 days with the Secretary of State and the State Registrar and pay the applicable fees. You may write or contact the State Registrar at:

California Department of Public Health
Vital Records – MS 5103
P.O. Box 997410
Sacramento, CA 95899-7410

Phone: 916-445-2684
Website: *www.cdph.ca.gov*

Local courts may supplement these instructions. Check with the court to determine whether supplemental information is available. For instance, the court may provide you with additional written information identifying the department that handles name and gender change petitions, and the times when petitions are heard.

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*):	**DRAFT** **04-24-18** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITION OF *(Name of each petitioner):* FOR CHANGE OF GENDER (Minor)	
ORDER TO SHOW CAUSE FOR RECOGNITION OF MINOR'S CHANGE OF GENDER AND ISSUANCE OF NEW BIRTH CERTIFICATE ☐ and CHANGE OF NAME	CASE NUMBER:

TO ALL LIVING PARENTS OF PETITIONING MINOR:

1. Petitioners *(name of petitioning minor):*
   (name of petitioning adult):
   filed a petition for an order recognizing change of gender and issuance of a new birth certificate.

2. THE COURT ORDERS that any living parent interested in this matter appear before this court at the hearing indicated below to show cause, if any, why the petition should not be granted. Any person objecting to the gender or name changes described above must file a written objection that includes the reasons for the objection **at least two court days before the matter is scheduled** to be heard, and must appear at the hearing to show cause why the petition should not be granted. If no written objection is timely filed or, even if filed timely, the objector does not appear on the hearing date, the court may grant the petition without a hearing.

NOTICE OF HEARING

a. Date: Time: ☐ Dept.: ☐ Room:

b. The address of the court is ☐ same as noted above ☐ other *(specify):*

TO ALL INTERESTED PERSONS:

3. ☐ A petition has been filed seeking change of name from *(minor's current name):*
   to *(proposed name):*

4. ☐ THE COURT ORDERS that any person objecting to the name changes described above must file a written objection that includes the reasons for the objection **within six weeks of the date this order is issued.** If no written objection is timely filed, the court will grant the petition without a hearing.

   A hearing date may be set only if an objection is timely filed and shows good cause for opposing the name change. Objections based solely on concerns over the petitioner's actual gender identity shall not constitute good cause. (See Code Civ. Proc., § 1277.5 (b).)

Date:

JUDGE OF THE SUPERIOR COURT

Form Adopted for Mandatory Use
Judicial Council of California
NC-520 [New September 1, 2018]

ORDER TO SHOW CAUSE FOR RECOGNITION OF MINOR'S CHANGE OF GENDER AND ISSUANCE OF NEW BIRTH CERTIFICATE (and CHANGE OF NAME)

Code of Civil Procedure, § 1277
www.courts.ca.gov

W18-03

Civil Forms: Name Change and Gender Change Forms (Revise forms NC-100, NC-110, NC-130, NC-130G, NC-200, NC-230, NC-300, and NC-330; adopt forms NC-125/NC-225, NC-500, and NC-520; approve forms NC-100-INFO, NC-150, and NC-500-INFO; and revoke forms NC-210/NC-310, NC-220, and NC-320)

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

	Commentator	Position	Comment	Committee Response
1.	American Civil Liberties Union (California) Center for Advocacy and Policy By Amanda C. Goad, Senior. Staff Attorney		The ACLU of California appreciates the opportunity to comment on the court form revisions proposed by the Civil and Small Claims Advisory Committee of the Judicial Council as part of the implementation process for SB 179 and SB 310 of 2017. The ACLU of California is interested in these issues because of our longstanding commitment to advancing the rights of transgender people, particularly those who are incarcerated. Our comments below are based on our extensive experience in advocating for people seeking to formalize gender transition through a legal name change and/or court-ordered gender change, as well as on consultation with other advocates working with affected communities. NC-100: Petition for Change of Name At item 5, we suggest changing "both parents" to "two parents." This wording would better reflect the reality of many children not having relationships with two parents. NC-100 INFO: Instructions for Filing a Petition for Change of Name At 8(d) and the sentence following it, the references to serving "grandparents" are confusing, as the accompanying forms indicate that any "near relative" may file these petitions on behalf of a young person who does not have a parent or guardian able to do so. We suggest adjusting the language to be consistent.	The committee appreciates the thoughtful review and comments provided. The form has been modified in light of this suggestion. Item 8(d) applies only to guardians filing petitions, who, by statute, are required to serve grandparents. A near relative or friend of a minor may file a name change petition on the minor's behalf when the minor's parents are not alive, and there is no appointed guardian. (Code Civ. Proc. § 1276(a)). The statute does not place any service requirements on such petitioners. It does, however, place requirements of service on

	Commentator	Position	Comment	Committee Response
			Also at 8, in the last sentence, delete the extraneous word "is" before "conform."	guardians who file the petitions. Guardians must serve the order to show cause on living parents or on grandparents if one or both parents are deceased. (Code Civ. Proc. §1277(e)).
			At 9, we suggest adding "in Jail" to the heading just before "in Prison," for clarity. Also at 9, we suggest deleting the first "on parole" from the first sentence, for clarity, as this clause appears to be referring to people on parole as well as people currently incarcerated in a state prison.	The form has been modified as suggested.
			Also at 9, the instructions note that a petitioner who is currently incarcerated in county jail must "provide a copy of the petition to the county sheriff's department" and that a person who is currently in state prison or on state parole must "provide a copy of the petition to the Department of Corrections and Rehabilitation." We suggest that this sentence should more specifically instruct incarcerated individuals on how they may serve copies on these agencies, recognizing that it may be easier to do so after CDCR issues relevant rules and/or policies.	The amended statute provides for service "in a manner prescribed by the department". For those in county jail, it will not be possible for the form to include how each county's sheriff's department prescribes the manner of service, but the committee has further modified the new language on this form to advise petitioners in county jail to check with the department as to how service should be done. Judicial Council staff has been informed that the CDCR will require service on wardens or, for parolees, on the regional parole administrator. However, CDCR does not expect to have regulations finalized on this issue until shortly before September 2018, too late to add the instructions to the forms being approved by the Council in May 2018.

	Commentator	Position	Comment	Committee Response
			Finally, we suggest adding clarification at 9 that the petitioner's declaration at item 7(f) on form NC-110 as to whether they are under the jurisdiction of CDCR or a county jail is relevant only to where the papers must be served, and will not affect the court's review of the substance of the petition. NC-200: Petition for Change of Name, Recognition of Change of Gender, and Issuance of New Birth Certificate	The form has been modified in light of this comment.
			In the AFFIDAVIT section, the parenthetical "(name)" should read "(present name)" for clarity. Also in this section, a parenthesis is missing after "Signature of Petitioner."	The form has been modified in light of these comments.
			In the instructions, at item 7. Court Hearing, to align with NC-100, we suggest adding the sentence "You may also check with the court after the deadline to find out if a hearing date has been set." Additionally, as with NC-100, we suggest noting explicitly here (as NC-100 does) that the decree may be picked up from the court after it has been signed. NC-230: Decree Changing Name and Order Recognizing Change of Gender and For Issuance of New Birth Certificate	The form has been modified in light of the first comment. The committee considered the second comment, and has modified the item to note that if objections are not filed, the court will grant the petition without a hearing. (The committee is not aware of any instructions on form NC-100 telling the party to go to the court.)
			To conform to the layout of other documents in this packet and other forms used for non-adversarial proceedings, remove the	The form has been modified in light of this comment.

	Commentator	Position	Comment	Committee Response
			"PLAINTIFF:" / "DEFENDANT:" box that currently appears in the caption below the Superior Court address. NC-300: Petition for Recognition of Change of Gender and for Issuance of New Birth Certificate	
			In item 1, the parenthetical "(name)" should read "(present name)" for clarity.	The form as been modified in light of this comment.
			At item 5 of the instructions, it may be helpful to state that if there is no hearing, the judge will sign the order and decree and the petitioner may pick them up at the court.	The form has been modified to state that if there are not objections the court will grant the petition and sign the order.
			NC-350: [Now NC-500] Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (Change of Name)	
			At item 1, we suggest changing "both parents" to "two parents" for reasons described above.	The form has been modified in light of this comment.
			In the AFFIDAVIT section, the parenthetical "(type or print name of petitioning minor)" should read "(type or print present name of petitioning minor)" for clarity.	The form has been modified in light of this comment.
			Also in this section, a parenthesis is missing after "Signature of Petitioning Minor."	This has now been corrected.

	Commentator	Position	Comment	Committee Response
			NC-350-INFO [now NC-500-INFO]: Instructions for Filing Petitioner for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate and Change of Name	
			At 3, in reference to item 2, we suggest removing the phrase "what gender you (the minor) have changed to" and replacing it with "your gender," as a more clear, accurate, and respectful characterization.	The committee considered this comment, but concluded that the original wording more accurately reflects the statute, which authorizes petitions for judgments which "recognizing the change of gender" (Health & Saf. Code § 103425) and provide for a petition "for a court order to recognize a change in the petitioner's gender" (Health & Saf. Code § 103430(a)).
			At 5(A), the instructions note that a petitioner may "ask the court that service be done in another way" if personal service is "not possible" or if a parent resides outside the United States. We suggest adding a reference to family violence protective orders as an example of a situation in which personal service would not be possible and the petitioner should discuss alternatives with the court.	The committee has declined this suggestion. California protective orders to prevent domestic violence expressly permit such service. See *Restraining Order After Hearing (Order of Protection),* form DV-130, at item 6(b) ("Peaceful written contact through a lawyer or process server or another person for service of legal process related to a court case is allowed and does not violate this order.")
			Global Suggestion	
			Throughout the packet of proposed revisions, various forms and instructions refer to changes of name "to conform to gender." Although this tracks relevant language in the Code of Civil Procedure, it risks confusing the impacted	The committee considered this comment and understands the concerns that have been raised. However, as noted, the statute authorizing these forms expressly refers on name changes "to conform to gender", and the new law expressly

	Commentator	Position	Comment	Committee Response
			community, as the term "conform to gender" is sometimes colloquially used to indicate efforts to repress a transgender person's identity. Many of the people likely to pursue legal gender changes to "nonbinary" also identify as "gender nonconforming," meaning that their gender expression and/or identity do not conform to cultural assumptions and stereotypes associated with their sex assigned at birth, and this may cause further confusion. In the interest of minimizing confusion and ensuring that all affected individuals immediately recognize these as the appropriate forms to meet their needs, we suggest globally replacing the phrase "to conform to gender" with another, such as "to match gender" or "because of gender transition". Conclusion Overall, the ACLU of California supports the proposed changes and believes they fulfill the legislative mandates to ease the name change process for incarcerated individuals, create a nonbinary gender option for court-ordered gender changes, and allow self-attestation of legal gender for all Californians. However, we note that in several places, clarifications are needed to make the forms easily usable and accessible.	adds "nonbinary" to male and female as the genders the court may issue an order recognizing. The committee suggests that if the commenter believes other terms are more appropriate, that legislative amendments be sought.
2.	Orange County Bar Association by Nikki P. Milibrand, President Newport Beach, CA 92658	AM	Form NC-100-INFO (*new)*	The committee notes the commenter's general agreement with the form, and addresses the amendments requested individually.

	Commentator	Position	Comment	Committee Response
			At Item 6, second paragraph, second line, it is suggested for clarity and internal consistency, the phrase "the completed form" be inserted after the word "take."	The form has been modified in light of this comment.
			At Item 8, while there is no note highlighted to which the explanatory text makes reference, it is suggested for clarity, for greater consistency with the provisions of CCP section 1277.5(a)(2), and to remove the word "is" included in error, the final paragraph be modified to read: The service of these orders or notices is not required if the minor's name is being changed to conform to gender.	The final sentence has now been highlighted as new and has been further modified in light of this suggestions.
			Form NC-300 (revised). At Item 2 of the instructions for the use of the form, it is suggested for consistency with the language of other instructions for the use of forms in this series, the second sentence of this paragraph be placed in parentheses.	The form has been modified in light of this suggestion.
			Form 320 (revoke) The agreed revocation of form NC-320 is based on the discussion and representation of this form in the explanatory text, rather than the form titled *Order to Show Cause for Change of*	The committee thanks the commenter for bringing this to its attention. The form NC-320 listed and described in the Invitation to Comment, *Setting of Hearing of Petition for Change of Gender*, is indeed the form recommended for revocation, and a copy has now been included with the report to the council.

	Commentator	Position	Comment	Committee Response
			Gender and Issuance of New Birth Certificate included with the proposals. Form NC-350-INFO [now NC-500 INFO] (new) At Item 3, the sentence in parentheses requires a closing parenthesis. Response to Specific Request: Yes, these proposals appropriately address the stated purpose.	 This has now been corrected. The committee notes the commenter's agreement.
3.	Superior Court of California, County of Orange by Civil and Probate Operations Managers	NI	Form NC125/NC225 (Order to Show Cause for Change of Name to Conform to Gender): We suggest to add more space to item 1 and to maintain consistency as some forms are a to c and others are a to e. For item 3, it is unclear what a timely filed objection means. Form NC-130 (Decree Changing Name): Suggest being consistent with present name and new name section as NC100 lists a to d, OSC lists a to c, and the decree lists a to e. If an attachment is needed on one of the form, it may not be needed for all or it would require different information. This would make it	 The form has been modified in light of this comment. Item 2 provides that objections must be filed in writing within 6 weeks of the date of the order. Those filed in that time frame are timely. The form has been modified in light of this comment.

	Commentator	Position	Comment	Committee Response
			extremely confusing for the petitioner and for the clerk reviewing the forms. Form NC-200 (Petition for Change of Name, Recognition of Change of Gender, and Issuance of New Birth Certificate): Suggest indicating "present name" under the affidavit. Form NC-350 [now NC-500] (Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate): Suggest making the number of signature lines for petitioning parent/guardian consistent with the other forms which only have two signature lines. Form NC-350-INFO [now NC-500 INFO] (Instructions for Filing Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate and Change of Name): Item 3, 11th bullet point - suggest changing "should attach" to "must attach." Item 5B, second paragraph - suggest changing "different form" to "additional form."	The form has been modified in light of this comment. Four signature lines are provided on the form on the advice of the Family and Juvenile Law Advisory Committee, who noted that there may be two guardians and two living parents, all consenting to the petition for the minor. Because a hearing would be required if all did not sign, and because space was available on the form in any event, the advisory committee agreed to include 4 signature lines. The form has been modified in light of this comment.
4.	Superior Court of California, County of Riverside	AM	General Comments: Form NC-100 (page 1); Section labeled 'b – f. (Attachment page or pages)' is unclear and may be confusing to litigants.	The form has been modified in light of this comment.

	Commentator	Position	Comment	Committee Response
			Form NC-100-INFO: We recommend adding statement regarding service of process for the petition for name change.	There is no general service of process requirement relating to the petition. The order to show cause must be served in most proceedings involving a minor, and instructions as to how to do that are provided in item 8. A prisoner or parolee must serve the sheriff or Department of Corrections and Rehabilitation, but the method of service is to be determined by each county's sheriff and by the CDCR. General instructions to that effect have been added to the form.
			Form NC-110: In light of the fact that this form is already signed under penalty of perjury, we recommend reformatting item (f) to delete "Declaration box" and include the pertinent language in the standard format. Item (f) could read: If the person whose name will be changed is 18 years of age or older, please state: (1) ☐ I am not ☐ I am under the jurisdiction of the California Department of Corrections and Rehabilitation (in state prison or on parole) or in a county jail. (2) ☐ I am not ☐ I am required to register as a sex offender under Penal Code section 290.	The committee had considered this issue before amending the forms, and considered it again in light of this comment, but declined to change this section of the form. The form has required this discrete declaration for many years, and the committee saw no reason to remove it. The information sheet does advise petitioners that the first point is now used only for indicating that special service requirements apply.
			Form NC-125: Is there any method available to notify those who could potentially object? Was consideration given to developing an objection form? We recommend taking the second item on NC-125 and including it on an objection	The statute expressly states that the order to show cause for change of name to conform to gender (form NC-125) is not to be published, and there is no requirement for service. (Code Civ. Proc. § 1277.5.) Trying to notify those who might object

	Commentator	Position	Comment	Committee Response
			form with an example, (e.g., fraudulent purpose, registered sex offender, etc.)	would appear to be contrary to statutory provision and far outside the council's purview. For that same reason, no consideration was given to developing an objection form to respond to this form. In light of the proposal here, the committee will in the future, as time and resources permit, consider developing an objection form to be used generally in opposing name change petitions.
			Forms NC-130, NC-130G, and NC230: It is recommended that a clerk's certification be added to the form (similar to restraining order forms) versus clerk's stamping certification the back of the document.	The committee considered this comment but declines to proceed on it. Most civil orders do not have a clerk's certification on them, and to add here would require a second page on each order.
			Form NC-150: It is recommended that the form title be changed to 'Notice of Hearing on Petition'. Further, delete the 'Notice of Hearing' title in the middle of the form. It is recommended that direction be provided on who is responsible to give notice of notice of hearing (i.e. petitioner, clerk, etc.).	The form has been modified in light of this and other comments. A clerk's certificate of mailing has now been added to the form.
			Form NC-200: It is recommended that California Dept. of Public Health information be consistent in format between the NC-100-INFO and the NC-200 forms.	The form has been modified in light of this comment.
			Response to Request for Specific Comments:	

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

	Commentator	Position	Comment	Committee Response
			1. Does the proposal appropriately address the stated purpose? Yes. 2. Would the proposal provide cost savings? If so please quantify. No. 3. What would the implementation requirements be for courts? The proposed changes would have an impact on court case management systems. New case categories, filing and minute codes would need to be created for the new and revised forms. Tracking mechanisms would need to be developed to track the timeframes for filing oppositions in order for the judicial officer to decide whether or not to schedule matters for hearing. Further, the proposed changes would result in the need for additional training for Filing Clerks, Legal Services, Self Help, Courtroom Assistants and Judicial Officers. Courts will need to revise current desk procedures and operational manuals. 4. Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes. 5. How well would this proposal work in courts of different sizes? No difference.	The committee appreciates the commenter's response to these questions.

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Civil Forms: Name Change and Gender Change Forms (Revise forms NC-100, NC-110, NC-130, NC-130G, NC-200, NC-230, NC-300, and NC-330; adopt forms NC-125/NC-225, NC-500, and NC-520; approve forms NC-100-INFO, NC-150, and NC-500-INFO; and revoke forms NC-210/NC-310, NC-220, and NC-320)

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

	Commentator	Position	Comment	Committee Response
5.	Superior Court of California, County of San Diego, by Mike Roddy, Executive Officer	AM	Q: Does the proposal appropriately address the stated purpose? Yes. Q: Would the proposal provide cost savings? If so, please quantify. No. Q: What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems? Training court operations clerks and courtroom clerks (approximately 5 hours), updating internal procedures and training materials, and updating case management system to reflect additional/revised filings. Q: Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes. Q: How well would this proposal work in courts of different sizes?	The committee appreciates the commenter's responses to these questions.

	Commentator	Position	Comment	Committee Response
			It will have a larger impact on larger courts based on the number of staff that will need to be trained.	
			General Comments:	The form has been modified in light of this comment.
			INFO forms:	
			• Our court proposes including "Civil Case Coversheet (CM-010)" among the forms listed in the "What Forms Are Required" sections of NC-100-INFO & NC-300 to be consistent with NC-200 & NC-350-INFO	The form has been modified to a consistent use of the second person pronoun in light of this comment
			NC-100-INFO:	
			• The form switches between second and third person pronoun. Our court proposes using one form throughout the form.	The form has been modified in light of this comment.
			• Items 6: Insert a period after "clerk's office in the second paragraph and the following sentence to be consistent with the first paragraph: "*The clerk will obtain the judicial officer's signature, file the original, and give you a copy."*	The form has been modified in light of this comment.
			Item 8c: For consistency the reference to the gender of the nonconsenting parent (e.g., "he or she") should be replaced with a gender neutral pronoun (e.g., "that parent…").	The form has been modified in light of this comment. A clerk's certificate of mailing has been added, along with an item for adding the name and address of any objectors, who, along with the parties, must be served the notice.

	Commentator	Position	Comment	Committee Response
			NC-150: Is the proposed Notice of Setting of Hearing On Petition to be served by the clerk? If so, should the form include a Clerk's Certificate of Mailing? **NC-350-INFO: [now NC-500 INFO]** Item 2b.: Propose adding clarifying language to indicate that the Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (NC-360) is **only** required if both parents/all living parents do not consent.	The circumstances in which specific orders must be served is somewhat complicated, but the form has now been modified to direct the parties to the explanation of those circumstances, at item 5). .
6.	Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee Joint Rules Subcommittee (JRS)	AM	The JRS notes the following impact to court operations: • Impact on existing automated systems (e.g., case management system, accounting system, technology infrastructure or security equipment, Jury Plus/ACS, etc.) – The proposed changes would have an impact on court case management systems. New case categories, filing and minute codes would need to be created for the new and revised forms. Tracking mechanisms would need to be developed to track the timeframes for filing oppositions in order for the judicial officer to decide whether or not to schedule matters forhearing.; and	The committee appreciates the commenter providing this information on impacts to court operations.

	Commentator	Position	Comment	Committee Response
			• Results in additional training, which requires the commitment of staff time and court resources – The proposed changes would result in the need for additional training for Filing Clerks, Legal Services, Self Help, Courtroom Assistants and Judicial Officers. Courts will need to revise current desk procedures and operational manuals. *Suggested Modifications:* •Form NC-100 (page 1): Section labeled "b – f. (Attachment page or pages)" is unclear and may be confusing to litigants. •Form NC-100-INFO: Suggest adding statement regarding service of process on the petition •Form NC-125: Is there some advocacy for those who could potentially object? Was consideration given to developing an objection form? Suggestion: Take the second sentence on NC-125 and include that on an objection form with an example (e.g., fraudulent purpose,	The form has been modified in light of this comment. There is no general service of process relating to the petition. The order to show cause must be served in most proceedings involving a minor, and instructions as to how to do that are provided in item 8. A prisoner or parolee must serve the sheriff or Department of Corrections and Rehabilitation, but the method of service is to be determined by each county's sheriff and by the CDCR. General instructions to that effect have been included. The committee is not aware of any advocacy for those who would object to a name change to conform to gender, other than private attorneys hired buy such objectors. The statute expressly states that the order to show cause on such petitions (form NC-125) is not to be published, and there is no requirement for service. (Code

	Commentator	Position	Comment	Committee Response
			registered sex offender, etc.).	Civ. Proc. § 1277.5.) Trying to identify those who might object would appear to be contrary to statutory provision and far outside the council's purview. For that same reason, no consideration was given to developing an objection form to respond to this form. In light of the proposal here, the committee will in the future, as time and resources permit, consider developing an objection form that might be used generally in opposing name change petitions, but not one responsive only to this order to show cause.
			•Forms NC-130, NC-130G, and NC230: Suggest that a clerk's certification be added to the form (similar to restraining order forms) versus clerk's stamping certification the back of the document.	The committee considered this comment but declines to proceed on it. Most civil orders do not have a clerk's certification on them, and to add one here would require a second page on each order.
			•Form NC-150: Suggest that the form title be changed to "Notice of Hearing on Petition." Delete "Notice of Hearing" title in the middle of the form. Recommend that direction be provided on who is responsible to give notice of hearing (i.e. petitioner, clerk, etc.).	The form has been revised to in light of this and other comments. There is now a clerk's certificate of service, and a new item to enter the name and address of the objectors, who must be served along with the petitioner.
			•Form NC-200: Make the California Department of Public Health information consistent in format on the NC-100-INFO and the NC-200 forms.	The form has been modified in light of this comment.
			•NC-230 (page 24): 4. a, b, c, -- the "to" in front of each gender should be deleted. The top	

	Commentator	Position	Comment	Committee Response
			sentence to number 4 should read "the gender of (new name) is changed to:" •NC-300 (page 25): Same comment as to paragraph 1. Move the word "to:" after gender and delete it from a, b and c. •NC-350 (page 29): Same comment as above for paragraph 2.	The form has been modified in light of this comment. The form has been modified in light of this comment. The form has been modified in light of this comment.
7.	TGI Justice San Francisco, California Kelly Densmore, Legal Director	NI	Overall Comments • Change all the language "**conform** to gender" to ***"related** to gender"* throughout all forms and instructions. Alternately, use "**to better match gender identity**." The community filling out these forms often uses the term "gender nonconforming" in place of the term "non-binary." The language "conform to gender" will confuse many people filling out these forms. "*Related to gender*" or "*to better match gender identity"* has the same meaning but will not confuse the people for whom these forms are written for. • Change language "both parents" to "two parents." (found in NC-100 and NC-350 [now NC-500]). Proposed forms to be revised: • **NC-100: Petition for Change of Name** o Change language "both parents" to "two parents" in number 5.	The committee considered this comment and understands the concerns that have been raised. However, as noted, the statute authorizing these forms expressly refers on name changes "to conform to gender", and the new law expressly adds "nonbinary" to male and female as the genders the court may issue an order recognizing. The committee suggests that if the commenter believes other terms are more appropriate, that legislative amendments be sought. The forms have been modified in light of this comment. The form has been modified in light of this comment

	Commentator	Position	Comment	Committee Response
			o Change language in number 6 from "conform name of…" to "change name of ___ to better *match* that person's gender identity."	The form has been modified somewhat in light of this comment, but continues to track the language of the statute that the name change is to conform to the petitioner's gender identity. (Code Civ. Proc. § 1277.5.)
			o NC-100 INFO: Item 4. The list does not include NC-150. Does the court fill out the form, NC-150?	The clerk issues form NC-150 should it be required. That form has been modified to reflect this.
			o NC-100 INFO: Item 7. Change wording "conform to a change of gender…" so it reads, "*But petitioners do not have to publish the order if they are seeking to change a name to* ***better match*** *their gender identity or are participants…*"	The committee disagrees, concluding that the form should track the language of the statute, that the name change is to conform to the petitioner's gender identity. (Code Civ. Proc. § 1277.5.)
			o NC-100 INFO: Item 9. Add "jail" to the heading.	The form has been modified in light of this comment.
			o NC-100 INFO. Item 9. Where will a person in jail serve the county sheriff?! Please notify our organization if/when CDCR develops statewide rules on service of petition?	The statute requires that each sheriff's department develop a process for this. The form has been modified to advise petitioners in jail to check with that department. As to CDRC, council staff has been informed that service is to be on the prison warden or, for parolees, or the regional parole administrator. This is now reflected on the forms. No further information is currently available.

	Commentator	Position	Comment	Committee Response
			• **NC- 110: Attachment to Petition for Change of Name** o In Item 7(f) add a sentence informing petitioner that court findings are not based on being under the jurisdiction of CDCR "or county jail,", but that service is required for petitioners under the jurisdiction of CDCR "or in county jail." **NC-130: Decree Changing Name** o No comments. • **NC-130G: Decree Changing Name** o No comments. • **NC-200: Petition for Change of Name, Recognition of Change of Gender, and Issuance of New Birth Certificate** o In Item 2, for clarity, should read: "Petitioner requests that the court decree that, *for purposes of* ***better matching*** to petitioner's gender identity, petitioner's name is changed to (proposed name): In AFFIDAVIT section, the parenthetical "(name)" should read "(present name)" for clarity. o In the instructions, in 7, *Court Hearing*, to align with NC-100, add the sentence "*you may also check with the court after the deadline to see if a hearing date has been set."*	This information has been added to the information sheet. The committee concluded that the form should track the language of the statute, that the name change is to conform to the petitioner's gender identity. (Code Civ. Proc. § 1277.5.) The form has been modified. The form has been modified.

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	Commentator	Position	Comment	Committee Response
			Additionally, as with NC-100, it may be helpful to state explicitly that the decree may be picked up from the court once it is signed.	The committee disagrees that this statement is needed.
			• **NC-230: Decree Changing Name and Order Recognizing Change of Gender and For Issuance of New Birth Certificate** o Remove PLAINTIFF: DEFENDANT: found underneath the Superior Court address.	The form has been corrected.
			• **NC-300: Petition for Recognition of Change of Gender and for Issuance of New Birth Certificate** o In Item 1, the parenthetical "(name)" should read "*(present name)*" for clarity.	The form has been modified.
			o In Item 1, a blank line should be follow "I (*present name*) to indicate the field to be filled.	The form style used by the Judicial Council on this form set only includes blank lines for signatures. The committee notes that there will be a field to fill in on the on-line version of the form.
			o Item 3 should read "*... is to **better match** my legal gender to my gender identity…*"	See responses above re tracking statutory language.
			o In Item 5 of the instructions, it may be helpful to state that if there is no hearing, the judge will sign the order and decree and they may be picked up at the court.	The form has been modified to state that if there is no hearing the court will grant the petition and sign the order.

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

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Civil Forms: Name Change and Gender Change Forms (Revise forms NC-100, NC-110, NC-130, NC-130G, NC-200, NC-230, NC-300, and NC-330; adopt forms NC-125/NC-225, NC-500, and NC-520; approve forms NC-100-INFO, NC-150, and NC-500-INFO; and revoke forms NC-210/NC-310, NC-220, and NC-320)

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	Commentator	Position	Comment	Committee Response
			• **NC-330: Order Recognizing Change of Gender and For Issuance of New Birth Certificate** o In Item 1, add an opportunity for petitioner to say if they were born in California since birth certificates will not be reissued for people born out of state.	This is an order form, for findings and orders by the court, not assertions by the petitioner. Moreover, the committee does not want to add this requirement to the petition because there is no requirement in the statute that the court may only recognize a change of gender of a petitioner born in California. The form has been modified so that the final item on the order regarding birth certificates state "If the petitioner was born in California. . ." the order shall be filed with the State Registrar and a new birth certificate issued. This tracks the statutory language.
			• **Additional Comments** Change all the language "**conform** to gender" to *"**related** to gender"* throughout all forms and instructions. Alternately, use "**to better match gender identity**." The community filling out these forms often uses the term "gender nonconforming" in place of the term "non-binary." The language "conform to gender" will confuse many people filling out these forms. "*Related to gender*" or "*to better match gender identity"* has the same meaning but will not confuse the people for whom these forms are written for. Proposed new forms to be adopted	As discussed above, the committee declines to proceed with these suggestions, choosing instead to use the statutory language. The committee suggests that if the commenter believes other terms are more appropriate, that legislative amendments be sought.

	Commentator	Position	Comment	Committee Response
			• **NC-125/NC-225: Order to Show Cause for Change of Name to Conform to Gender** Change title of form to "Order to Show Cause of Name Change ***to Match*** Gender"	As discussed above, the committee has decided to continue to use the statutory language.
			• **NC-350:[now NC-500] Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (Change of Name)** o INFO "Check the box to select gender"	The committee declines to accept this suggestion, as it would leave it unclear what gender the petitioner was checking: the one currently on petitioner's birth certificate or the one the petitioner wants the court to recognize.
			o INFO 5(a) add if there is a protective order barring contact, "or inquire that service be waived…"	As noted above in response to a similar comment by the ACLU, California protective orders do not bar service of legal papers.
			• **NC-360: Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate and Change of Name** • **Additional Comments** o Change all the language "**conform** to gender" to ***"related** to gender"* throughout all forms and instructions. Alternately, use "**to better match gender identity**." The community filling out these forms often uses the term "gender nonconforming" in place of the term "non-binary." The language "conform to gender" will confuse many people filling out these forms.	As discussed above, the committee has decided to continue to use the statutory language.

	Commentator	Position	Comment	Committee Response
			"*Related to gender*" or "*to better match gender identity"* has the same meaning but will not confuse the people for whom these forms are written for. Proposed new forms to be approved • **NC-100-INFO: Instructions for Filing a Petition for Change of Name** o See comments above under NC-100.	See responses to those comments.
			NC-150: Notice of Setting Hearing on Petition o No comments.	
			• **NC-350-INFO [Now NC-500-INFO]: Instructions for Filing Petition for Minor's Change of Gender and Issuance of New Birth Certificate (and Change of Name)** o See comments above under NC-350.	See responses to those comments.
			• **Additional Comments** o Change all the language "**conform** to gender" to *"**related** to gender"* throughout all forms and instructions. Alternately, use "**to better match gender identity**." The community filling out these forms often uses the term "gender nonconforming" in place of the term "non-binary." The language "conform to gender" will confuse many people filling out these forms. "*Related to gender*" or "*to better*	As discussed above, the committee has decided to continue to use the statutory language.

	Commentator	Position	Comment	Committee Response
			match gender identity" has the same meaning but will not confuse the people for whom these forms are written for. Proposed forms to be revoked - NO COMMENTS	
8.	Transgender Law Center Oakland, California Corinne Green	NI	NC-100: Petition for Change of Name ○ NC-100-INFO, 4. What Forms Are Required: There is no mention of NC-150: Notice of Setting of Hearing on Petition. If this is intentional, it implies that the court will fill out the entirety of NC-150 when required. If it is intended that petitioners pre-fill NC-150 and submit it to the court, it should be listed. Because the vast majority of cases are unlikely to require hearings, the former option – the court filling out the form if necessary - is preferred. ○ NC-100-INFO, 7. Publishing the Order to Show Cause : The phrase "to conform to a change of gender identity" should read, simply, "to conform to the petitioner's gender identity" to avoid unnecessarily implying that someone's gender identity has changed. This also conforms to the language used in Item 6 of the NC-100 form. ○ NC-100-INFO, 9. Name Change for Person in Prison or on Parole : The address of a CDCR	The committee agrees that, because most of the cases in which form NC-150 might be issued (cases involving changes of name to conform to gender or recognition of a change of gender) will not have a hearing, there is no need for petitioners in those cases to complete that notice of hearing form. That is why it is not on the list of forms to be completed. The form has been corrected. The Judicial Council does not know the details of the procedure that CDCR will use for service of

	Commentator	Position	Comment	Committee Response
			agent designated to accept service should be listed to assist petitioners required to serve CDCR with a copy of their petition. It would also be appropriate to note additional notification steps required for people registered as sex offenders here.	name change petitions, beyond that service on the prison warden or the regional parole administrator will be required. The procedures have not yet been finalized by the CDCR. The "additional notification steps" required of a registered sex offender are not related to service of the petition, but rather to service of the order or decree, should such a petition be granted. The committee concluded that such information should be included as part of an order in such a case. These cases are rare enough that the provisions could be added to such order individually, along with the specific findings a court has to make to grant the petition in such a case.
			NC-100-INFO, 10. Court Hearing: In case of a hearing date being set, the petitioner is informed both that they "will be sent a notice of the hearing date" and to "check with the court after the deadline … to see if a hearing date has been set." To clearly communicate the fact that the court's notice is the primary way to learn this information, the latter sentence should read: "You may also c heck with the court after the deadline … to see if a hearing date has been set." Additionally, it may be helpful to state explicitly that the decree may be picked up from the court once it is signed.	No notice is sent out setting a hearing in most name change proceedings: the date of the hearing is set in the Order to Show Cause which the petitioner is required to obtain from the court and publish. This is described in item 6 of form NC-100. It is only in proceedings for a name change to conform to gender that a notice of hearing is set. The committee considered this suggestion but concluded the language in the circulated form is sufficient.

	Commentator	Position	Comment	Committee Response
			● NC-110: Attachment to Petition for Change of Name ○ In f. Declaration , because many petitioners miss the Date fields accompanying the signatures, the Date fields should gain a blank line indicating a need for input. ● NC-125/NC-225: Order to Show Cause for Change of Name to Conform to Gender ○ No comments. ● NC-130: Decree Changing Name ○ No comments. ● NC-130G: Decree Changing Name ○ No comments. NC-150: Notice of Setting Hearing on Petition ○ No comments. ●NC-200: Petition for Change of Name, Recognition of Change of Gender, and Issuance of New Birth Certificate ○ Item 2, for clarity, should read: "Petitioner requests that the court decree that, for purposes of conforming to petitioner's gender identity, petitioner's name is changed to (proposed name): " ○ In the AFFIDAVIT section, the parenthetical "(name)" should read "(present name)" for clarity.	As noted above, in the form style used for this set of forms, generally only signature lines have a blank line. The form has been modified in light of this comment. The form has been modified in light of this comment.

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Civil Forms: Name Change and Gender Change Forms (Revise forms NC-100, NC-110, NC-130, NC-130G, NC-200, NC-230, NC-300, and NC-330; adopt forms NC-125/NC-225, NC-500, and NC-520; approve forms NC-100-INFO, NC-150, and NC-500-INFO; and revoke forms NC-210/NC-310, NC-220, and NC-320)

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	Commentator	Position	Comment	Committee Response
			○ In the AFFIDAVIT section, because many petitioners miss the Date fields accompanying the signatures, the Date fields should gain a blank line indicating a need for input.	See response above.
			○ In the instructions, in 7. Court Hearing, to align with NC-100, add the sentence "You may also check with the court after the deadline to see if a hearing date has been set." Additionally, as with NC-100, it may be helpful to state explicitly that the decree may be picked up from the court once it is signed.	The form has been modified in light of this comment.
			● NC-230: Decree Changing Name and Order Recognizing Change of Gender and For Issuance of New Birth Certificate ○ The PLAINTIFF: DEFENDANT: box at the top part of the form should be removed.	This has been corrected.
			NC-300: Petition for Recognition of Change of Gender and for Issuance of New Birth Certificate ○ In Item 1, the parenthetical "(name)" should read "(present name)" for clarity.	The form has been modified in light of this comment. See response above, that blank lines are generally only for signatures in this style of form.
			○ In Item 1, a blank line should follow "I (present name)" to indicate the field to be filled.	The form has been modified in light of this comment.

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

	Commentator	Position	Comment	Committee Response
			○ In Item 5 of the instructions, it may be helpful to state that if there is no hearing, the judge will sign the order and decree and they may be picked up at the court.	Form NC-230 has been modified, in light of this comment, to include this item.
			● NC-330: Order Recognizing Change of Gender and For Issuance of New Birth Certificate ○ NC-330, in Item 5, has an additional court order to file with the State Registrar, while the similar NC-230 does not have this direction.	The form has been corrected.
			○ In the footer, correct typo: "RECO G NIZING"	
			● NC-350: [now NC-500] Petition for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate (and Change of Name) ○ In NC-350-INFO, [now NC-500 INFO] in Item 2d, the Civil Case Cover Sheet is form CM-010, not CM-100.	The form has been corrected
			○ In NC-350-INFO, [now NC-500 INFO] in Item 2b, note that there should be no need to complete NC-360 if there is no living parent who did not sign the petition.	Item 2 has been modified to direct the parties to the paragraph containing information as to when the OSC forms and order forms are needed.
			○ In NC-350-INFO, in Items 2c and 2f, note that if the petitioner needs form NC-230	See comment above.

	Commentator	Position	Comment	Committee Response
			because they are also changing their name, there should be no need to complete NC-330. NC-360: [now NC-520] Order to Show Cause for Recognition of Minor's Change of Gender and Issuance of New Birth Certificate and Change of Name ○ No comments. ● Additional Comments ○ Forms NC-350 and NC-360 could be moved to a new series (the 500 series?) because they do not fit the NC-300 series description as being for "individuals seeking only gender change recognition (with no name change order requested)." Form NC-350 contains a name change component (Item 6). ○ It would likely be useful to incorporate the text, including the contact information for the Office of Vital Records, from Item 8 of NC-350-INFO/Item 6 of NC-300's instructions/Item 8 of NC-200's instructions to NC-230, NC-330, and possibly NC-130 and NC-130G. ○NC-330 currently includes a directive to file a copy of the order with the State Registrar without providing the address. It would be beneficial to standardize this section across forms, and to make plainly available the Office	The forms are being renumbered as NC-500 and NC-520. The committee notes, however, that the description of the current NC-300 forms in the Invitation to comment was merely descriptive of the current forms, and not prescriptive in any way. The committee concluded that it is sufficient that the address information is in the Information Sheets and instructions on the forms, and does not need to be included in the order forms. See response above.

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Civil Forms: Name Change and Gender Change Forms (Revise forms NC-100, NC-110, NC-130, NC-130G, NC-200, NC-230, NC-300, and NC-330; adopt forms NC-125/NC-225, NC-500, and NC-520; approve forms NC-100-INFO, NC-150, and NC-500-INFO; and revoke forms NC-210/NC-310, NC-220, and NC-320)

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

	Commentator	Position	Comment	Committee Response
			of Vital Records contact information in each case where it may be needed.	

Item number: 05

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 5, 2018

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

Committee or other entity submitting the proposal:
Criminal Law Advisory Committee

Staff contact (name, phone and e-mail): Eve Hershcopf; 415-865-7961; eve.hershcopf@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 24, 2017
Project description from annual agenda: Revise Plea Form, With Explanations and Waiver of Rights – Felony (Criminal), CR-101

If requesting July 1 or out of cycle, explain:
Technical change

Additional Information: (To facilitate RUPRO's review of your proposal, please include any relevant information not contained in the attached summary.)
The Criminal Law Advisory committee, based upon a public comment, has identified a formatting error in Judicial Council form CR-101. The Criminal Law Advisory Committee recommends making the necessary correction to avoid causing confusion for court users, clerks, and judicial officers.

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 24, 2018

Title
Form: Technical Change

Rules, Forms, Standards, or Statutes Affected
Revise form CR-101, *Plea Form with Explanations and Waiver of Rights – Felony*

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

Agenda Item Type
Action Required

Effective Date
May 25, 2018

Date of Report
February 26, 2018

Contact
Eve Hershcopf, 415-865-7961
eve.hershcopf@jud.ca.gov

Executive Summary

The Criminal Law Advisory committee, based upon a public comment, has identified a formatting error in Judicial Council form CR-101. The Criminal Law Advisory Committee recommends making the necessary correction to avoid causing confusion for court users, clerks, and judicial officers.

Recommendation

The Criminal Law Advisory committee recommends that the council, effective May 25, 2018:

Revise form CR-101, *Plea Form with Explanations and Waiver of Rights – Felony*, by inserting a box for the defendant's initials following item 1.

Previous Council Action

The Judicial Council approved the current form CR-101 effective January 1, 2018, but directed the Criminal Law Advisory Committee to circulate for public comment minor revisions that had not previously circulated.

Rationale for Recommendation

Comments from the post-adoption circulation for public comment indicated agreement with the already-approved revisions. In addition, one commentator identified that a box for the defendant's initial was missing in item 1, which states, "Read this form carefully. For each item, if you understand and agree with what you read, put your initials in the box to the right of the item. For any item that does not apply to you or that you do not understand, leave the box blank." As with the other items on form CR-101 that provide a box for the defendant's initials, item 1 should have such a box.

Comments, Alternatives Considered, and Policy Implications

This revision was not circulated for public comment because it is noncontroversial, involves a technical revision, and is therefore within the Judicial Council's purview to adopt without circulation.[1] (See Cal. Rules of Court, rule 10.22(d)(2).)

Implementation Requirements, Costs, and Operational Impacts

Operational impacts are expected to be minor. The proposed revision may result in reproduction costs if courts provide hard copies of form CR-101. Because the proposed change is a technical correction, case management systems are unlikely to need updating to implement it.

Attachments and Links

1. Form CR-101, at pages 3–9

[1] In addition, the change arose from a comment during circulation for public comment.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. Defendant:	
PLEA FORM, WITH EXPLANATIONS AND WAIVER OF RIGHTS—FELONY	CASE NUMBER:

INSTRUCTIONS: (1) Fill out this form only if you want to plead guilty or no contest.
(2) Read this form carefully. For each item, if you understand and agree with what you read, put your initials in the box to the right of the item. For any item that does not apply to you or that you do not understand, leave the box blank.
(3) On page 6, sign and date the form under "DEFENDANT'S STATEMENT."
(4) Keep in mind that the court cannot give legal advice. If you have any questions about anything in this form, ask your attorney.

1. **CHARGES AND MAXIMUM TERM.** I want to plead guilty or no contest ("nolo contendere") to the charges and allegations listed below. I understand that the minimum and maximum penalties for the charges to which I am pleading guilty or no contest are listed below. INITIALS ☐

COUNT	CHARGES (SECTION & DESCRIPTION)	YEARS / MONTHS MINIMUM	YEARS / MONTHS MAXIMUM	PRIOR CONVICTIONS, ENHANCEMENTS, & SPECIAL ALLEGATIONS (SECTION & DESCRIPTION)	YEARS / MONTHS MINIMUM	YEARS / MONTHS MAXIMUM	TOTAL MAXIMUM TIME
						AGGREGATE MAXIMUM TIME OF IMPRISONMENT	

2. **PLEA AGREEMENT.** I understand that I must tell the court on this form about any promises anyone has made to me about the sentence I will receive or the sentence recommendations that will be made to the court. My attorney, the court, or the prosecutor has explained to me that if I plead guilty or no contest to the charges and admit the allegations listed above, the court will sentence me as follows:

a. Check one: ☐ **State Prison** (or the Division of Juvenile Justice) ☐ **County Jail** for INITIALS ☐
(1) ☐ years and months or
(2) ☐ Not less than years and months and/or not more than years and months.
(3) ☐ Other *(specify):*

b. **Probation** for years under conditions to be set by the court, including: ☐
☐ days in the **county jail** or
☐ up to days in the **county jail.**

I understand that a violation of any of the conditions of probation, including failure to complete a drug education or treatment program, if ordered by the court, may cause the court to send me to **county jail or state prison** for up to the **"Aggregate Maximum Time of Imprisonment"** specified in item 1, which may include a period of mandatory supervision under Penal Code section 1170(h)(5)(B) if the court sends me to county jail.

Form Approved for Optional Use
Judicial Council of California
CR-101 [Rev. January 1, 2018]

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

INITIALS

2. c. **Split Sentence (1170(h)(5)(B)):** years and days in the county jail and years and days on mandatory supervision under conditions set by the court. I understand that if I violate any of the terms or conditions of mandatory supervision, I may be remanded into custody for the entire unserved portion of the sentence. ☐

d. **Narcotics Addiction Confinement** ☐
I understand that if the court finds that I am addicted to narcotics or in immediate danger of becoming a narcotics addict, the court may send me to a narcotics detention, treatment, and rehabilitation facility for up to the amount of time I would otherwise have served in prison.

e. **Open Plea**

1. ☐ I understand the maximum and minimum sentences for the charges and allegations stated on page 1. No one has made any other promises to me about what sentence the court may order. ☐
2. ☐ I understand that I am not eligible for probation.
3. ☐ I understand that I will not be granted probation unless the court finds at the time of sentencing that this is an unusual case where the interests of justice would be best served by granting probation.

f. **Restitution, Statutory Fees, and Assessments** ☐
I understand that the court will order me to pay the following amounts (if an amount is not yet known, "TBD" for "to be determined" is entered next to the $); I must prepare financial disclosure statements to assist the court in determining my ability to pay; and refusal or failure to prepare the required financial disclosure statements may be used against me at sentencing:

1. ☐ $ **to the Victim Restitution Fund**
2. ☐ $ **restitution to actual victims**
3. ☐ $ **restitution to the State of California, Victims of Crime Fund**
4. ☐ $ **court operations assessment**
5. ☐ $ **court facilities assessment**
6. ☐ $ **base fine plus any applicable penalties, assessments, and surcharges**
7. ☐ $ **other** *(specify):*
8. ☐ $ **other** *(specify):*
9. ☐ An (additional) amount to be determined by the court at sentencing or such other hearing as the court may set.

g. **Parole Revocation or Probation Revocation Fine** ☐
I understand that if I am sentenced to **state prison**, the court **will** impose a parole revocation fine, which will be collected only if my parole is later revoked. I also understand that if I am granted probation, the court **will** impose a probation revocation fine, which will be collected only if my probation is later revoked.

h. **Dismissal of Other Counts** ☐
I understand that as part of the plea agreement bargain, the following counts will be dismissed after sentencing:

I understand and agree that the sentencing judge may consider facts underlying dismissed counts to determine restitution and to sentence me on the counts to which I am entering a plea. ☐

i. **Other Terms (*specify):*** ☐

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

3. **CONSEQUENCES OF MY PLEA** INITIALS

a. **No Contest ("Nolo Contendere") Plea** ☐
I understand that a no contest plea is the same as pleading guilty and that if I plead no contest, I will be convicted and my no contest plea could be used against me in a civil case.

b. **Parole and Postrelease Community Supervision** ☐
I understand that if I am sentenced to **state prison** or a **narcotics treatment facility**
(1) I will be placed on parole or postrelease community supervision for up to years after my release.
(2) If I abscond or the court tolls my supervision, the total time of parole or postrelease community supervision can be extended.
(3) If I violate any of the terms or conditions of my parole, I can be sentenced to county jail for up to 180 days for each violation, or returned to state prison for up to one year, up to a maximum of years. If I violate any of the terms or conditions of postrelease community supervision, I can be sentenced to county jail for up to 180 days for each violation, for up to a maximum of 3 years.

c. **Effect of Conviction on Other Cases** ☐
I understand that a conviction in this case may constitute a violation of any other current grant of parole, mandatory supervision, postrelease community supervision, or probation in any other case and that I may receive additional punishment as a result of that violation.

d. **Registration** ☐
I understand that I will be required to register with the local police agency or sheriff's department in the city or county in which I reside as

(1) ☐ an arson offender
(2) ☐ a gang member
(3) ☐ a narcotics offender
(4) ☐ a sex offender **(this registration is a lifelong requirement)**
(5) ☐ other (*specify*):

and that if I fail to register or to keep my registration current for any reason, new felony criminal charges may be filed against me.

e. **Prints and DNA Samples** ☐
I understand that I must provide biological samples and prints for identification purposes—including buccal (mouth) swab samples, right thumb prints, palm prints of each hand, and blood specimens or other biological samples required by law—and that failure to do so constitutes a new criminal offense.

f. **Serious or Violent Felony** ☐
(1) ☐ I understand that by pleading guilty or no contest to a serious or violent felony ("strike"), the penalty for any future felony conviction will be increased as a result of my convicion in this case, depending on the number of strikes I have, up to a mandatory prison sentence of double the term otherwise provided or a term of at least 25 years to life.
(2) ☐ I understand that if I am convicted of a violent felony, jail or prison conduct/work-time credit I may accrue will not exceed 15%.
(3) ☐ I understand that if I am admitting a prior strike conviction, prison work-time credit that I may accrue will not exceed 20% of the total term of imprisonment.
(4) ☐ I understand that if I am convicted of murder or a third felony conviction of certain offenses, I am ineligible to receive work-time credits. Count is such an offense.

g. **Prior Prison Term or County Jail Sentence Under Penal Code Section 1170(h)(5)** ☐
I understand that if I am sentenced to prison or county jail under Penal Code section 1170(h)(5), the penalty for any future felony conviction may be increased as a result of my incarceration in this case.

h. **Driver's License and Vehicle Forfeiture** ☐
I understand that my privilege to drive a motor vehicle may be revoked or suspended by the court or the California Department of Motor Vehicles, and my vehicle may be ordered forfeited if it was involved in the offense.

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

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3. i. **Immigration Consequences**
I understand that if I am not a citizen of the United States, my plea of guilty or no contest may or, with certain offenses, **will** result in my deportation, exclusion from reentry to the United States, and denial of naturalization and amnesty, and that the appropriate consulate may be informed of my conviction. The offenses that **will** result in such immigration action include, but are not limited to, an aggravated felony, conspiracy, a controlled substance offense, a firearm offense, and, under certain circumstances, a moral turpitude offense. ☐

j. **Firearms**
I understand that federal and state laws prohibit a convicted felon from possessing firearms or ammunition for life. ☐

k. **Other Consequences** (*specify*): ☐

4. **RIGHT TO AN ATTORNEY**
I understand that I have the right to an attorney of my choice to represent me throughout the proceedings. If I cannot afford to hire an attorney, the court will appoint one to represent me. ☐

I hereby give up my right to be represented by an attorney. ☐

5. **OTHER CONSTITUTIONAL RIGHTS**
I understand that I am entitled to each of the following rights as to the charges listed in item 1 (on page 1):

a. **Right to a Jury Trial**
I understand that I have a right to a speedy and public jury trial. At the trial, I would be presumed to be innocent, and I could not be convicted unless, after hearing all of the evidence, 12 impartial jurors chosen from the community were unanimously convinced beyond a reasonable doubt that I am guilty. I have a right, through my counsel, to participate in jury selection. ☐

b. **Right to a Court Trial**
I understand that, as an alternative to a jury trial, if the prosecutor agrees, I may give up a jury trial and have a court trial in which the judge alone, without a jury, hears the evidence. I still could not be convicted unless, after hearing all of the evidence, the judge was convinced beyond a reasonable doubt that I am guilty. ☐

c. **Right to Confront and Cross-Examine Witnesses**
I understand that I have the right to confront and cross-examine all witnesses testifying against me. This means that the prosecution must produce the witnesses in court, they must testify under oath in my presence, and my attorney may question them. ☐

d. **Right to Remain Silent and Not to Incriminate Myself**
I understand that I have the right to remain silent, and my silence cannot be considered as evidence against me. I understand that I also have the right not to incriminate myself, and I cannot be forced to testify. ☐

e. **Right to Produce Evidence and to Present a Defense**
I understand that I have a right to present evidence and to have the court issue subpoenas to bring to court all witnesses and evidence favorable to me, at no cost to me. I also have the right to testify on my own behalf. ☐

6. **BEFORE THE PLEA**

a. **Discussion With My Attorney** ☐

Before entering this plea, I have had a full opportunity to discuss the following with my attorney:

(1) The facts of my case;
(2) The elements of the charged offenses, prior convictions, enhancements, and special allegations;
(3) Any defenses that I may have;
(4) My constitutional and statutory rights and waiver of those rights;
(5) The consequences of this plea, including the immigration consequences; and
(6) Anything else I think is important to my case.

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

INITIALS

6. b. **Questions**
I have no further questions of the court or of my attorney with regard to my plea and admissions in this case, any of the rights, or anything else on this form. ☐

c. **Stipulation to Commissioner**
I understand that I have the right to have a judge take my plea and sentence me. I give up this right and agree to have a commmissioner, sitting as a temporary judge, take my plea and sentence me. ☐

d. **Medications or Controlled Substances**
I am not taking any medication that affects my ability to understand this form and the consequences of my plea, have not recently consumed any alcohol or drugs, and am not suffering from any medical condition, except for the following: ☐

e. **Court Approval of Plea Agreement**
I understand that the plea agreement in item 2 (on pages 1 and 2) is based on the facts before the court. I understand that if the court approves this plea agreement the approval of the court is not binding, and that the court may withdraw its approval of the plea agreement upon further consideration of the matter. I understand that if the court withdraws its approval of this plea agreement I will be allowed to withdraw my plea. (Pen. Code, § 1192.5.) ☐

7. **STATUTORY RIGHT TO A PRELIMINARY HEARING**
I understand that before I have a trial, the law gives me the right to a speedy preliminary hearing at which the prosecution would produce evidence and the court must find reasonable cause to believe I committed the crimes with which I have been charged. I understand that I have all of the above constitutional rights at the preliminary hearing, except for the right to a jury trial. ☐

I give up my right to a preliminary hearing and the constitutional rights listed in item 5 (on page 4).

8. **WAIVER OF CONSTITUTIONAL RIGHTS**
I give up, for each of the charges and allegations listed in item 1 (on page 1), my right to a jury trial, my right to a court trial, my right to confront and cross-examine witnesses, my right to remain silent and not to incriminate myself, and my right to produce evidence and to present a defense, including my right to testify on my own behalf. I understand that I am, in fact, incriminating myself with my plea. ☐

9. **THE PLEA**
I freely and voluntarily plead ☐ GUILTY ☐ NO CONTEST to the charges listed in item 1 (on page 1) and admit the allegations listed in item 1 (on page 1), understanding that this plea and admission will lead to the penalties listed in item 2 (on pages 1 and 2). ☐

a. I offer my plea of guilty or no contest freely and voluntarily and with full understanding of everything in this form. No one has made any threats; used any force against me, my family, or my loved ones; or made any promises to me, except as listed in this form, in order to convince me to plead guilty or no contest. ☐

b. **I understand that the court is required to find a factual basis for my plea to make sure that I am entering a plea to the proper offenses under the facts of the case.**

I offer to the court the following as the basis for my plea of guilty or no contest and any admissions:

(1) **I understand that the court may consider the following as proof of the factual basis for my plea:** ☐

(a) ☐ Preliminary hearing transcript
(b) ☐ Police report
(c) ☐ Probation report
(d) ☐ Welfare investigator's declaration
(e) ☐ Court documents regarding any alleged prior offenses
(f) ☐ Other *(specify):*
(g) ☐ (Specify facts):

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

INITIALS

9. b. (2) **I am pleading guilty or no contest to take advantage of a plea agreement (my attorney will stipulate to a factual basis for the plea).** (*People v. West* (1970) 3 Cal.3d 595.) ☐

10. **AFTER THE PLEA**

a. **Surrender** ☐
I understand that the court is allowing me to surrender at a later date to begin serving time in custody.

I agree that if I fail to appear on the date set for surrender or sentencing without a legal excuse, my plea will become an "open plea" to the court, I will not be allowed to withdraw my plea, and I may be sentenced up to the maximum allowed by law. ☐

b. **Sentencing Court** ☐
I understand that I have the right to be sentenced by the same judge or commissioner who takes my plea. I give up that right and agree that any judge or commissioner may sentence me.

c. **Sentencing Date** ☐
I understand that I have the right to be sentenced within 20 court days. I give up that right and agree to be sentenced at a later date.

11. **MANDATORY WARNING** ☐
I understand that if I am charged with violating Vehicle Code section 23103, as specified in Vehicle Code section 23103.5, or Vehicle Code sections 23152 or 23153, the following warning applies:

You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and as a result of that driving someone is killed, you can be charged with murder.

DEFENDANT'S STATEMENT

I have read or have had read to me this form and have initialed each of the items that applies to my case. If I have an attorney, I have discussed each item with my attorney. By putting my initials next to the items in this form, I am indicating that I understand and agree with what is stated in each item that I have initialed. The nature of the charges, possible defenses, and effects of any prior convictions, enhancements, and special allegations have been explained to me. I understand each of the rights outlined above, and I give up each of them to enter my plea.

DEFENDANT'S SIGNATURE _____ DATE _____

ATTORNEY'S STATEMENT

I am the attorney of record for the defendant. I have reviewed this form with my client. I have explained each of the items in the form, including the defendant's constitutional and statutory rights, to the defendant and have answered all of his or her questions with regard to those rights, the other items in this form, and the plea agreement. I have also discussed the facts of the case with the defendant and have explained the nature and elements of each charge; any possible defenses to the charges; the effect of any prior convictions, enhancements, and special allegations; and the consequences of the plea.

I concur in the plea and admissions and join in the waiver of the defendant's constitutional and statutory rights, and I hereby stipulate that there is a factual basis for the plea and refer the court to the ☐ police report ☐ preliminary hearing transcript ☐ probation report ☐ other (*specify*): (*People v. West* (1970) 3 Cal.3d 595.)

ATTORNEY'S SIGNATURE _____ DATE _____

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

INTERPRETER'S STATEMENT

I, having been duly sworn or having a written oath on file, certify that I truly translated this form to the defendant in the language noted below. The defendant stated that he or she understood the contents of the form and then initialed and signed the form.

Language: ☐ Spanish ☐ Other (*specify*):

INTERPRETER'S SIGNATURE _____ DATE _____

INTERPRETER'S NAME (TYPE OR PRINT) _____

DISTRICT ATTORNEY'S STATEMENT

I have read this form and understand the terms of the plea agreement.

I ☐ agree ☐ do not agree with the terms of the plea agreement and the indicated sentence.

ATTORNEY'S SIGNATURE _____ DATE _____

COURT'S FINDINGS AND ORDER

The court, having reviewed this form (and any addenda), and having orally examined the defendant, finds as follows:

1. The defendant has read or has had read to him or her and understands each of the initialed items in this form.
2. The defendant understands the nature of the crimes and allegations listed in item 1 (on page 1) and the consequences of the plea and any admissions.
3. The defendant expressly, knowingly, understandingly, and intelligently waives his or her constitutional and statutory rights.
4. The defendant's plea, admissions, and waiver of rights are made freely and voluntarily.
5. A factual basis exists for the plea and admissions, or the defendant is pleading pursuant to a plea bargain under *People v. West.*

The court accepts the defendant's plea, admissions, and waiver of rights, and the defendant is hereby convicted based thereon.

It is ordered that this document be filed with the court's records of this case and that the defendant's plea, admissions, and waiver of rights be accepted and entered in the minutes of this court.

JUDGE'S SIGNATURE _____ DATE _____

Item number: 06

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: April 30, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Sealing of and Access to Records (Adopt Cal. Rules of Court, rule 5.850; amend rules 5.552 and 5.840; approve forms JV-597 and JV-598; revise forms JC-590, JV 595 INFO, JV-596, and JV-596-INFO)

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

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

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 24, 2017
Project description from annual agenda: Item 2. Implementation of Legislative Changes from the 2017-2018 Legislative Session
As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.
p) AB 529 (Stone): Juveniles: sealing of records
Ch. 685, Statutes of 2017
Would require, if a person who has been alleged to be a ward of the juvenile court and has his or her petition dismissed or if the petition is not sustained by the court after an adjudication hearing, the court to seal all records pertaining to that dismissed petition that are in the custody of the juvenile court, and in the custody of law enforcement agencies, the probation department, or the Department of Justice.

q) SB 312 (Skinner): Juveniles: sealing of records
Ch. 679, Statutes of 2017
Expands the exception to sealing of juvenile court records to include those cases where a finding on a serious or violent offense is reduced to a misdemeanor.

r) SB 462 (Atkins): Juveniles: case files: access
Ch. 462, Statutes of 2017
Expands the list of who can be allowed to access an otherwise sealed juvenile case file to include law enforcement agencies, probation departments, or other specified agencies for the purposes of data collection and research, provided the court is satisfied that identifying information is protected.

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

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

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: May 24–25, 2018

Title
Juvenile Law: Sealing of and Access to Records

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rule 5.850; amend rules 5.552 and 5.840; approve forms JV-597 and JV-598; revise forms JV-590, JV-595-INFO, JV-596, and JV-596-INFO

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

Agenda Item Type
Action Required

Effective Date
September 1, 2018

Date of Report
April 2, 2018

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

Executive Summary

The Family and Juvenile Law Advisory Committee recommends new and amended rules and new and revised forms to conform to recently enacted statutory provisions concerning the sealing of juvenile records. The proposal would update recently adopted rules and forms to implement sealing of records under Welfare and Institutions Code section 786[1] to include recent changes to that section, modify forms to reflect the authority of the court to seal records for section 707(b) offenses, and adopt a new rule and optional form for use by probation to seal records under newly enacted section 786.5.

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

Recommendation

The Family and Juvenile Law Advisory Committee recommends that the Judicial Council, effective September 1, 2018:

1. Adopt rule 5.850 of the California Rules of Court to implement new statutory provisions providing for the sealing of juvenile records for probation diversion programs;

2. Approve *Probation Department Notice on Sealing of Records After Diversion Program (Welf. & Inst. Code, § 786.5)* (form JV-597) and *Petition to Review Denial of Sealing of Records After Diversion Program* (form JV-598) as optional forms for use in implementation of new provisions on the sealing of juvenile records for probation diversion programs;

3. Amend rule 5.552 of the California Rules of Court to include new statutory and procedural requirements for accessing juvenile case file information for research purposes;

4. Amend rule 5.840 of the California Rules of Court to incorporate recent statutory changes on the sealing of juvenile delinquency records for serious and violent offenses;

5. Revise *Order to Seal Juvenile Records—Welfare and Institutions Code Section* 781 (form JV-590) to clarify that some sealed records should not be destroyed to implement recent changes to Welfare and Institutions Code section 781;

6. Revise *Dismissal and Sealing of Records—Welfare and Institutions Code Section 786* (form JV-596) to allow the court to find that the petition was dismissed before wardship as an alternative to finding that probation was satisfactorily completed consistent with recent changes in section 786.

7. Revise *How to Ask the Court to Seal Your Records* (form JV-595-INFO) and *Sealing of Records for Satisfactory Completion of Probation* (form JV-596-INFO) to include information about the expansion of section 786 and the possibility of record sealing by probation under new section 786.5, and to clarify the much narrower constraints on record sealing by request under section 781 for 707(b) offenses.

The new and amended rules are attached at pages 10–13, and the revised forms are attached at pages 14–24.

Relevant Previous Council Action

Rule 5.552 was originally adopted effective July 1, 1992, as rule 1423 and has previously been amended numerous times, most recently effective January 1, 2018, to implement Judicial Council–sponsored legislation providing access to juvenile case files for an Indian child's tribe. Rule 8.40 was adopted by the Judicial Council effective July 1, 2016, to implement the

provisions of Welfare and Institutions Code section 786.[2] The council adopted form JV-590 effective January 1, 1991, and revised the form effective January 1, 2007, to reflect the renumbered rules of court and revised the form effective July 1, 2016, to make it an optional form and incorporate recent legislative changes in sealing law. *How to Ask the Court to Seal Your Records* (form JV-595-INFO) was adopted effective July 1, 2016, to implement a legislative requirement that the council develop informational materials on how to petition the court to seal juvenile records. *Dismissal and Sealing of Records—Welfare and Institutions Code Section 786* (form JV-596) was approved, and *Sealing of Records for Satisfactory Completion of Probation* (form JV-596-INFO) was adopted effective July 1, 2016, to implement section 786. These forms were both revised effective September 1, 2017, to incorporate recent changes in the law on sealing of records.

Analysis/Rationale

Background

In 2013, the Legislature took action to ensure that all juveniles who come before the court or a probation officer receive information about the process to request sealing of records and required the adoption of a Judicial Council form that can be used to petition the court for sealing under Welfare and Institutions Code section 781 (Assem. Bill 1006 [Yamada]; Stats. 2013, ch. 269). In 2014, the Legislature went a step further by enacting section 786, which requires courts to seal records—without the filing of a petition—for any child 14 years of age or older who was not a serious or violent (707(b)) offender and who satisfactorily completed probation (Sen. Bill 1038 [Leno]; Stats. 2014, ch. 249). That legislation, however, spurred many questions and concerns within the juvenile justice system, and legislation has been enacted in every year since 2014 to clarify the scope and impacts of section 786.

In 2017, the Legislature enacted Assembly Bill 529 (Stone; Stats. 2017, ch. 685), which further amended section 786 to require the court to seal records for any case that it dismisses on the motion of the prosecution, on its own motion, or because the petition is not sustained after an adjudication hearing. AB 529 also enacted section 786.5, which requires the probation department to seal the records of any juvenile who successfully completes a diversion program for an arrest that does not lead to the filing of a petition with the juvenile court and to notify any agency overseeing the diversion program to seal its records. This sealing would result in the arrest being deemed not to have occurred. If the probation department determines that the diversion program was not successfully completed, section 786.5 requires that notice of that determination be provided to the individual and that the individual have an opportunity to petition the court for a review of that determination. Also enacted in 2017 was Senate Bill 312 (Skinner; Stats. 2017, ch. 679), which clarified that records for section 707(b) offenses can be sealed under section 786 if the offense was reduced to a misdemeanor and authorized courts to seal other 707(b) records—other than those for registerable sex offenses under section 290.008—under section 781, as long as access to those records is provided under specified circumstances.

[2] Hereinafter, all statutory references are to the Welfare and Institutions Code unless otherwise specified.

Finally, the Legislature, in 2017, enacted Senate Bill 462 (Atkins; Stats. 2017, ch. 462), which presents specific standards for accessing juvenile case files for data collection and research purposes, with specific confidentiality protections required.

Rule and forms proposals to implement amendments to section 786

Because section 786 has been expanded to require the court to seal records when it dismisses a petition without finding the child a ward of the delinquency court, amendments and revisions to the rule and forms to implement section 786 are proposed, as follows, to reflect this expansion. Section 786 was also amended to clarify that a 707(b) offense that has been reduced to a misdemeanor is eligible for sealing, and changes have been made to the rule to reflect that clarification.

Amended rule 5.840. This rule describes the procedures for the court to seal records under section 786. Now that the court must seal records if it dismisses a case before wardship in the same manner that it currently seals records for satisfactory completion of probation, the rule must incorporate this expansion of the statute.

Revised form JV-596. To assist courts in implementing the new requirements of section 786, the council approved optional sealing order form JV-596, *Dismissal and Sealing of Records—Welfare and Institutions Code Section 786,* effective July 1, 2016. For this form to be used to seal records under newly enacted section 786(e), it needs to be revised to allow the court to find that the petition was dismissed before wardship as an alternative to finding that probation was satisfactorily completed.

Rules and forms proposals for sealing by probation for diversion cases

Newly enacted section 786.5 requires the probation department to seal records for diversion cases when the diversion program has been satisfactorily completed and to provide notice that it has sealed the records or, if it has not, the reason for not doing so. It also provides the right to petition the court for review of a determination that records should not be sealed. A new rule and new optional forms, described immediately below, are proposed to implement this new statute.

New rule to implement probation diversion sealing. Rule 5.850 implements newly enacted section 786.5. The rule specifies the time frame within which probation must notify the child about whether his or her records have been sealed. It also specifies that if probation does not seal the records because it does not find satisfactory completion of the program, it must provide the child with a statement of its reasons and a form for the child to complete to ask the court to review that determination if desired. These procedures include a requirement that the probation department file with the court any such request for review, that the court appoint counsel for any child seeking such review at or before the hearing consistent with the requirement in section 634, and that the court appoint counsel for any child alleged to be a 601 or 602 unless the right to appointed counsel has been knowingly waived by the child.

New forms to provide notice of sealing and to request court review. The two optional forms for implementation of probation diversion sealing are proposed so all probation departments will have a tool for compliance with the new sealing requirements of section 786.5 and the new option for the diversion participant—whose records are not sealed—to petition the court for review of the determination that he or she did not satisfactorily complete the program. The optional form petition for review of nonsatisfactory completion includes simple instructions, and provides a means for probation departments to comply with the requirements in new rule 5.850 that they provide a form to seek review when they give notice of nonsealing.

Form changes to implement amendments to section 781 allowing for sealing of 707(b) offenses

Before the enactment of SB 312, records for offenses committed by individuals aged 14 or older listed in section 707(b) were ineligible for sealing under section 781. Now those records can be sealed under specific circumstances as long as they are not sealed for 707(b) sex offenses that require registration under Penal Code section 290.008. However, access to these records is allowed in future proceedings for a variety of reasons, and the prohibition on the destruction of the court's records of these offenses remains. In addition to updating various information forms, as discussed below, this proposal would revise optional *Order to Seal Juvenile Records—Welfare and Institutions Code Section 781* (form JV-590) to allow the court to specify that the court records will not be destroyed under section 781(d) as an alternative to setting a destruction date. In addition, because the court may be sealing only selected offense records, the form will include a new table modeled on one used on a Superior Court of Los Angeles County form that will allow the court to grant and deny sealing orders on the same form to clarify for law enforcement and other agencies which offense records should be sealed.

Record sealing information form revisions[3]

The Judicial Council has two sealing-specific informational forms that describe the law concerning record sealing for different audiences and contexts, each of which is proposed to be updated to reflect the changes in sealing law discussed above. Form JV-596-INFO is to be given at the termination of the case to wards whose records are sealed under section 786, and form JV-595-INFO is for those wards whose cases are not dismissed under section 786 and who need information about petitioning the court for the sealing of records under section 781. Both of these forms need to be revised to include information about the expansion of section 786 and the possibility of record sealing by probation under new section 786.5, and to clarify the much narrower constraints on record sealing by request under section 781 for 707(b) offenses. Because record sealing under section 786.5 is narrower than under section 786, the committee is recommending that the information about diversion sealing be placed primarily on the JV-595-INFO with the JV-596-INFO remaining focused on cases in which records have been sealed under section 786.

[3] Revisions to form JV-060 to reflect record sealing changes are included in another Judicial Council report for this meeting titled: *Juvenile Law: Information for Parents*.

Amendments to rule 5.552 to implement section 827.12 access for data collection and research

Rule 5.552 presents the procedures for accessing juvenile case files and provides that any access that is unauthorized under section 827 or 828 requires that a petition be filed with the juvenile court. Newly enacted section 827.12 allows law enforcement, probation, the court, the Department of Justice, and other state and local agencies with custody of a juvenile delinquency case file to access those records for data collection or reporting requirements imposed under the terms of a grant or as required by state or federal law, provided that personally identifying information is not released. In addition, it gives provisions for a chief probation officer to make a request of the juvenile court that access and data be provided from juvenile delinquency case files and related juvenile records in the possession of the probation department for the purpose of data sharing or research, provided that the court finds that the methodology to protect confidentiality is sound and that any personally identifying information that is accessed is not further released. To ensure that rule 5.552 is not in conflict with section 827.12, it needs to be amended to incorporate cross-references to the statute and to include the required findings that the court must make before authorizing the release of information from confidential files.

Comments

This proposal circulated for comment as part of the winter 2018 invitation-to-comment cycle, from December 15, 2017, to February 9, 2018, to the standard mailing list for family and juvenile law proposals. Included on the list were appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks, attorneys, social workers, probation officers, and other juvenile law professionals. Nine organizations and the Joint Rules Subcommittee of the Trial Court Presiding Judges and Court Executives Advisory Committees provided comment: one agreed with the proposal, seven agreed with the proposal if modified, and two did not indicate a position but provided comments. In addition to the comments discussed below, the committee adopted numerous technical and clarifying changes suggested by various commentators. A chart with the full text of the comments received and the committee's responses is attached at pages 25–61.

Guidance and forms for probation implementation of diversion sealing useful. The proposal circulated for comment by the committee included an optional form and rule guidance for implementation of new section 786.5 by probation departments that are authorized to seal diversion program records for those who satisfactorily complete such programs in lieu of having a petition filed in court. The committee sought specific comment on whether it was optimal to provide some structure for that process in the rules of court and whether probation departments would benefit from having an optional form available to fulfill their statutory obligations. While one commentator was ambivalent about the value of these tools, the remainder opined that clear guidance and optional forms would assist probation in carrying out its duties under section 786.5. The committee did take a closer look at the text of the rule and worked to clarify the timelines and expectations in rule 5.850 for probation in a manner that would not be burdensome or unworkable.

Probation filing of petition for court review of nonsealing of diversion cases is most workable approach. The committee sought specific comment on whether rule 5.850 should direct that probation be responsible for filing a petition to the court from a child seeking review of a decision by probation that the diversion program was not satisfactorily completed. Most commentators were clear that probation should do so only if the child were seeking to have the decision reviewed, and some felt that the option should be available for the child to file the petition directly or for a child's attorney to file the petition directly. Because it would be very logistically challenging for an unrepresented child to file a petition directly in a delinquency court—since these courts are not typically set up to accept filings from the public—the committee drafted the rule to provide that petitions be submitted by the child to probation for filing with the court. This practice is consistent with the practice for the filing of petitions to seal delinquency records under section 781, which are also required to be filed by the probation department. Because very few probationers in diversion programs will have appointed counsel, as they have not yet been subject to court proceedings, the committee also felt it would be clearer and less confusing to craft the rule around the practice that would impact the vast majority of petitioners and ensure that instructions on how to seek review of a denial of sealing could be simple and straightforward for all petitioners to follow.

Appointment of counsel is required under existing statutory requirements. New section 786.5, which requires the court to hear any requests for a review of a probation determination that a child has not satisfactorily completed probation, does not provide express guidance on whether counsel for a child should be appointed to represent his or her interests at the hearing. The committee sought specific comment on this issue and received a wide range of responses, with some commentators urging that counsel be appointed as a rule and others suggesting that the court have discretion to appoint counsel if needed and/or based on the ability of the petitioner to afford counsel. The committee reviewed the statute on appointment of counsel in delinquency cases, section 634, which provides that the court may appoint counsel in any case when the child cannot afford it, and must appoint counsel regardless of ability to pay in any case in which it is alleged that the child is described by section 601 or 602.

Because the probation diversion programs whose satisfactory completion is at issue in these hearings are taking place because the child is alleged to come under the description of section 601 or 602 and the diversion program is agreed to by the child in lieu of filing a petition, the committee concluded that the mandatory appointment requirements would come into play once the child came before the court to challenge the probation department's determination on sealing. As a result, the committee drafted the rule to require appointment of counsel at or before the hearing in all cases.

Information regarding probation diversion sealing should be placed on general sealing information form. Courts and probation agencies are statutorily required to provide information on record sealing to all juvenile probationers at the termination of their cases. Because section 786 provides that records for some probationers are sealed as a matter of law by the court at the end of their cases if they satisfactorily complete probation (or immediately if their case is

dismissed prior to the court imposing a disposition), there are two different information forms that can be used to fulfill this duty: one is specifically for those whose records have been sealed, and one is for the remainder who will need to petition the court at a later date to seal juvenile case records. As circulated for comment, the proposal added the information about record sealing in diversion cases primarily to the form to be given to those whose cases are sealed under section 786 because in a somewhat similar manner, records are sealed by probation without a petition. However, a number of commentators pointed out that sealing under section 786.5 is not as broad in scope (it does not, for example, include any arrest records) and it does not result in dismissal because there is no court case to dismiss.

In addition, it was noted that some of these diversion participants may wish to seek sealing of the additional records under section 781 at a later date. Given these distinctions and the need to provide information about petition sealing under section 781 to these youth, the committee opted to relocate the information about probation diversion sealing to the information form that is not specific to section 786 (JV-595-INFO) and leave the JV-596-INFO focused solely on explaining sealing under section 786. Form JV-596-INFO also includes a reference to form JV-595-INFO for those who may have multiple cases and need to seek additional sealing by petition.

Provisions for counsel for children to object to release of case file information for human subjects–research need clear timelines. In modifying rule 5.552 to allow for release of case file information pursuant to newly enacted section 827.12, which provides that information can be released with court approval for research purposes, the committee sought to provide some protection for the privacy interests of the subjects of the files in the event the research would involve human subjects–interactions. To accomplish this end, the rule was drafted to require that notice of such a request for information release be provided to the office of the public defender in the county and to allow that office to respond to such a request with any concerns or objections. The Chief Probation Officers of California, who sponsored the legislation that enacted section 827.12, submitted a comment asking that the committee work with probation to identify a timeline and procedure for such notice and objection in the rule to ensure that it would not lead to undue delay in those unusual cases in which human subjects–research is contemplated. The committee modified the rule accordingly to set time frames for objections to be filed and a hearing on the matter to be set.

Alternatives considered

The committee considered not proposing a form for probation to comply with section 786.5, allowing each county to develop a solution to meet its own needs, but concluded that, as an optional form, the proposed form would not interfere with local efforts to implement the section. The committee also considered limiting the rule of court on section 786.5 to the court review process but determined that the process was intertwined with the notice requirements for probation under the statute and thus drafted the rule to include general procedures for probation to follow consistent with the statute. The committee considered allowing petitioners seeking review of a denial of diversion sealing to file directly with the court but deemed that unnecessarily difficult for the young people involved, and there was some support on the

committee for probation having at least 60 days to file the review petition to assist those jurisdictions with limited resources. However, the committee concluded that 30 days should be sufficient given that the petition would already be completed. Finally, the committee considered making appointment of counsel discretionary with the court or contingent on inability to pay but determined that under section 634, appointment would be mandatory.

Policy implications

One commentator noted that because of additional record sealing in diversion cases, other agencies would have less case information available to assess the needs of a young person who might be involved in both the child welfare and juvenile justice systems. The committee notes this concern but cannot address it since the statute does not make an exception to allow access to diversion case files for this purpose.

Fiscal and Operational Impacts

Printing costs may be incurred to replace any existing stock of the mandatory sealing information forms. Some courts may incur programming charges if electronic case management systems are used for the court orders, and they opt to use the optional revised order forms. In addition, all of the sealing law changes will result in more cases being eligible for sealing under sections 781 and 786, and thus will create additional court workload as will the option to seek review under section 786.5, which will bring cases into the court that otherwise would not have required a court file or intervention (although this influx may be partially offset by filing of fewer 781 petitions for diversion cases overall). All of these impacts are a result of the legislative changes and are necessary to make the rules and forms legally accurate. In addition, because the informational forms are available in other languages, there will be costs to translate the revised forms. Finally, courts have pointed out the need for staff time and resources to be dedicated to training and the development of procedures to implement the new rules, forms, and statutory requirements.

Attachments and Links

1. Cal. Rules of Court, rules 5.552, 5.840, and 5.850, at pages 10–13
2. Judicial Council forms JV-590, JV-595-INFO, JV-596, JV-596-INFO, JV-597, and JV-598, at pages 14–24
3. Chart of comments, at pages 25–61
4. Assembly Bill 529, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB529*
5. Senate Bill 312, *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB312*
6. Senate Bill 462 *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB462*

Rule 5.850 of the California Rules of Court is adopted and rules 5.552 and 5.840 are amended, effective September 1, 2018, to read:

Rule 5.552. Confidentiality of records (§§ 827, 827.12, 828)

(a) * * *

(b) Petition

Juvenile case files may ~~only~~ be obtained or inspected only in accordance with sections 827, 827.12, and 828. They may not be obtained or inspected by civil or criminal subpoena. With the exception of those persons permitted to inspect juvenile case files without court authorization under sections 827 and 828, and the specific requirements for accessing juvenile case files provided in section 827.12(a)(1), every person or agency seeking to inspect or obtain juvenile case files must petition the court for authorization using *Request for Disclosure of Juvenile Case File* (form 7-570). A chief probation officer seeking juvenile court authorization to access and provide data from case files in the possession of the probation department under section 827.12(a)(2) must comply with the requirements of subdivision (e) of this rule.

(1)–(2) * * *

(c)–(d) * * *

(e) Release of case file information for research (§ 872.12(a)(2))

The court may authorize a chief probation officer to access and provide data contained in juvenile delinquency case files and related juvenile records in the possession of the probation department for the purpose of data sharing or conducting or facilitating research on juvenile justice populations, practices, policies, or trends if the court finds the following:

(1) The research, evaluation, or study includes a sound method for the appropriate protection of the confidentiality of an individual whose juvenile delinquency case file is accessed for this purpose. In considering whether a method is sound, the court must have information on:

(A) The names and qualifications of any nonprobation personnel who will have access to personally identifying information as defined in Civil Code section 1798.79.8(b);

(B) Procedures to mask personally identifying information that is shared electronically; and

(C) Data security protocols to ensure that access to the information is limited to those people authorized by the court.

(2) No further release, dissemination, or publication of personally identifying information by the probation department or a program evaluator, researcher, or research organization that is retained by the probation department will take place for research or evaluation purposes.

(3) The disclosure requirements of section 10850 are met if any dependency information in a delinquency file may be disclosed.

(4) A date for destruction of records containing personally identifying information in the possession of nonprobation department personnel has been set to prevent inappropriate disclosure of the records.

If the information is being released for human subject research as defined in 45 Code of Federal Regulations part 46, the probation department must provide notice to the office of the public defender 30 days before the court authorizes the release of the information so that the office has an opportunity to file an objection to the release with the court. If such an objection is filed within the 30 day period the court must set a hearing on the objection within 30 days of the filing of the objection to consider the objection and make a determination on whether and how release of information should be accomplished. Upon receiving authorization, but prior to the release of information, the probation department must enter into a formal agreement with the entity or entities conducting the research that specifies what may and may not be done with the information disclosed.

(ef) Reports of law enforcement agencies (§ 828)

(fg) Other applicable statutes

Rule 5.840. Dismissal of petition and sealing of records (§ 786)

(a) * * *

(b) Dismissal of petition

If the court finds that a minor subject to this rule has satisfactorily completed his or her informal or formal probation supervision, the court must order the petition dismissed. The court must not dismiss a petition if it was sustained based on the commission of an offense listed in subdivision (b) of section 707 when the minor was 14 or older unless the finding on that offense has been dismissed or was

reduced to a misdemeanor or an offense not listed in subdivision (b) of section 707. The court may also dismiss prior petitions filed or sustained against the minor if they appear to the satisfaction of the court to meet the sealing and dismissal criteria in section 786. An unfulfilled order, condition, or restitution or an unpaid restitution fee must not be deemed to constitute unsatisfactory completion of probation supervision. The court may not extend the period of supervision or probation solely for the purpose of deferring or delaying eligibility for dismissal and sealing under section 786.

(c) Sealing of records

For any petition dismissed by the court under section 786, including any petition dismissed before adjudication, the court must also order sealed all records in the custody of the court, law enforcement agencies, the probation department, and the Department of Justice pertaining to those dismissed petition(s) using form JV-596, *Dismissal and Sealing of Records—Welfare and Institutions Code Section 786,* or a similar form. The court may also seal records pertaining to these cases in the custody of other public agencies upon a request by an individual who is eligible to have records sealed under section 786, if the court determines that sealing the additional record(s) will promote the successful reentry and rehabilitation of the individual. The prosecuting attorney, probation officer, and court must have access to these records as specifically provided in section 786. Access to the records for research purposes must be provided as required in section 787.

(d)–(f) * * *

Rule 5.850 Sealing of records by probation in diversion cases (§ 786.5)

(a) Applicability

This rule states the procedures to seal the records of persons who are subject to section 786.5.

(b) Sealing of records

Upon satisfactory completion of a program of diversion or supervision under a referral by the probation officer or the prosecutor in lieu of filing a petition to adjudge the person a ward of the juvenile court, including, but not limited to a program of informal supervision under section 654, the probation department must seal the arrest and other records in its custody relating to the arrest or referral and participation in the program. The probation department must also notify the public or private agency operating the diversion program to which the person has been

referred to seal any records in its custody relating to the arrest or referral and participation in the program, and the operator of the program must do so promptly.

(c) Notice to participant

Within 60 days of the satisfactory completion of a program subject to this rule, the probation department must notify the person in writing that his or her records have been sealed. If the probation department determines that the program has not been completed satisfactorily, it must notify the person in writing of the reason or reasons for not sealing the record and provide the person with a copy of the *Petition to Review Denial of Sealing of Records After Diversion Program* (form JV-598) or similar local form to allow the person to seek court review of the probation department's determination within 60 days of making that determination.

(d) Review of unsatisfactory completion of program by the juvenile court

A person who receives notice from the probation department that he or she has not satisfactorily completed the program and that his or her records have not been sealed may seek review of that determination by the court by submitting a petition to the probation department on the *Petition to Review Denial of Sealing of Records After Diversion Program* (form JV-598) or similar local form, and the probation department must file that petition with the court for a hearing to review whether he or she has met the satisfactory completion requirement and is eligible for record sealing by the probation department. The petition must be provided to the probation department within 60 days of the date the notice from the probation department was sent, and must include a copy of that notice. The probation department must file the petition with the juvenile court in the county that issued the notice within 30 days of receiving it. The clerk of the court must set the matter for hearing and notify the petitioner and the probation department of the date, time, and location of the hearing. The court must appoint counsel to represent the child before or at the hearing unless the court finds that the child has made an intelligent waiver of the right to counsel under section 634 or is already represented. If the court finds after the hearing that the petitioner is eligible for sealing of the records under section 786.5, it must order the probation department to promptly comply with the sealing and notice requirements of this rule.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO:	FOR COURT USE ONLY
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	**DRAFT** **NOT APPROVED BY THE JUDICIAL COUNCIL**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
ORDER TO SEAL JUVENILE RECORDS— WELFARE AND INSTITUTIONS CODE SECTION 781	CASE NUMBER:

1. Name of the petitioner *(specify aliases):* Date of birth:

2. a. Date of hearing: Dept.: Room:
   b. Judicial officer *(name):*

3. ☐ The court has read and considered the petition and the report of the probation officer.

THE COURT ORDERS

4. a. ☐ The petition for sealing of petitioner's juvenile records in the custody of this court and the courts, agencies, and officials named below is granted or denied as specified below:

Petition/Case Number	Incident Number	Offense Date	Arresting Agency	Violations	Disposition (Sealing or Denial)

   ☐ See attachment (5) for additional orders.
   b. The destruction or retention of all sealed records according to Welfare and Institutions Code section 781(d).
   c. ☐ Date court records must be destroyed: ☐ Court records must be retained.
   d. Date all other records must be destroyed:

5. ☐ Petitioner is relieved from the registration requirements under Penal Code section 290, and the registration information in the custody of the Department of Justice and other agencies and officials listed above shall be destroyed.

6. The clerk will send a certified copy of this order to the clerk in each county in which a record is ordered sealed and a copy to each agency and official listed above.

Date:

JUDICIAL OFFICER OF THE SUPERIOR COURT

[SEAL]

CLERK'S CERTIFICATE

I certify that the foregoing is a true and correct copy of the original on file in my office.

Date: Clerk, by _____, Deputy

Form Approved for Optional Use
Judicial Council of California
JV-590 [Rev. September 1, 2018]

Penal Code, § 290;
Welfare and Institutions Code, § 781
Cal. Rules of Court, rules 5.504, 5.830
www.courts.ca.gov

JV-595-INFO How to Ask the Court to Seal Your Records

If you were arrested or subject to a court proceeding or had contact with the juvenile justice system when you were under 18, there may be records kept by courts, police, schools, or other public agencies about what you did. If the court makes those records **private** (sealed), it could be easier for you to:

- Find a job.
- Get a driver's license.
- Get a loan.
- Rent an apartment.
- Go to college.

If the court sealed your records when probation was terminated, you do not need to ask for them to be sealed.

There are now three ways that records may be sealed in California. As of January 1, 2015, courts are required to seal records in certain cases when the court finds that probation (formal, or informal) is satisfactorily completed or if your case was otherwise dismissed after the petition was filed. If the court sealed all of your records at the end of your case, you should have received a copy of the sealing order, and you do not need to ask the court to seal the records in that sealing order.

For more information about when the court seals your records at the completion of probation, see form **JV-596-INFO.**

If probation sealed your diversion records for satisfactory completion, you may wish to ask the court to seal any remaining records of your behavior.

As of January 1, 2018, if you participate in a diversion program or other supervision program instead of going to court, and the probation department determines that you satisfactorily completed that program, the probation department will seal your probation department records and the records for any program you were required to complete. If the probation department determines that you did not satisfactorily complete the program, it will not seal those records, but will give you a form to tell you why and a form that you can use to tell the court why you think you did satisfactorily complete the program. If the court agrees with you, it will order your probation and program records sealed. Because probation did not seal any arrest records at this time, you may want to ask the court to seal any other records relating to this conduct when you are eligible to ask for record sealing as explained on this form.

If you have more than one juvenile case or contact and/or are unsure if your records were sealed by the court, ask your attorney or probation officer or the juvenile court clerk in the county where you had a case or contact.

Who qualifies to ask the court to seal their juvenile records?

If the court has not already sealed your records, you can ask the court to make that order, if:

- You are at least **18** or it has been at least five years since your case was closed; and
- You have been rehabilitated to the satisfaction of the court.

What if you owe restitution or fines?

The court may seal your records even if you have not paid your full restitution order to the victim.

The court will not consider outstanding fines and court ordered fees when deciding whether to seal your records, but you are still required to pay the restitution, fines, and fees, and your records can be looked at to enforce those orders.

When do you *not* qualify to seal your records?

- If you were convicted as an adult of an offense involving moral turpitude, such as:
  - A sex or serious drug crime;
  - Murder or other violent crime; or
  - Forgery, welfare fraud, or other crime of dishonesty.
- If, when you were 14 or older, the court found that you committed a sex offense listed in Welfare and Institutions Code section 707(b) for which you must register under Penal Code section 290.008 because you were paroled from the Department of Juvenile facilities.

If you are unsure if you qualify, ask your attorney.

Who can see your sealed records?

- DMV can see your vehicle and traffic records and share them with insurance companies.
- The court may see your records if you are a witness or involved in a defamation case.
- If you apply for benefits as a nonminor dependent, the court may see your records.
- A prosecuting attorney may see your records that were sealed for an offense listed under Welfare and Institutions Code section 707(b) in a later proceeding for the reasons listed in section 781(d).

Judicial Council of California, *www.courts.ca.gov* Rev. September 1, 2018, Mandatory Form
Welfare and Institutions Code, §§ 781(b), 786, 786.5; Evid. Code, § 788
Cal. Rules of Court, rules 5.830, 5.840, 5.850

- If your sealed record was for a 707(b) offense when you were 14 or older, the prosecutor, probation, and the court may unseal your records if you are charged with a later felony.
- You can request the court to unseal your records if you want to have access to them or allow someone else to see them.

Can employers see your records if they are not sealed?

Juvenile records are not allowed to be disclosed to most employers, and employers are not allowed to ask about or consider your juvenile history in most cases. There are exceptions to this rule if you are applying to be a peace officer or to work in health settings. Also, federal employers may still have access to your juvenile history. You should seek legal advice if you have questions of what an employer can ask about you.

How do you ask to have your records sealed?

1. You must fill out a court form. Form JV-595, *Request to Seal Juvenile Records,* at *www.courts.ca.gov/forms.htm,* can be used, or your court may have a local form.
2. When you file your petition, the probation department will compile a list of every law enforcement agency, entity, or person the probation department knows has a record of your case, as well as a list of any prior contacts with law enforcement or probation, and attach it to your petition.
3. If you think there are agencies that might have records on you that were never sent to probation, you need to name those agencies, or the court will not know to seal those records.

   If you are not sure what contacts you might have had with law enforcement, you can get your criminal history record from the Department of Justice. See *http://oag.ca.gov/fingerprints/security* for more information.
4. Take your completed form to the probation department where you were on probation. (If you were not on probation, take your form to any county probation office where you have a juvenile record.) Note: A small number of counties require you to take your form to the court. More information on each county's specific requirements is available at *www.courts.ca.gov/28120.htm*.
5. If you are 26 years of age or older, you may have to pay a fee. If you cannot afford the fee, ask the probation department or the court about a fee waiver.
6. Probation will review your form and submit it to the court within 90 days, or 180 days if you have records in two or more counties.
7. The court will review your petition. The court may decide right away to seal your juvenile records, or the court may order a hearing. If there is a hearing, you will receive a notice in the mail with the date, time, and location of the hearing. If the notice says your hearing is "unopposed" (meaning there is no disagreement with your request), you may choose not to go.
8. If you qualify to have your juvenile records sealed, the court will make an order to seal the eligible records listed on your petition.
   ***Important!* The court can seal only records it knows about. Make sure you list *all* records from *all* counties where you have any records. The court will tell you if it does not seal records from another court that were listed on your petition, and you will need to file a petition in that county to seal those records.**
9. If the court grants your request, it will order each agency, entity, or person on your list to seal your records. The court will also order the records destroyed by a certain date. If the sealed records are for a 707(b) offense committed when you were 14 or older, the court will not order those records destroyed.
10. The court will provide you with a copy of its order. Be sure to keep it in a safe place.

What about sex offender registration? (Penal Code, § 290)

If the court seals a record that required you to register as a sex offender, the order will say you do **not** have to continue to register.

If your records are sealed, do you have to report the offenses in the sealed records on job, school, or other applications?

No. Once your records are sealed, the law treats those offenses as if they did not occur and you do not need to report them. **However**, the military and some federal agencies may not recognize sealing of records and may be aware of your juvenile justice history, even if your records are sealed. If you want to enlist in the military or apply for a job requiring you to provide information about your juvenile records, seek legal advice about this issue.

Questions?

If you are not sure if you qualify to seal your records or if you have other questions, talk to a lawyer. The court is not allowed to give you legal advice. More information about sealing your records can be found at *www.courts.ca.gov/28120.htm*.

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **NOT APPROVED BY THE JUDICIAL COUNCIL**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
DISMISSAL AND SEALING OF RECORDS— WELFARE AND INSTITUTIONS CODE SECTION 786	CASE NUMBER:

1. Name of subject child: Date of birth:

2. a. Date of hearing: Dept.: Room:

   b. Judicial officer *(name):*

3. The court has read and considered the report of the probation officer and any other evidence presented or information provided.

THE COURT MAKES THE FOLLOWING FINDINGS AND ORDERS:

4. ☐ The child has satisfactorily completed a program of informal supervision, probation under section 725, or a term of probation, or ☐ the petition was dismissed before wardship.

5. The petition(s) filed on *(date(s)):* is/are dismissed.

6. The child's juvenile records related to the arrest(s) on *(date(s)):*
   regarding an alleged violation of *(specify offense(s)):*
   in the custody of this court and of the courts, agencies, and officials listed below are ordered sealed:
   - ☐ Probation Dept. *(specify county):*
   - ☐ California Dept. of Justice
   - ☐ Law enforcement agency *(specify all):*
     - ☐ Law enforcement case number(s):

7. ☐ The court finds that sealing the following additional public agency records will promote the successful reentry and rehabilitation of the child and orders sealed the records in their custody relating to petitions and arrests listed in items 5 and 6 sealed:
   - ☐ District Attorney *(specify county):*
   - ☐ School:
   - ☐ Department of Motor Vehicles:
   - ☐ Other *(specify):*

   ☐ Attachment. Number of pages attached: _____

CHILD'S NAME:	CASE NUMBER:

8. All records pertaining to the dismissed petition are to be destroyed on the dates stated in this item, and the arrest is deemed never to have occurred except that the prosecuting attorney, probation officer, child welfare agency, court, and the subject of the order may access these records for the specific purposes stated in Welfare and Institutions Code section 786.

   a. Date court records must be destroyed:

   b. Date all other records must be destroyed:

9. The clerk shall send a certified copy of this order to the clerk in each county in which a record is ordered sealed and one copy each to the child, the child's attorney, and the agencies and officials listed in items 6 and 7.

Date:

_____
JUDICIAL OFFICER OF THE SUPERIOR COURT

[SEAL]

CLERK'S CERTIFICATE

I certify that the foregoing is a true and correct copy of the original on file in my office.

Date: Clerk, by _____, Deputy

JV-596-INFO Sealing of Records for Satisfactory Completion of Probation

In many cases, the court will seal your juvenile records if you satisfactorily complete probation (formal or informal supervision).

If your case is terminated by the juvenile court after January 1, 2015, because you satisfactorily completed your probation (formal or informal), or if your case was otherwise dismissed after the petition was filed, in many cases, the court will have dismissed the petition(s) and sealed your records. If the court sealed your records for this reason, you should have received a copy of the sealing order with this form.

If the court finds you have not satisfactorily completed your probation, it will not dismiss your case and will not seal your records at termination. If you want to have your records sealed in this situation, you will need to ask the court to seal your records at a later date (**see form JV-595-INFO** for information about asking the court to seal your records).

The court will not seal your records at the end of your case if you were found to have committed an offense listed in Welfare and Institutions Code section 707(b) (a violent offense such as murder, rape, or kidnapping, and some offenses involving drugs or weapons) when you were 14 or older unless it was not dismissed or reduced to a misdemeanor or a lesser offense not listed in 707(b), but unless you were found to have committed one or more of certain sex offenses, you can ask the court to seal your records at age 18 (or age 21 if you were committed to the Division of Juvenile Facilities).

How will the court decide if probation is satisfactorily completed?

If you have done what you were ordered to do while on probation and have not been found to have committed any further crimes (felonies or misdemeanor crimes involving moral turpitude, such as a sex crime or a crime involving dishonesty), the court will find that your probation was satisfactorily completed even if you still owe restitution, court ordered fees, and fines, **BUT...**

Restitution and court fines and fees must still be paid.

Even if your records are sealed, you must still pay your restitution and court-ordered fees and fines. Your sealed records can be looked at to enforce those orders.

Which records will be sealed?

The court will order your court, probation, Department of Justice, and law enforcement agency records sealed for the case the court is closing and earlier cases, if the court determines you are eligible. If you or your attorney ask the court, it can also seal records of other agencies (such as the District Attorney's office) if it finds that doing so would help you to be rehabilitated.

If you have more than one juvenile case and are unsure which records were sealed, ask your attorney or probation officer.

Who can see your sealed records?

- If your records were sealed by the court at termination, the prosecutor and others can look at your record to determine if you are eligible to participate in a deferred entry of judgment or informal supervision program.
- If you apply for benefits as a nonminor dependent, the court may see your records.
- If a new petition is filed against you for a felony offense, probation can look at what programs you were in but cannot use that information to keep you in juvenile hall or to punish you.
- If the juvenile court finds you have committed a felony, your sealed records can be viewed to decide what disposition (sentence) the court should order.
- If you are arrested for a new offense and the prosecuting attorney asks the court to transfer you to adult court, your record can be reviewed to decide if transfer is appropriate.
- If you are in foster care, the child welfare agency can look at your records to determine where you should live and what services you need.
- If your case was dismissed before you became a ward, the prosecutor can look at your records for six months after the dismissal in order to refile the dismissed petition based on new information or evidence.
- If you want to see your records or allow someone else to see them, you can ask the court to unseal them.

  NOTE: Even if someone looks at your records in one of these situations, your records will stay sealed and you do not need to ask the court to seal them again.

Do you have to report the offenses in the sealed records on job, school, or other applications?

No. Once your records are sealed, the law treats those offenses as if they did not occur and you do not need to report them. **However,** the military and some federal agencies may not recognize sealing of records and may be aware of your juvenile justice history, even if your records are sealed. If you want to enlist in the military or apply for a job that asks you to provide information about your juvenile records, seek legal advice about this issue.

Can employers see your records if they are not sealed?

Juvenile records are not allowed to be disclosed to most employers, and employers are not allowed to ask about or consider your juvenile history in most cases. There are exceptions to this rule if you are applying to be a peace officer or to work in health settings. Also, federal employers may still have access to your juvenile history. You should seek legal advice if you have questions of what an employer can ask about you.

PROBATION DEPARTMENT NOTICE ON SEALING OF RECORDS AFTER DIVERSION PROGRAM (WELF. & INST. CODE § 786.5)	Probation Dept., County of: **DRAFT NOT APPROVED BY THE JUDICIAL COUNCIL**
CHILD'S NAME:	

1. Name of subject child: Date of birth:

2. a. Date of completion of diversion program: or date diversion program was not satisfactorily completed:
   b. ☐ Probation officer *(name):*

3. **RECORDS ARE SEALED**
   ☐ The subject child has successfully completed a program of diversion or supervision after referral by the probation officer or prosecutor in lieu of the filing of a petition to adjudge the child a ward of the juvenile court. All records relating to the arrest or referral and participation in the program for an alleged violation of *(specify offense(s)):*
   (date of offense): in the department's custody have been sealed, and the arrest is deemed never to have occurred except that a probation department responsible for the supervision of a person may access this record for the purpose of complying with section 654.3(e).

   The probation department hereby notifies the following public or private agencies operating the diversion program to which the child was referred that it must promptly seal any records relating to the juvenile's arrest or referral or participation in the program in its custody:
   (Specify agency):
   (Specify agency):

4. **PROGRAM COMPLETION IS UNSATISFACTORY—RECORDS ARE NOT SEALED**
   ☐ The probation department has determined that sealing is inappropriate because the program was not satisfactorily completed for the reasons stated below and has not sealed the child's records. A copy of form JV-598, *Petition to Review Denial of Sealing of Records After Diversion Program,* has been provided to the child to allow the child to seek juvenile court review of this determination.

Form Approved for Optional Use
Judicial Council of California
JV-597 [New September 1, 2018]

PROBATION DEPARTMENT NOTICE ON SEALING OF RECORDS AFTER DIVERSION PROGRAM (WELF. & INST. CODE § 786.5)

Welfare and Institutions Code, § 786.5
www.courts.ca.gov

CHILD'S NAME:	Probation Dept., County of:

5. The probation department must send a copy of this order to the child, the child's attorney, and the agencies and officials listed in item 3 within 60 days of the completion of the program.

Date:

PROBATION OFFICER

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **NOT APPROVED BY THE JUDICIAL COUNCIL**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CHILD'S NAME:	
PETITION TO REVIEW DENIAL OF SEALING OF RECORDS AFTER DIVERSION PROGRAM	CASE NUMBER: Date: Time: Department:

INSTRUCTIONS

- Use this form if you received a notice from a probation officer saying that you did not satisfactorily complete your diversion program and you want the court to review this determination so that your records can be sealed. You must give this form to probation with in 60 days of receiving the notice of unsatisfactory completion if you want a court review.
- How to fill out the form:
  - A. Put your name and contact information in the box at the top of the form and in item 1 below.
  - B. Put the address of the juvenile court in the county where you were on probation for the offense.
  - C. In item 2, put the reasons why you think that you did satisfactorily complete your diversion program.
  - D. Check the box in item 5 if you need an interpreter, and specify the language.
  - E. Attach the notice from probation telling you that you did not satisfactorily complete your diversion program.
  - F. Give the completed form to probation to file with the court.

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

1. **MY INFORMATION**

   My name is:
   I was born on *(date):*

2. **WHY COMPLETION OF DIVERSION SHOULD BE DETERMINED BY THE COURT TO BE SATISFACTORY**

   For the reasons stated below, I believe that I satisfactorily complied with the reasonable terms of program participation that were within my capacity to perform.

Form Approved for Optional Use
Judicial Council of California
JV-598 [New September 1, 2018]

Welfare and Institutions Code, § 786.5
www.courts.ca.gov

CHILD'S NAME:	CASE NUMBER:

3. **ATTACHMENT OF PROBATION NOTICE**

I have attached a copy of the notice from the probation department determining that I did not complete my program satisfactorily (form JV-597 or similar local form) to this form.

4. **REQUEST FOR INTERPRETER**

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

Date:

▶ _____

SIGNATURE of PETITIONER

INSTRUCTIONS—AFTER YOU COMPLETE THIS FORM

Give this form and the attached copy of the notice from probation to the probation officer or department that gave you the notice. The probation department will file it with the court within 30 days and tell you when and where to come to court for your hearing. If you do not have an attorney, the court will appoint one for you before or at the hearing.

W18-06

Juvenile Law: Sealing of and Access to Records (Adopt Cal. Rules of Court, rule 5.850; amend rules 5.552 and 5.840; approve forms JV-597 and JV-598; revise forms JC-590, JV-595-INFO, JV-596, and JV-596-INFO)

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

	Commentator	Position	Comment	Committee Response
1.	Craig Burch, Chief Probation Officer, County of Napa	NI	General comments/Questions: 1. WIC 786.5 reads "upon satisfactory completion of a program of diversion or supervision to which a juvenile is referred by the probation officer or the prosecutor in lieu of the filing of a petition to adjudge the juvenile a ward of the juvenile court, including a program of informal supervision pursuant to Section 654, the probation department shall seal the arrest and other records in its custody relating to the juvenile's arrest or referral and participation in the diversion or supervision program." This code clearly applies to 654 cases. What about subsequent petitions for a fairly minor offense (e.g. petty theft) wherein the DPO gives an informal sanction? What about truancy cases wherein we place them on a 90 day contract and then successfully terminate? What about cases handled through citation diversion pursuant to WIC 256? And a scenario that happens quite frequently is petitions that we receive and dismiss due to a variety of reasons or petitions that we close out after referring them out but not placing them on a contract? 2. Specific to having diversion or other informally handled cases sealed, is there a limit? A youth only has one bite at 654.2 but this seems to make other informally handled cases to be unlimited. Also, under what circumstances are we allowed to unseal and view the information?	A plain reading of section 786.5 appears to limit to situations in which the program or referral is in lieu of filing a petition, meaning that no petition has yet been filed, it should apply to situations outside section 654, but only if the supervision is "in lieu of the filing of a petition." The draft rule of court uses the statutory language for clarity and breadth. Section 786.5(e) specifically allows access to the case file for compliance with WIC 654.3 which does not allow participation in multiple 654 programs, thus sealing should not result in additional opportunities to participate in pre-petition diversion or other informal supervision.

	Commentator	Position	Comment	Committee Response
			3. Firearm restrictions are often placed on our youth when disposition is made. The court is routinely sealing cases but allowing the firearm restriction to stand. Our county counsel has advised us to seal everything and leave it to the court to notify DOJ. Has anybody received different guidance?	*In re Joshua R.*, 7 Cal.App.5th 864 (2017) held that the court should maintain the order not to possess firearms until the subject of the order was 30. Legislation has been introduced in the current session (see SB 1281) that would expressly provide that records pertaining to firearms restrictions be maintained until age 33.
			4. Most of our youth have submitted DNA at time of arrest. We approached our DA, PD, and CC. Case law supports the DNA remaining in the database. Has anybody received different guidance?	Penal Code section 299 does not provide that if records are subsequently sealed that the DNA must be expunged.
			5. Straight diversion cases are often referred to several different programs (e.g. volunteer community service, drug education, anger management, etc.). Some of these referrals are done because it is clearly needed but not necessarily a requirement for satisfactory completion. Do we have to direct referral agencies to seal their records when no case information was provided?	Section 786.5 applies to records for any program that the child has been referred to as part of the program thus any agency that served the child as part of the diversion should be directed to seal its files.
			Judicial Council Questions: 1) Does the proposal appropriately address the stated purpose? Please note our concerns regarding Section 786.5 W&IC as indicated below: • It is not clear whether the legislators	The commentator correctly notes that WIC 786.5 does not address records of the arrest in the

	Commentator	Position	Comment	Committee Response
			intended to seal any and all records created by the arresting agencies or DOJ as well, since a read of Section 786.5(a) W&IC, as written currently, only mandates the probation departments to seal the related records in their possession and in the possession of a public or private agency operating a diversion program to which the youth was referred to. So, what about the J132s created by another law enforcement agency? How about the DOJ records? Are they going to be sealed under Section 786.5 W&IC? Or do we follow Section 781 W&IC to seal those particular records? However, the forms created by the Judicial Counsel (i.e. JV-597) read as if the above agencies are included in the sealing of these records. So, this concept appears to be vague.	custody of an agency other than probation or an agency that is participating in serving the child for diversion. To clarify, the committee has removed references to diversion sealing from the JV-596-INFO and added them to the JV-595-INFO with an instruction that further sealing under section 781 may be desirable.
			• Is the code retroactive? If so, how far back? If so, who has the burden to locate these youth (the unsuccessful ones so they can petition the court)? And if it is probation's burden to locate these youth, would sending a letter to the last known address suffice?	Nothing in the statute indicates that is should be applied retroactively.
			• In case the court determines the PO erred in their assessment of the youth's unsuccessful performance on the diversion/informal program, would the bench order the records sealed pursuant to Section 786.5 W&IC or 781 W&IC?	The court would be making its order pursuant to section 786.5 unless a section 781 petition was filed at the same time and the petitioner was eligible for sealing pursuant to section 781 because that section requires the petitioner to be 18 or for 5 years to have elapsed since the end of the case.

	Commentator	Position	Comment	Committee Response
			2) Is it helpful to probation departments to approve optional form JV-597 for their use, or would it be preferable to rely on local probation notice forms?	
			• The forms are helpful. Thank you. The only issue is that the code has a narrower scope than the form.	The committee has revised the information forms to clarify this point.
			• Orange County would prefer using the proposed form JV-597. It includes the language required and would be accompanied by form JV-598 Petition to Review Denial of Diversion Program Sealing of Records. In the event the youth would like to petition the court to review a denial for sealing (when the youth does not satisfactorily complete diversion), we could simply send the court the JV-597 which explains why it was denied. Additionally, the judicial council is great about updating forms when the law changes. In consideration of the changes that we have experienced every year for the past four years, that would be very helpful.	The committee agrees and will make these forms available as optional forms.
			3) Should proposed new rule 5.850 to implement section 786.5 cover the probation notice requirements or focus only on court procedures to review a determination that a diversion program was not satisfactorily completed?	
			• Riverside County: On one hand, if we	The committee determined that most

	Commentator	Position	Comment	Committee Response
			have specific guidelines to follow though, it would make things easier. On the other hand, a specific set of guidelines might not work for all departments. So, for the latter reason, perhaps, the new rule 5.850 should only cover the court procedure, allowing flexibility for probation procedure.	commentators were in favor of rules spelling out the basic responsibilities of probation in the rule and has maintained and clarified those provisions in rule 5.850.
			• Orange County: It would be much cleaner to include probation notification requirements.	The committee agrees and has maintained and clarified those provisions.
			4) Is it preferable to require the probation department to file a request for review of denial of sealing under section 786.5, or should that burden be on the child?	
			• Riverside County: Looking at the best interest of the child, probation should follow through and be the one to file the request for review of denial of sealing. Even though it might generate more work for the departments, it would be a great assistance for the child.	The committee notes that probation agencies appear to concur that the burden to file the request for review appropriately falls on the probation agency upon request by the child.
			• A hybrid would be great. It is recommended the youth be required to notify the DPO that they would like a review of the denial to seal. Subsequently, the DPO would be required to submit the appropriate paperwork to the court. The juvenile justice system is very confusing and putting the responsibility solely on the youth seems to defeat the purpose of these opportunities	The committee has adopted this approach – the child must request the review, and probation then files the petition for review.

	Commentator	Position	Comment	Committee Response
			5) Is it necessary to appoint counsel for a child who seeks to challenge the denial of sealing under section 786.5, or should appointment be at the discretion of the court? The appointment be at the discretion of the court.	The committee has concluded that a child who is seeking to make an argument at a hearing that probation has erroneously determined that a child has not satisfactorily completed a diversion program is entitled to appointed counsel under section 634 which requires the court to appoint counsel whenever a child appears at a hearing without counsel and there is an allegation that a child may be described by section 601 or 602. Because the diversion programs whose satisfactory completion is at issue in the review hearings are agreed to in lieu of the filing of a 601 or 602 petition, it would appear that such allegations are at stake. As a result the committee has clarified rule 5.850 and form JV-598 to require the court to make such an appointment unless the child has intelligently waived that right or is already represented by counsel.
2.	Jody Green, Division Director, Juvenile Services Superior Court of California, County of Santa Cruz	AM	Overall the suggested rules and edits to existing documents as well as the introduction of new language and forms are helpful to what is becoming a rather complicated area due to the numerous laws changes over the past several years. My only comments pertain to the suggested language in the INFO docs. The language highlighted in yellow suggests the recipient will have also received a copy of their sealing order. In informal and diversion cases, counties may opt to utilize something other than an actual order so this could be confusing.	The committee notes that WIC 786.5 requires that the person be notified in writing, but does not specifically require that it be the order, but the rule as proposed does require the use of the order as is the case for other types of sealing. For clarity and consistency the committee is opting to require that an order be provided to its subject, but if courts want to provide other information as well they are free to do so.

	Commentator	Position	Comment	Committee Response
			This could be a result of my own misunderstanding, but I'm wondering why language on Diversion sealing would be included on the 596 INFO doc (see grey shading below). I've trained my brain to believe 596 INFO form is used for court cases only – specifically where a 786 sealing has occurred. We would use 595 INFO for diversion cases or in addition to 596 INFO when records existed beyond what was sealed in a 786 sealing. Also, it appears 786.5 only covers sealing of records in the possession of the probation agency and any diversion programs a youth was referred to. I do not believe it covers records in the custody of law enforcement agencies. Therefore the blue highlight below is a bit misleading. Maybe adding a line about the possibility of records existing elsewhere including law enforcement agencies would be helpful. **JV – 595 INFO** There are now two ways that records may be sealed in California. As of January 1, 2015, courts or probation departments are required to seal records in certain cases when the court or probation department finds that probation (formal, informal, or diversion) is satisfactorily completed or if your case was otherwise dismissed after the petition was filed. If the court or probation sealed all of your records at the end of your case, you should have received a	The committee agrees with this comment and has revised the two information forms to only include diversion sealing on the JV-595-INFO form which is given to all probationers whose records are not sealed under WIC 786. The commentator correctly notes that WIC 786.5 does not address records of the arrest in the custody of an agency other than probation or an agency that is participating in serving the child for diversion. The forms have been revised to reflect this fact and to alert those whose records are sealed that they may wish to file a 781 petition to seal other records at a later date. As noted above the committee has concluded that a copy of the order should be provided in all

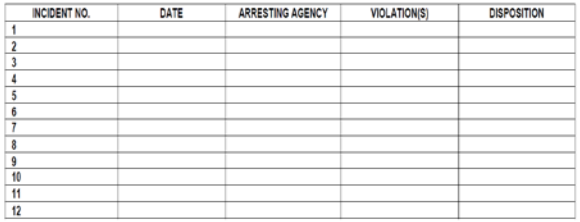
	Commentator	Position	Comment	Committee Response
			copy of the sealing order, and you do not need to ask the court to seal the records in that sealing order. **JV-596-INFO** If your case is terminated by the juvenile court after January 1, 2015, because you satisfactorily completed your probation (formal, informal, or diversion), or if your case was otherwise dismissed after the petition was filed, in many cases, the court or probation will have dismissed the petition(s) and sealed your records. If the court or probation sealed your records for this reason, you should have received a copy of the sealing order with this form. If the court or probation finds you have not satisfactorily completed your probation, it will not dismiss your case and will not seal your records at termination. If you want to have your records sealed in this situation, you will need to ask the court to seal your records at a later date (see form JV-595-INFO for information about asking the court to seal your records). The court will not seal your records at the end of your case if you were found to have committed an offense listed in Welfare and Institutions Code section 707(b) (a violent offenses such as murder, rape, or kidnapping, and also some offenses involving drugs or weapons) when you were 14 or older and it was not dismissed or reduced to a misdemeanor or a lesser offense not listed in	sealing cases. In addition the committee has clarified what is sealed in diversion cases and that additional sealing may be required to be complete. The committee has removed the information about diversion sealing from the JV-596-INFO and added it to the JV-595-INFO for clarity. As noted above the committee has concluded that a copy of the order should be provided in all sealing cases consistent with the current and proposed rules of court.

	Commentator	Position	Comment	Committee Response
			707(b), but except for certain sex offenses, you can ask the court to seal your records at age 18 (or age 21 if you were committed to the Division of Juvenile Facilities).	
3.	Chief Probation Officers of California Danielle Sanchez, Legislative Director	AM	The Chief Probation Officers of California (CPOC) prepares this letter in response to the request for public comment on the proposed amendments to Rule of Court 5.552 pertaining to the release of case file information for research. Subsection (e) of the proposed amended rule arises out of SB 462 (Chapter 462, Statutes of 2017) which was statutory action introduced by CPOC for the purposes of codifying the authority of probation departments to access juvenile case files for the purpose of complying with data collection or data reporting requirements and to conduct important research and evaluation on juvenile justice programs and associated outcomes. We appreciate the work completed by the Family and Juvenile Law Advisory Committee to develop the proposed amendments to the provisions set forth in (e) under Rule 5.552. We would note that the proposed language is largely consistent with the spirit of SB 462 as well as the specific statutory language. The one provision that reflects a degree of variation pertains to paragraph (3) of subsection (a) and reference to a newly proposed process for probation to notify the office of the public defender in cases in which the information is for human subject research as defined in 45 Code of	No response required. The committee concurs that this would clarify the procedure in the rule of court and has revised the rule accordingly.

	Commentator	Position	Comment	Committee Response
			Federal Regulations part 46. Further, it proposes a process by which the office of the public defender has the opportunity to respond prior to the court making their decision as to whether to approve the research. We would suggest that you consider the order in which that paragraph reads to: "If the information is being released for human subject research, as defined in 45 Code of Federal Regulations part 46, the probation department shall provide notice to the office of the public defender who shall have the opportunity to respond to the court on the proposed human subject research. Upon receiving authorization from the court, but prior to the release of any information, the probation department shall enter into a formal agreement with the entity or entities conducting the research or evaluation that specifies what may and may not be done with the information disclosed." Further, while we do not propose a specific timeline in this letter, as we believe that should be further discussed among the advisory committee and impacted stakeholders prior to the adoption of the amendments, we would suggest that paragraph (3) provide additional clarification on the timeline in which notice to, and a response from, the office of the public defender shall occur. Again, CPOC appreciates the work of the Family and Juvenile Law Advisory Committee to adopt language in subsection (e) that aligns	The committee has determined that a timeline is appropriate and proposes that the public defender have 30 days to respond to the research proposal and the court another 30 days to hold a hearing to determine how to proceed in light of any objection by counsel.

	Commentator	Position	Comment	Committee Response
			with the spirit and statutory language of SB 462. We ask for your consideration of our comments and suggestions relative to paragraph (3) on the processes surrounding human subject research including further clarification on timelines and the manner in which the office of the public defender shall respond to the court. We believe these changes will add needed clarity for the parties involved in such a request.	
4.	Trial Court Presiding Judges and Court Executive Officers Advisory Committees Joint Rules Subcommittee	NI	The JRS notes the following impact to court operations: •Impact on existing automated systems (e.g., case management system, accounting system, technology infrastructure or security equipment, Jury Plus/ACS, etc.) – The JRS estimates that modifications to case management systems will be needed and this will require some staff time. Costs would not be significant. •Results in additional training, which requires the commitment of staff time and court resources. Request for Specific Comments: 1. Should proposed new rule 5.850 to implement section 786.5 cover the probation notice requirements or focus only on court procedures to review a determination that a diversion program was not satisfactorily completed? The notice requirement should be included and made clear. 2. Is it preferable to require the probation department to file a request for review of denial	The committee has noted these impacts in its report to the Judicial Council but notes that they largely flow from the change in law. The committee agrees and has sought to clarify rule 5.850. The committee has determined that logistically it would be challenging for the child to file a

	Commentator	Position	Comment	Committee Response
			of sealing under section 786.5, or should that burden be on the child? The burden should be on the child to avoid any potential delays.	petition in juvenile court and has opted to leave the requirement on probation after the child has completed a request for review.
			3. Is it necessary to appoint counsel for a child who seeks to challenge the denial of sealing under section 786.5, or should appointment be at the discretion of the court? Appointment of counsel should be at the discretion of the court. It may not be necessary in the majority of cases.	As explained in the response to comment 1, on page 30, the committee has concluded that appointment of counsel is mandatory under section 634.
			Suggested Modifications: The JRS recommends adding the following table which provides a section to list multiple violations and the court can indicate which are ordered sealed and which are denied. This table should be added to Item 4 of Form JV-590 and to Item 5 of Form JV-596. "Petitioner requests that an order be made sealing all records, papers, exhibits in petitioner's case in the custody of the juvenile court, including the juvenile court record, case management/automated entries, and other records relating to the case in the custody of all	The committee has added this table to Form JV-590 as requested by Los Angeles Superior Court but has left JV-596 unchanged because the court has discretion on the scope of sealing that needs to be distinguished by agency rather than arrest. The committee also added one additional column to allow inclusion of a petition number or other court case identification number.

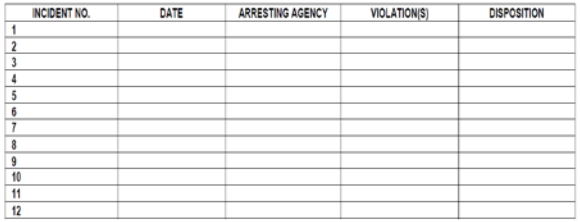
	Commentator	Position	Comment	Committee Response
			agencies and officials named herein:"  The JRS also recommends the following changes: •Page 7 (B), page 8 (2), (5)- delete "ly" after the word "personal" •Page 8, line 42- should read "An unfulfilled order or condition of restitution…" Rationale: The way the punctuation is in the sentence now makes it appear that the court must dismiss the case even though there is an unfulfilled order of any kind. The statute refers only to currently owing restitution or fines, not other orders of probation. •JV-590 form- section 5 b. is confusing. There is no box next to the sentence "The destruction of all records…." So that it appears to be an automatic order. However, there is a box on the right side of the next line that "Or court records must be retained…" To correct this conflicting order, there should be a box next to b. that can	Because the statute upon which the rule is based uses the term "personally identifying information" the committee has opted to retain the statutory language for consistency. The committee has adopted this clarifying change to correct an error in the rule. The committee concurs that clarification is required and has amended the sentence to provide for the destruction or retention of records as

INCIDENT NO.	DATE	ARRESTING AGENCY	VIOLATION(S)	DISPOSITION
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				
11				
12				

	Commentator	Position	Comment	Committee Response
			be checked. Then there should be c. with a box followed by "Court records must be retained…" That should be followed by d. and e., each with a box in front of them to be checked- "date court records must be destroyed…" and "Date all other records must be destroyed."	provided by section 781(d) and then retained the check boxes and dates.
			•JV-595-INFO- Page 1, left side, last line of first paragraph- "If you make those records…" should be changed to "If the court makes those records…"	The committee has adopted this clarifying change.
			•JV-595-INFO- page 2- the paragraphs keep changing from "petition" in (2) to "application" in (7) and (8). I believe it is a "petition" and all the paragraphs should match.	The committee has adopted this suggestion and used petition throughout.
			•JV-598- In the first line of the instructions, the word "complete" needs to be inserted between "satisfactorily" and "your."	
			•JV-598- In paragraph 2. "Why completion of probation…" should be "Why completion of diversion…", since this form is a petition to review the denial of diversion.	The committee has made this change to add the missing term.
			•JV-598 – page 2- The instructions should have "and you request and qualify for one" inserted between "attorney" and "the court…." Rationale: We are recommending that the appointment not be automatic and left to the discretion of the court. Petitioners coming in may no longer be minors and may not be	As explained in the response to comment 1, on page 30, the committee has concluded that appointment of counsel is mandatory under section 634.

	Commentator	Position	Comment	Committee Response
			indigent.	
5.	Los Angeles County Department of Children and Family Services Ruben Borja, Children's Services Administrator		Sealed records under WIC 786 may also be viewed by child welfare agencies for limited purposes (WIC 786 (f)(1)(H)). The JV-595-Info sheet does not reference this. This is referenced in the JV-596 info sheet. I would argue that WIC 786 applies to both types of sealing records and should be included in the JV-595 info sheet.	The committee does not see section 786 access rules as applying to section 781 sealing orders because section 781 sealing typically happens after the subject of the order is 18 while section 786 sealing occurs before that time and thus requires broader access to sealed records. As a result the committee is not making this change.
6.	Orange County Bar Association Nikki P. Milliband, President	AM	• Does the proposal appropriately address the stated purpose? Yes. • Is it helpful to probation departments to approve optional form JV-597 for their use, or would it be preferable to rely on local probation notice forms? Yes, form JV-597 is helpful. • Should proposed new rule 5.850 to implement section 786.5 cover the probation notice requirements or focus only on court procedures to review a determination that a diversion program was not satisfactorily completed? It is recommended that probation notice requirements be covered in addition to the court procedures. • Is it preferable to require the probation department to file a request for review of denial of sealing under section 786.5, or should that burden be on the child? We recommend that the child be required to notify the probation officer that they would like to request a review of	No response required. No response required. The committee agrees and has clarified these provisions of rule 5.850. The committee has adopted this approach – the child must request the review, and probation then files the petition.

	Commentator	Position	Comment	Committee Response
			denial. The probation officer would then be required to notify the court and submit the appropriate documentation. • Is it necessary to appoint counsel for a child who seeks to challenge the denial of sealing under section 786.5, or should appointment be at the discretion of the court? It is recommended that counsel be appointed to represent the child. • Do the changes to rule 5.552 effectively implement newly enacted section 827.12? Yes. • JV-598, under Instructions, it is missing the word "complete".	As explained in the response to comment 1, on page 30, the committee has concluded that appointment of counsel is mandatory under section 634. No response required. The committee has made this change to add the missing term.
7.	Superior Court of Los Angeles	AM	Suggested Modifications: FORM JV-590 Item 4 In Los Angeles County, we use a local form that allows for multiple petitions that are identified by number, so that the court can clearly indicate which of the juvenile's petitions are ordered sealed and which are denied (because it is a 707(b), or does not otherwise qualify for sealing). We recommend using that numbering system from the local form in the JV-590 form by adding the table below to Item 4 of JV-590. Petitioner requests that an order be made sealing all records, papers, exhibits in petitioner's case in the custody of the juvenile court, including the juvenile court record, case	The committee has added the table to the order form as requested with an additional column added to the table to allow for a court identification number.

	Commentator	Position	Comment	Committee Response
			management/automated entries, and other records relating to the case in the custody of all agencies and officials named herein:  Request for Specific Comments: Should proposed new rule 5.850 to implement section 786.5 cover the probation notice requirements or focus only on court procedures to review a determination that a diversion program was not satisfactorily completed? The notice requirement should be included and made clear.	The committee concurs and has clarified these provisions of rule 5.850.
			Is it preferable to require the probation department to file a request for review of denial of sealing under section 786.5, or should that burden be on the child? The burden should be on the child to avoid any potential delays.	Because probation seems to concur that it would be easier for them to accomplish this task, the committee has opted to leave the responsibility with probation as is the case with other sealing related petitions.
			Is it necessary to appoint counsel for a child who seeks to challenge the denial of sealing under section 786.5, or should appointment be at the discretion of the court? Appointment of counsel should be at the discretion of the court. It may not be necessary	As explained in the response to comment 1, on page 30, the committee has concluded that appointment of counsel is mandatory under section 634.

	Commentator	Position	Comment	Committee Response
			in the majority of cases.	
8.	Superior Court of Riverside Susan D. Ryan, Chief Deputy, Legal Services	AM	General Comments: Form JV-596-Info: We suggest modifying the form title to *Sealing of Records After Completion of Probation or Diversion*. A person looking at the current title may not realize that the information sheet also addresses the unsatisfactory completion of probation; and further, may not understand its applicability to a diversion program. Form JV-597: Assuming rule 5.850(d) is implemented, it would be beneficial to include language in item 4 stating that the child may also submit a request to the probation department to file the JV-598 with the court. Form JV-598: In the instruction box, first line add "you did not satisfactorily complete your diversion program…" Response to Request for Specific Comments: 1. Does the proposal appropriately address the stated purpose? Yes. 2. Is it helpful to probation departments to approve optional form JV-597 for their use, or would it be preferable to rely on local probation notice forms?	This form is to be given to those whose records were sealed for satisfactory completion of probation, and since the diversion information has been removed, the committee opted not to change the title. The committee has added an instruction to the form directing the child to give the petition to probation to file with the court. The committee has made this change to add the missing term. No response required. The committee concurs and will make the optional form available.

	Commentator	Position	Comment	Committee Response
			Since the JV-597 is optional, it would be helpful for probation departments to have a choice between the JV-597 and a locally created form. 3. Should proposed new rule 5.850 to implement section 786.5 cover the probation notice requirements or focus only on court procedures to review a determination that a diversion program was not satisfactorily completed? It would be best if the probation notice requirements and the court review procedures were better delineated. This could be accomplished by a separate rule, or by additional subdivisions within rule 5.850. The proposed rule 5.850 subdivision (d) is somewhat confusing, in part because while it seems to foreclose a child filing the JV-598 directly with the court, it also anticipates that a child represented by counsel may well have done so: ("If the petitioner is not represented by counsel, the clerk must provide a copy of the petition to the probation department . . ."). At a minimum, the rule should make clear that a child may file the petition directly with the court. 4. Is it preferable to require the probation department to file a request for review of denial of sealing under section 786.5, or should that burden be on the child?	The committee has clarified rule 5.850 to require that probation file the petition for review at the request of the child as is the case with other sealing petitions. The committee determined that in many counties it would be logistically challenging for a child to file a petition independently and thus drafted the rule and the form to ensure access to the review process. As described above, the committee has clarified

	Commentator	Position	Comment	Committee Response
			We see nothing in Welfare & Institutions Code § 786.5 shifting the burden of filing the petition to the probation department, though nothing precludes the probation department from assuming responsibility of filing the petition either. The rule should make clear that the probation department is only required to file the petition if requested to do so by the child; and that the child retains the right to file the petition directly with the court. Moreover, consideration should be given to the procedure by which the child makes a request to the probation department to file the petition.	the rules and the petition form to make it clear that probation should file the request for review after receiving a completed petition from the child and notify the child of the date, time, and location of the hearing.
			5. Is it necessary to appoint counsel for a child who seeks to challenge the denial of sealing under section 786.5, or should appointment be at the discretion of the court?	
			The appointment of counsel should be left to the discretion of the court, however from a practical standpoint the court would likely almost always appoint counsel. It may streamline the process and lead to less court hearings if the appointment of counsel is automatic per rule of court.	As explained in the response to comment 1, on page 30, the committee has concluded that appointment of counsel is mandatory under section 634.
			6. Do the changes to rule 5.552 effectively implement newly enacted section 827.12?	
			Yes.	No response required.
			7. Would the proposal provide cost savings?	

	Commentator	Position	Comment	Committee Response
			No. To the contrary, this will increase costs to the court. There will be increased staffing costs depending on how many of these types of petitions need to processed and adjudicated. 8. What would the implementation requirements be for courts? Clerk's office and courtroom staff would need to be trained on how to process these types of petitions (approximately 1 hour). Procedures would need to be created for filing the petitions, setting the hearings and completing minute entries. Codes would need to be created in the case management system for processing the documents and hearings. Procedures would also need to be updated for the sealing of records as well as the processing of WIC 827 disclosure requests. 9. Would 4 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Yes. 10. How well would this proposal work in courts of different sizes? No difference.	The committee notes this comment and will report the impact of the legislative change to the Judicial Council. The committee will report this impact to the Judicial Council along with the proposed changes to implement the legislation. No response required. No response required.

	Commentator	Position	Comment	Committee Response
9.	Superior Court of San Diego Mike Roddy, Court Executive Officer	AM	• Does the proposal appropriately address the stated purpose? Yes. • Is it helpful to probation departments to approve optional form JV-597 for their use, or would it be preferable to rely on local probation notice forms? It is probably more helpful to approve optional form JV-597. • Should proposed new rule 5.850 … cover the probation notice requirements or focus only on court procedures to review a determination that a diversion program was not satisfactorily completed? It should include the notice requirements so that probation departments will have a clear understanding of what is expected from them. • Is it preferable to require the probation department to file a request for review of denial of sealing under section 786.5, or should that burden be on the child? Probation should file the request if the child is not represented by counsel. Otherwise, the child's attorney should file it. • Is it necessary to appoint counsel for a child who seeks to challenge the denial of sealing under section 786.5, or should appointment be at the discretion of the court? If the child is not represented by counsel, the court should appoint counsel solely for the purpose of challenging the	No response required. The committee concurs and will make the optional form available. The committee has retained and clarified these provisions of rule 5.850. The committee has revised the rule and form instructions to make clear that probation should file the petition as with other sealing petitions, and has not drafted a provision for an attorney to file because so very few children in diversion matters will be represented by counsel at the time the petition for review is filed. As explained in the response to comment 1, on page 30, the committee has concluded that appointment of counsel is mandatory under

	Commentator	Position	Comment	Committee Response
			denial of sealing under section 786.5. (See, e.g., Cal. Rules of Court, rule 5.906(e)(2) [appointment of attorney solely for hearing on request for return to juvenile court jurisdiction].)	section 634.
			• Do the changes to rule 5.552 effectively implement newly enacted section 827.12? Yes.	No response required.
			• Would the proposal provide cost savings? Unknown.	No response required.
			• What would the implementation requirements be for courts? Developing or revising required procedures in collaboration with the probation department, training court staff, writing or revising docket codes, replacing old forms with new versions.	The committee will note these impacts in its report to the Judicial Council.
			• Would four months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Probably.	No response required.
			• How well would this proposal work in courts of different sizes? It is probably sufficient for the varying needs of different courts, particularly since the only mandatory forms are the JV-595-INFO and the JV-596-INFO.	No response required.
			CRC 5.552	
			Subd. (e): Typo – change (§ 872.12(a)(2)) to (§ 827.12(a)(2)). Now would be a good time to add	The committee has corrected the error and added section 827.10 to subdivision (b).

	Commentator	Position	Comment	Committee Response
			a reference to WIC 827.10 as well. **CRC 5.840** Subd. (c), last sentence: Add language – Access to the records for research purposes must be provided as required in sections 787 and 827.12. **CRC 5.850** The proposal states, "These procedures include a requirement that the probation department file with the court the request for the court to review the determination for the child and that **the court appoint counsel for any child** seeking review in a court hearing before or during the hearing." (Proposal, p. 3.) The draft rule, however, does not contain any provision requiring the court to appoint counsel for a child seeking review of the decision not to seal. Was such a requirement intentionally deleted from the draft rule (perhaps because WIC § 786.5 does not expressly require the appointment of counsel for court review of probation's decision)? Note: The last sentence on proposed form JV-598 *does* state, "If you do not have an attorney, the court will appoint one for you before or at the hearing." If it was inadvertently omitted, the fourth	The committee does not view section 827.12 as applying to sealed records, but only to records that would otherwise be confidential under section 827, thus the committee has not made this change. Rule 5.850 has been revised to require appointment upon request by the child.

	Commentator	Position	Comment	Committee Response
			sentence of subdivision (d) could be revised as follows: "If the petitioner is not represented by counsel, the court must appoint counsel for the petitioner, and the clerk must provide a copy of the petition to the probation department at the time notice of the hearing is provided." Also, it is not clear why the clerk is required to provide a copy of the petition to probation when probation itself is responsible for filing the petition with the court. Is it simply to provide probation with a file-stamped copy of the petition? If so, then perhaps that part of the sentence could be revised for clarification to: "the clerk must provide a file-stamped copy of the petition to the probation department at the time notice of the hearing is provided." Subd. (b): Arguably, this subdivision is unnecessary, as it merely paraphrases subdivision (a) of WIC § 786.5. If it is deleted, subdivisions (c) and (d) should be relettered to (b) and (c) respectively, and the first sentence of the new subdivision (b) should be revised as follows: "The probation department must notify the person in writing that his or her records have been sealed based on satisfactory completion of the supervision or diversion program." At a minimum, since much of subdivisions (b) and (c) just copies WIC 786.5 verbatim, they could be shortened and simplified. Subd. (d): Suggested revisions --	The committee has adopted this suggested change. While the committee generally refrains from including statutory text in the rules, this subdivision is needed logically to set forth the process for sealing under section 786.5, thus the committee is retaining this subdivision.

	Commentator	Position	Comment	Committee Response
			A person who receives notice from the probation department that he or she has not satisfactorily completed the program and that his or her records have not been sealed may submit a request to that same probation department for the court to review that determination, and the probation department must file ~~that petition~~ the *Petition to Review Denial of Diversion Program Sealing of Records* (form JV-598) or similar local form with the court ~~for a hearing to review whether he or she has met the satisfactory completion requirement and is eligible for record sealing by the probation department~~. This petition must be filed with the juvenile court in the county that issued the notice within 60 days of the petitioner's receiving the notice from the probation department and must include a copy of that notice. The clerk of the court must set the matter for hearing and notify the petitioner and the probation department of the date, time, and location of the hearing. If the petitioner is not represented by counsel, the clerk must provide a copy of the file-stamped petition to the probation department at the time notice of the hearing is provided. If the court finds after the hearing that the petitioner is eligible for	The committee has adopted these clarifying changes to subdivision (d) as suggested.

	Commentator	Position	Comment	Committee Response
			sealing of the records under section 786.5, it must order the probation department to promptly comply with the sealing and notice requirements of this rule. Subdivision (d) has some internal inconsistencies and some inconsistencies with WIC 786.5(d). The rule says the petition is to be filed with the probation department, and the statute says the youth may petition the juvenile court. The rule sets a 60-day deadline that is not in the statute. The rule states that the court clerk must provide a copy of the petition to the probation department, even though it is the probation department that would have filed the petition under the proposed procedure. The rule does not address appointment of counsel, but form JV-598 states that counsel will be appointed. These inconsistencies should be corrected and/or clarified. **FORM JV-590** Title and center footers: Suggested changes for consistency with other Judicial Council forms (e.g., JV-425, JV-426, JV-430, JV-431, JV-436, JV-441, JV-448 et al.) Change from: ORDER TO SEAL JUVENILE RECORDS—WELFARE AND INSTITUTIONS CODE	The committee has clarified rule 5.850 to provide that the way for a petitioner to seek review is via probation who will file the petition. The rule has also been clarified to indicate that the will notice the hearing and the file stamped copy requirement has been removed. The 60 day deadline is a procedural requirement to ensure that these cases can be handled efficiently. The committee has opted to retain the title distinction that incorporates the relevant code sections into the form titles to promote clarity.

	Commentator	Position	Comment	Committee Response
			SECTION 781 To: ORDER TO SEAL JUVENILE RECORDS (Welf. & Inst. Code § 781) Right footer: Insert space between "§" and "781."	The committee has adopted this technical change.
			Item 5(c): Our court recommends: "Court records must be retained." The Or is not necessary and the reference to WIC 781(d) is duplicative.	The committee has adopted this clarifying change.
			FORM JV-595-INFO Page 1, left column - suggested changes: For more information about when the court seals your records at ~~termination~~ the completion of probation, see form JV-596-INFO. Who ~~qualifies to~~ can ask the court to seal their juvenile records? If the court has not already sealed your records, you can ask the court to make that order~~. You qualify~~ if: The court will not consider outstanding fines	The committee has adopted all of the suggested changes to Form-JV-595-INFO from this commentator for clarity and plain language.

	Commentator	Position	Comment	Committee Response
			and court-ordered fees when deciding whether to seal your records, … Page 1, right column - suggested changes: Capitalize the F in Department of Juvenile Facilities. If you were convicted ~~as an~~ in adult court of an offense involving moral turpitude, such as: … If you are unsure if you ~~are eligible~~ qualify, ask your attorney. The DMV can see your vehicle and traffic records and share them with insurance companies. A prosecuting attorney may see your records that were sealed for an offense listed under Welfare and Institutions Code section 707(b) in a later proceeding for the reasons listed in ~~Welfare and Institutions Code~~ section 781(a)(1)(D). If your sealed record was for a 707(b) offense committed when you were 14 or older, the prosecutor, probation, and the court may unseal your records if you are charged later with a ~~subsequent~~ felony. You can request the court to unseal your records if you want to have access to them or allow	

	Commentator	Position	Comment	Committee Response
			someone else to ~~inspect~~ see them. In the section about employers, our court recommends: You should seek legal advice if you have questions about ~~of~~ what an employer can ask of you. (Same comment on JV-596-INFO) You should seek legal advice if you have questions ~~of~~ about what an employer can ask of you. Page 2, left column - suggested changes: 3. If you think there are agencies that might have records on you that were never sent to probation, you need to ~~include them~~ name those agencies, or the court will not know to seal ~~them~~ those records. 5. If you are ~~currently~~ 26 years of age or older, you may have to pay a fee. … 7. The court will review your application. The court may decide right away to seal your juvenile records~~.~~, ~~O~~or the court may order a hearing. If there is a hearing, you will receive a notice in the mail with the date, ~~and~~ time, and location of the hearing. If the notice says your hearing is "unopposed" (meaning there is no disagreement with your request), you may choose not to go.	

	Commentator	Position	Comment	Committee Response
			Page 2, right column - suggested changes: 9. If the court grants your request, it will order each agency, entity, or person on your list to seal your records. The court will also order the records destroyed by a certain date. If the sealed records are for a 707(b) offense committed when you were 14 or older, the court will not ~~destroy~~ order those records destroyed. If you ~~are seeking~~ want to enlist in the military or apply for a job requiring you to provide information about your juvenile records, seek legal advice about this issue. Juvenile sex offender registration is governed by Penal Code section 290.008. **FORM JV-596** Title and center footers: Suggested changes for consistency with other Judicial Council forms (e.g., JV-425, JV-426, JV-430, JV-431, JV-436, JV-441, JV-448 et al.) Change from: DISMISSAL AND SEALING OF RECORDS— WELFARE AND INSTITUTIONS CODE SECTION 786	As explained above, the committee is using this format for clarity and to distinguish types of sealing orders and thus is opting to retain the current title.

	Commentator	Position	Comment	Committee Response
			To: DISMISSAL AND SEALING OF RECORDS (Welf. & Inst. Code § 786) Item 1, suggested change: Name of ~~subject~~ child: Item 7, suggested changes: The court finds that sealing the following additional public agency records will promote the successful reentry and rehabilitation of the ~~subject~~ child and orders sealed the records in their custody relating to petitions and arrests listed in items 5 and 6 ~~sealed~~: **FORM JV-596-INFO** Probation does not dismiss a petition or make a sealing order. Instead of adding "or probation" to the existing paragraphs, our court recommends that a new paragraph be added to address sealing in diversion cases. That would also allow a brief explanation of the court review process, which is missing from this form. Page 1, left column - suggested changes: The court will not seal your records at the end of your case if you were found to have committed an offense listed in Welfare and Institutions Code section 707(b) (a violent	The committee has made the remaining suggested changes to this form for clarity. The committee agrees that the differences in sealing between WIC 786 and 786.5 are significant enough that they cannot be on the JV-596-INFO together and has moved the WIC 786.5 content regarding diversion to the JV-595-INFO in part because additional sealing by petition may be desirable for those whose diversion records are sealed.

	Commentator	Position	Comment	Committee Response
			offense~~s~~ such as murder, rape, or kidnapping, and ~~also~~ some offense<u>s</u> involving drugs or weapons) when you were 14 or older ~~and it was not~~ <u>unless that offense was</u> dismissed or reduced to a misdemeanor or a lesser offense not listed in 707(b), but ~~except for certain sex offenses,~~ you can ask the court to seal your records at age 18 (or age 21 if you were committed to the Division of Juvenile Facilities) <u>unless you were found to have committed one or more of certain sex offenses</u>. If you have done what you were ordered to do while on probation and have not been found to have committed any further crimes (felonies or ~~any~~ misdemeanor~~s for~~ crimes involving moral turpitude, such as a sex crime or a crime involving dishonesty), the court will find that your probation was satisfactorily completed even if you still owe restitution, court-ordered fees, and fines, BUT... <u>Page 1, right column - suggested changes</u>: If you are in foster care, <u>the</u> child welfare <u>agency</u> can look at your records to determine where you should live and what services you need. <u>Page 2, par. 2 - suggested changes</u>: … You should seek legal advice if you have questions ~~of~~ <u>about</u> what an employer can ask of	The committee has made the remaining suggested changes to this form for clarity.

	Commentator	Position	Comment	Committee Response
			you. **FORM JV-597** Title and center footers: Suggested changes for consistency with other Judicial Council forms (e.g., JV-425, JV-426, JV-430, JV-431, JV-436, JV-441, JV-448 et al.) Change from: DIVERSION PROGRAM, PROBATION DEPARTMENT NOTICE ON SEALING OF RECORDS—WELFARE AND INSTITUTIONS CODE SECTION 786.5 To: PROBATION DEPARTMENT NOTICE ON SEALING OF RECORDS AFTER DIVERSION PROGRAM (Welf. & Inst. Code § 786.5) Item 1, suggested deletion: Name of ~~subject~~ child: Item 1, suggested addition (underneath name of child): Name of child's attorney:	Because this form is not a court order, the committee has adopted the suggested title change to distinguish it from the other sealing orders. The committee all of the suggested changes to this

	Commentator	Position	Comment	Committee Response
			Item 2, suggested changes: or date ~~of noncompletion~~ of diversion program was not satisfactorily completed: Item 3, suggested deletion: The ~~subject~~ child has successfully completed … Item 4, suggested deletions: The probation department has determined that ~~the~~ sealing is inappropriate because the program was not satisfactorily completed for the reasons stated below and has ~~therefore~~ not sealed the child's records. … **FORM JV-598** Title and center footers: Suggested changes for consistency with other Judicial Council forms (e.g., JV-425, JV-426, JV-430, JV-431, JV-436, JV-441, JV-448 et al.) Change from: PETITION TO REVIEW DENIAL OF DIVERSION PROGRAM SEALING OF RECORDS To: PETITION TO REVIEW DENIAL OF ~~DIVERSION PROGRAM~~ SEALING OF	form. The committee has adopted almost all of the suggested technical and clarifying changes with the exception of using the word "print" in the instructions because this form might be handwritten but might also be filled out online and thus print might imply that it needs to be handwritten.

	Commentator	Position	Comment	Committee Response
			RECORDS AFTER DIVERSION PROGRAM (Welf. & Inst. Code § 786.5) Instructions, suggested changes: In the first line of the instructions, it should be "you did not satisfactorily complete your diversion program". In item 2, it should be diversion program, rather than probation. There is an extra r in the signature line. Use this form if you received a notice from a probation officer saying that you did not satisfactorily complete your diversion program and you want the court to review this determination so that your records can be sealed. • How to fill out the form: A. ~~Put~~ Print your name and contact information in the box at the top of the form and in item 1 below. B. ~~Put~~ Print the address of the juvenile court in the county where you were on probation for this offense in the second box at the top of the form. C. ~~Fill out~~ Print in item 2 ~~about~~ the reasons why you think that you did satisfactorily complete your diversion program. D. Attach the notice from probation ~~that you received~~ telling you that you did not satisfactorily complete your diversion program.	

	Commentator	Position	Comment	Committee Response
			Item 2, suggested changes: It should be diversion program, rather than probation. Item 3, suggested changes: I have attached a copy of the notice from the probation department stating ~~determining~~ that I did not complete my program satisfactorily (form JV-597 or similar local form) to this form. Signature line: Delete lower case "r" SIGNATURE OF PETITIONER~~r~~	
10.	Santa Clara County Department of Children and Family Services Francesca LeRue, Director	A	With the implementation of this law, there is potential for impact on the ability of the child welfare system to provide a thorough 241.1 assessment of a dually involved youth. Should the social worker not have access to significant historical information, due to sealed records, important clinical factors might be missed, in turn affecting potential recommendations to the Juvenile Justice Court for services and associated case planning.	No response required.

Item number: 0 7

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: May 1, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Law: Presumptive Transfer of Specialty Mental Health Services

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

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

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 24,2017
Project description from annual agenda: As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.

a) AB 1299 (Ridley-Thomas) Medi-Cal: specialty mental health services: foster children Ch.603, Statutes of 2016 Requires that the responsibility under Medi-Cal for providing specialty mental health services is presumpitively transferred when a child or nonminor is being moved to a new county. In certain situations, this presumptive transfer can be waived and a hearing may be held to review the determination on the waiver.

If requesting July 1 or out of cycle, explain:
Presumptive transfer under AB 1299 went into effect on July 1, 2017. The departments responsible for the majority of implementation efforts requested delayed court procedures while the underlying process was developed. Now that a process is known, court procedures are necessary.

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

JUDICIAL COUNCIL OF CALIFORNIA

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

REPORT TO THE JUDICIAL COUNCIL

For business meeting on May 24, 2018

Title
Juvenile Law: Presumptive Transfer of Specialty Mental Health Services

Rules, Forms, Standards, or Statutes Affected
Adopt Cal. Rules of Court, rule 5.647; adopt forms JV-214, JV-214(A), JV-214-INFO, and JV-215; renumber JV-215 as JV-212

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

Agenda Item Type
Action Required

Effective Date
September 1, 2018

Date of Report
April 24, 2018

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

Executive Summary

The Family and Juvenile Law Advisory Committee proposes the adoption of one statewide rule and four juvenile law (JV) forms, including an information sheet. The rule and forms implement a procedural framework and are intended to provide procedural clarity for a juvenile court review hearing created by recent legislation involving foster children's access to specialty mental health services under federal early and periodic screening, diagnosis and treatment services. The committee also recommends renumbering a JV form to keep the JV forms related to this proposal in sequential order with other JV forms related to mental health treatment for foster children, including the administration of a foster child's psychotropic medications.

Recommendation

The Family and Juvenile Law Advisory committee recommends that the Judicial Council, effective September 1, 2018:

1. Adopt the following rule and forms:

- Rule 5.647 of the California Rules of Court;
- *Request for Hearing on Waiver of Presumptive Transfer* (form JV-214);
- *Notice of and Order on Request for Hearing on Waiver of Presumptive Transfer* (form JV-214(A));
- *Instructions for Requesting a Hearing to Review Waiver of Presumptive Transfer of Specialty Mental Health Services* (form JV-214-INFO); and
- *Order After Hearing on Waiver of Presumptive Transfer* (form JV-215); and

2. Renumber *Application to Review Decision by Social Worker Not to Commence Proceedings* from JV-215 to JV-212.

The text of the proposed rule and the new forms are attached at pages 14-26.

Relevant Previous Council Action

Because the proposal addresses the creation of procedures related to new legislation, the council has never before taken action related to this proposal.

Analysis/Rationale

When a foster child or nonminor is moved to a different county, the responsibility for providing and arranging for specialty mental health services (SMHS) is presumptively transferred to the new county unless certain exceptions apply. Assembly Bill 1299 (Ridley-Thomas; Stats. 2016, ch. 603) gives certain individuals the right to request a hearing to challenge a placing agency's determination regarding whether an exception applies to presumptive transfer. This proposal is in response to AB 1299. SMHS jurisdiction is to be presumptively transferred to the county of residence, unless an exception listed under Welfare and Institutions Code section 14717.1(d)(5)(A)–(D) applies.[1] Certain individuals may request that presumptive transfer be waived based on an exception. The placing agency is responsible for determining whether an exception to presumptive transfer applies. The placing agency's determination may be challenged by the person who requested the waiver and any party to the case, who may petition the juvenile court for judicial review of the placing agency's decision.

The procedures related to this judicial review are the focus of this proposal and the proposed new rule of court and JV forms. The process related to presumptive transfer is often noted for being complicated, and stakeholders involved in its implementation requested that the Judicial Council explore the creation of a rule of court to aid participants and the courts when a hearing is considered. A rule of court addressing a procedural framework for these hearings will therefore benefit courts statewide, in addition to the participants in the presumptive transfer process. The committee proposes the creation of the rule of court and the four Judicial Council forms to create a procedural framework for the holding and conducting of the hearing related to AB 1299.

[1] Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

In addition, the committee recommends renumbering *Application to Review Decision by Social Worker Not to Commence Proceedings* from JV-215 to JV-212. Doing so will ensure that the forms addressed in this proposal will be in sequential order with forms related to the administration of a foster child's psychotropic medications.[2]

Presumptive transfer, exceptions, and review hearing

Assembly Bill 1299 created section 14717.1 to address lengthy delays or denials in accessing mental health services for children placed in an out-of-county[3] placement. To overcome barriers to care when the child or nonminor[4] changes placements, SMHS jurisdiction must presumptively transfer from the county of original jurisdiction to the county of residence unless an exception applies and the mental health plan in the county of original jurisdiction demonstrates an existing contract with a specialty mental health care provider or the ability to enter into a contract within 30 days of the waiver determination.[5] Section 14717.1(d)(5) provides the four possible exceptions:

- It is determined that the transfer would disrupt continuity of care or delay access to services provided to the foster child.
- It is determined that the transfer would interfere with family reunification efforts documented in the individual case plan.
- The foster child's placement in a county other than the county of original jurisdiction is expected to last less than six months.
- The foster child's residence is within 30 minutes of travel time to his or her established specialty mental health care provider in the county of original jurisdiction.

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[2] *Order Delegating Judicial Authority Over Psychotropic Medication* (form JV-216); *Guide to Psychotropic Medication Forms* (JV-217-INFO); *Child's Opinion About the Medicine* (form JV-218); *Statement About Medicine Prescribed* (JV-219); *Application for Psychotropic Medication* (JV-220).

[3] A placement in a county other than the one in which the child originally entered foster care (i.e., the county of original jurisdiction).

[4] The committee elected to specify that the rule applies to nonminors as well as children. Section 14717.1 refers to foster children in most places, but (b)(2)(A) and (c)(2) mention foster *youth*. Federal early and periodic screening, diagnosis, and treatment services, the services that are the subject of this proposal, are available to Medicaid beneficiaries under age 21 (42 U.S.C. § 1396d; Cal. Code Regs., tit. 22, § 51340). The committee, therefore, elected to include nonminors in the rule.

[5] Under section 14717.1, presumptive transfer refers to the transfer of SMHS jurisdiction from the county of *original jurisdiction*. Therefore, any determination of an exception to presumptive transfer will apply to maintaining SMHS jurisdiction in the county of original jurisdiction. This includes the situation where a child or nonminor moves from one out-of-county placement to another. Section 14717.1(c) defines presumptive transfer as "absent any exceptions as established pursuant to this section, responsibility for providing or arranging for specialty mental health services shall promptly transfer *from the county of original jurisdiction* to the county in which the foster child resides..." (italics added). Likewise, section 14717.1(d)(1) states that "presumptive transfer may be waived and the responsibility for the provision of specialty mental health services *shall remain with the county of original jurisdiction* if any of the exceptions described in paragraph (5) exist." (italics added). All County Letter 17-77 also defines presumptive transfer as the "prompt transfer of the responsibility for the provision of, or arranging and payment for SMHS *from the county of original jurisdiction* to the county in which the foster child resides." (p. 2).

The person or agency that is responsible for making mental health care decisions on behalf of the foster child or nonminor, the county probation agency or child welfare services agency with responsibility for the care and placement of the child or nonminor, or any other interested party who owes a legal duty to the child involving the child's health or welfare, as defined by the department,[6] may request a waiver of presumptive transfer.[7] The placing agency, in consultation with the child and family team (CFT),[8] is responsible for responding to the waiver request and determining whether an exception under section 14717.1(d)(5)(A)–(D) applies. Once this determination is made, the placing agency is responsible for informing the CFT, the person or agency who requested the waiver, and parties to the case of the placing agency's determination.

The individual who requested the waiver, or any party to the case, may request a judicial review of the placing agency's determination before the county's determination becomes final. Under section 14717.1(d)(4), the court may set the matter for hearing and confirm or deny the transfer of SMHS jurisdiction or application of an exception based on the best interests of the child.

Proposed rule and JV forms

This proposal is directed at providing procedural clarity for the court and parties on hearings related to the waiver of presumptive transfer. Proposed rule 5.647 addresses the notice requirements, reporting requirements, and conduct of the hearing. Rule 5.647 would apply to any placement change to an out-of-county placement after the rule's effective date of September 1, 2018. The rule would also apply to those children and nonminors who are placed out of county as of December 31, 2017, continue to reside in an out-of-county placement, and have not had a presumptive transfer determination as required under section 14717.1. The various elements of the proposed rules are highlighted below.

Notice. Proposed rule 5.647 requires the clerk to provide notice of the hearing if a hearing is granted by the court. The committee elected to require notice by the court clerk because certain individuals who can request a hearing may not be able to provide effective notice. Although an attorney or social worker may be well versed on how to provide notice, others—such as a self-represented parent, foster child, or youth, or the person responsible for making mental health decisions on behalf of the child—may not be.

In addition, subdivision (b)(3) requires that the person requesting the hearing also inform the placing agency of that request within seven days of being informed of the placing agency's determination on the application of a waiver to presumptive transfer by providing the placing agency with a copy of form JV-214 requesting a hearing. This requirement was included in the rule to ensure that the administrative process of presumptive transfer does not take place before

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[6] Department of Health Care Services.

[7] Section 14717.1(d)(2).

[8] "'Child and family team' means a group of individuals who are convened by the placing agency and who are engaged through a variety of team-based processes to identify the strengths and needs of the child or youth and his or her family, and to help achieve positive outcomes for safety, permanency, and well-being." (Section 16501(a)(4).)

the court ruling on the request for a hearing or the application of a waiver to presumptive transfer. By being aware of a request for a hearing, the placing agency can ensure that presumptive transfer does not occur before the resolution of the request for a hearing.

Report from the social worker or probation officer. Proposed rule 5.647 requires that the social worker or probation officer prepare a report for the hearing, if one is granted. The committee wanted to ensure that the court had important information available to make an informed decision on how the presumptive transfer determination will affect the child's or nonminor's best interests. Subdivision (d) of the proposed rule provides a list of items that must be discussed or documented in the report. These items include a discussion of the placing agency's rationale for its determination on the request for waiver and the reporting requirements of section 14717.1(d)(7).[9] In addition, the rule requires that the report document that the child or nonminor, his or her parents if applicable, the child and family team, and others who serve the child or nonminor as appropriate—such as the therapist, mental health care decision maker for the child or nonminor if one has been appointed under section 361(a)(1), and Court Appointed Special Advocate volunteer—were consulted regarding the waiver determination. The rule also requires that the placing agency report that notice on the presumptive transfer determination was provided to the person or agency that requested waiver and all parties to the case.

These items give the court important information it needs to make a best-interests determination on the presumptive transfer and help to provide oversight of the placing agency's responsibilities during the presumptive transfer process. This information and oversight will help ensure that a well-informed, team-based decision is made on presumptive transfer and that those who are entitled to challenge the placing agency's determination are given the opportunity to request a hearing.

Ruling on presumptive transfer. Section 14717.1(d)(4) requires that if the court sets the matter for hearing, it may confirm or deny the transfer of SMHS jurisdiction or application of an exception based on the best interests of the child. This point is stated in subdivision (e)(2) of proposed rule 5.647 and in item 9 of proposed form JV-215. Subdivision (e)(3) requires that the person or agency that requested the waiver of presumptive transfer bear the burden to show that an exception to presumptive transfer is in the best interests of the child or nonminor by a preponderance of the evidence.

Under section 14717.1(d)(6), a waiver based on an exception to a presumptive transfer must be contingent on demonstration by the mental health plan in the county of original jurisdiction of an

[9] Section 14717.1(d)(7) requires that a request for waiver, the exceptions claimed as the basis for the request, a determination whether a waiver is determined to be appropriate under section 14717.1, and any other objections to the determination be documented in the foster child's case plan under section 16501.1. The case plan must also document that a waiver processed based on an exception be contingent on demonstration that the mental health plan in the county of original jurisdiction has an existing contract with a specialty mental health care provider, or can enter into a contract within 30 days of the waiver decision, and the ability to deliver timely specialty mental health services (§ 14717.1(d)(6)). Because these reporting requirements apply when a hearing is not granted under this rule, they were not incorporated into the proposed rule.

existing contract with a specialty mental health care provider, or the ability to enter into a contract within 30 days of the waiver decision, and the ability to deliver timely specialty mental health services directly to the child. The court will have to make this determination if it determines that an exception to waiver applies. Information related to the ability of the county of original jurisdiction to contract with a specialty mental health care provider is required by the rule (in subdivision (d)(4)) to be in the report that is provided for the hearing. This finding is also included in proposed form JV-215, item 9.

New Juvenile forms. Four new forms are proposed to facilitate the court process:

Request for Hearing on Waiver of Presumptive Transfer (form JV-214). This form is the application for a hearing to review the placing agency's determination on the presumptive transfer determination. It asks for the requisite information needed by the court to determine whether to grant a hearing, including the placing agency's determination on the request for waiver of presumptive transfer and the reason the person requesting a hearing believes that it would be in the child's or nonminor's best interests to depart from the placing agency's determination. It also includes the applicant's contact information, unless it is confidential, in which case the petitioner would use form JV-287 to provide his or her contact information confidentially.

Notice of and Order on Request for Hearing on Waiver of Presumptive Transfer (form JV-214(A)). This form provides for the court's order granting or denying a hearing. In addition, it can also be used as the notice form by the clerk when a hearing is granted. The form gives the court the option to grant or deny the hearing. When the court is denying the hearing, the form provides a checklist for the court to indicate the reason for the denial.

Instructions for Requesting a Hearing to Review Waiver of Presumptive Transfer of Specialty Mental Health Services (form JV-214-INFO). The committee elected to include an information sheet to accompany the JV form requesting a hearing on presumptive transfer. The information sheet explains presumptive transfer and its exceptions, as well as how to request a hearing.

Order After Hearing on Waiver of Presumptive Transfer (form JV-215). This form is to be used for the court's order on the presumptive transfer determination if a hearing is granted. This form provides the court with the requisite orders needed to confirm or deny the placing agency's presumptive transfer determination. Under section 14717.1(d)(4), the court may confirm or deny the transfer of SMHS jurisdiction or application of an exception based on the best interests of the child.

The committee recommends renumbering *Application to Review Decision by Social Worker Not to Commence Proceedings* (form JV-215) from JV-215 to JV-212. Doing so will ensure that the forms related to this proposal will be in sequential order with forms related mental health treatment such as the administration of a foster child's psychotropic medications.

Policy implications

Before circulating the rules for public comment, the committee determined that to have a meaningful hearing, the court should review the placing agency's responsibilities during the presumptive transfer process to ensure that all who are entitled to request a hearing were given a opportunity to do so. The proposed rules therefore incorporated the administrative requirements as found in the policy guidance issued in All County Letter (ACL) 17-77.[10]

The Department of Health Care Services (DHCS) and the California Department of Social Services (CDSS) are responsible for implementing and administering the changes made by AB 1299. Under section 14717.1, they are required to provide policy guidance on the implementation of AB 1299.[11] They may implement and administer the changes through all-county letters, information notices, or similar written instructions until regulations are adopted. ACL 17-77 was published in July 2017. It provides a framework for the presumptive transfer process and for the responsibilities of the placing agency during that process. It also includes timelines and notice requirements that the placing agency is required to follow.

After the public comment period, the committee elected to not include a review of these administrative functions in the rule for reasons addressed in the next section.

Comments

Twenty-one comments were received from a variety of commenters. The commenters raised several significant issues, provided feedback on the request for specific comment, and suggested technical revisions.

A large portion of the comments received addressed the inclusion in the rule of a review of the administrative functions of the placing agency during the presumptive transfer process. A request for specific comment on this issue was included in the invitation to comment. The request asked whether the rule should include the requirements of the placing agency's responsibilities during the presumptive transfer individualized exception determination, as provided in section 14717.1 and ACL 17-77, and if the court should review these efforts. Eleven comments were received in response. Seven commenters responded that these requirements should be included and three said that they should not be included.

Although many commenters agreed with including this review in the rule, including the Joint Rules Working Group of the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee, several raised concerns. Notably, CDSS stated that the inclusion of these administrative functions creates a separation-of-powers issue because these

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[10] See *www.cdss.ca.gov/Portals/9/ACL/2017/17-77.pdf?ver=2017-07-17-110909-783*.

[11] Section 14717.1(g) requires that the DHCS and CDSS adopt regulations to implement section 14717.1 by July 1, 2019. Section 14717.1(d)(2) further requires that a request for waiver be in a manner established by DHCS. Section 14717.1(d)(3) further requires that DHCS define who may request a waiver for those who owe a legal duty to the child.

functions are required by law to be created and implemented by CDSS and DHCS.[12] CDSS noted that administrative procedures are still being developed and are subject to change. Including them in the rule would prevent CDSS and DHCS from making changes to the process, creating a separation-of-powers issue. If these administrative responsibilities were included in the rule, the policy guidance and regulations required by section 14717.1(b) and (g) to be developed by CDSS and DHCS would have to follow the rule of court.

The committee agreed with these concerns and elected to remove the administrative responsibilities from the rule. The removal of these requirements created a more simplified rule. Proposed rule 5.648, which addressed youth who were placed in an out-of-county placement prior to December 31, 2017 and who continue to reside in the out-of-county placement as of December 31, 2017, was no longer necessary because it was largely superfluous.[13] Without including the administrative responsibilities of the placing agency in the rule, rule 5.648 was almost identical to rule 5.647.[14]

In addition, the rule no longer addresses the elaborate requirements of ACL 17-77 during the presumptive transfer process, which resulted in several proposed subdivisions being removed from the rule. These subdivisions addressed the placing agency's notice requirements during presumptive transfer process and the timelines for a request for waiver of presumptive transfer. In addition, former subdivision (d)(5) (now (d)(3)) no longer requires that the notice be within three court days of the placing agency's determination on the request for waiver to the person who requested waiver. The subdivision still requires that the placing agency confirm that it has provided notice of its determination on the request for waiver to the individual or agency that requested the waiver and all parties to the case in the report required for the hearing. This is a

[12] See § 14717.1(b)(1–2) and (g).

[13] Section 14717.1(c)(2) addresses the presumptive transfer of SMHS jurisdiction for all foster children who were placed outside their county of original jurisdiction before July 1, 2017, and continue to reside out of county as of December 31, 2017. For these children, the SMHS jurisdiction is to transfer either if the foster child requests the transfer (which begins the transfer process), or if the foster child continues to reside outside the county of original jurisdiction after December 31, 2017 (§ 14717.1(c)(2)). SMHS jurisdiction shall transfer no later than the child's first regularly scheduled status review hearing, conducted under section 366 in the 2018 calendar year, unless an exception to waiver as described under section 14717.1(d)(5) applies.

The committee considered whether to address this category of youth in this proposal given that the proposed rule will become effective *after* the presumptive transfer determination should be made. The committee elected, however, to include these youth in a separate rule that will sunset. The committee reasoned that this was necessary because it is feasible that there will be cases in which the presumptive transfer determination will not be made before the first section 366 hearing of 2018.

[14] The only difference in the rules is in subdivision (a), which addresses the applicability of the rule. Subdivision (a) in proposed rule 5.648 specified that the rule applies to "any child or nonminor that resides outside their county of original jurisdiction as of December 31, 2017." Whereas subdivision (a) of proposed rule 5.467 applies to "presumptive transfer following any change of placement within California for a child or nonminor to a placement that is outside the county of original jurisdiction." The committee elected to create a new subdivision (f) in rule 5.647 that will sunset. The subdivision specifies that the rule applies to those youth who resided in a county other than the county of original jurisdiction after June 30, 2017, and who continue to reside outside their county of original jurisdiction after December 31, 2017, and have not had a presumptive transfer determination as required under Welfare and Institutions Code section 14717.1(c)(2).

requirement of section 14717.1(d)(3). The requirement that it be within three court days of the decision was removed because this is an administrative function that is the responsibility of CDSS and DHCS to determine.

There were however portions of the rule where the administrative responsibilities of the placing agency and an essential element related to the conduct of the hearing intersected, including the timeline for when a hearing may be requested and the definition of who may request a hearing. The committee elected not to include a timeline for when a hearing may be requested to avoid requiring that the rule mirror the policy guidance and regulations of DHCS and CDSS, which are subject to change. Presumptive transfer is on hold until the court rules on the request for a hearing or gives a ruling at the hearing. Therefore, the timelines to request a hearing should mirror the administrative timeline so that the administrative process of presumptive transfer does not proceed before someone entitled to a hearing has the chance to request a hearing or to have the hearing reach completion if one is granted. If the rule and policy guidance aren't coordinated, the presumptive transfer process could proceed before the court addresses the request for a hearing or holds a hearing. ACL 17-77 indicated that a person will have three days to request a hearing, but in its comment, DHCS indicated that the timeline will be changed to seven days. The committee elected to avoid having the rule address this administrative function, which is the responsibility of DHCS and CDSS to implement.

Similarly, the committee elected to avoid attempting to define who is entitled to request a hearing by specifying who may request a waiver of presumptive transfer under section 14717.1(d)(2). Although it would benefit courts to specify in the rule who may request a hearing, doing so requires the rule to mirror the policy guidance and regulations of DHCS and CDSS, which are subject to change. Section 14717.1(d)(4) allows the person or agency that requested the waiver or any party to the case to request a hearing. Section 14717.1(d)(2) lists who may request a waiver, including "any other interested party who owes a legal duty to the child involving the child's health or welfare, *as defined by the department*" (italics added). The committee considered including the individuals that DHCS has listed in ACL 17-77 and in its comment related to the proposal in the rule to provide clarity to the court on who may request a hearing. However, the committee decided that the rule should not address items that directly relate to the policy guidance and regulations. The committee instead elected to have the rule mirror the language of section 14717.1(d)(2) in terms of who may request a waiver and thus a hearing. The advisory committee comment indicates that to determine who owes a legal duty to the child, readers should consult the policy guidance and regulations of DHCS and CDSS.

In addition, several items were raised by commenters and addressed by the committee.

Burden. A commenter noted that subdivision (d)(1)(A)–(C) appears to shift the burden to show that the presumptive transfer waiver determination is in the child's or nonminor's best interests from the petitioner to the placing agency. Although a burden was not originally addressed in the rule, the committee elected to indicate in the rule that the person or agency that is requesting an exception or waiver to presumptive transfer should bear the burden to show that the waiver is in the child's or nonminor's best interests. This decision was made because the transfer of the

responsibility for providing specialty mental health services is a presumption. The person requesting that the presumption should be rebutted should carry the burden at the hearing. The placing agency would carry the burden when it is indicating that a waiver applies to presumptive transfer. The committee also decided to indicate that the standard of proof for this determination would be the preponderance of evidence. Although section 14717.1(d)(4) does not specify an evidentiary standard, when not provided, the burden of proof requires proof by a preponderance of the evidence. (Evid. Code, § 115.)

Factors the court may consider when determining the child's or nonminor's best interests. Many comments were received on subdivision (e)(4) [now subdivision (e)(5)], on the factors the court may consider when determining the child's or nonminor's best interests in the determination of whether presumptive transfer should be waived. A majority of commenters agreed that the list was sufficient and should be included. Hence, the committee has included five factors that the court may consider.

However, one commenter noted that subdivision (e)(5) should clarify that the list of factors that can be considered is not exclusive. In response, subdivision (e)(5) now says that "the court may consider the following *in addition to any other factors the court deems relevant*" (italics added).

Also, subparagraph (E) was added to (e)(5) in response to comments to read:

> The ability to maintain specialty mental health services in the county of original jurisdiction or to arrange for specialty mental health services in the county of residence after the child or nonminor changes placements.

(Proposed Cal. Rules of Court, rule 5.647(e)(5)(E).)

The committee elected to include this subdivision to encourage the court to compare the anticipated provision of services in the county of original jurisdiction with that in the county of residence.

When notice is required. Several commenters were confused by the notice requirements for the setting of a hearing. As written, whether the referenced time frame in (c)(2) of five court days after the form was filed referred to when the court must set a hearing or when the clerk must provide notice was unclear. The language mirrored similar language in rule 5.651(e) and was intended to reference when the hearing will occur. Rule 5.651(e) addresses the hearing to review a child's change of school placement. Because both hearings are triggered by a change in placement and both require a prompt hearing that could potentially be heard at the same time, rule 5.647 mirrored many of the elements related to the holding of the hearing in rule 5.651(e).

The committee, however, agreed that the language would benefit from further clarification and amended it, moving "no later than five court days after the request for a hearing was filed" from subdivision (c)(2) to (c)(1). This change reflects that the court has the option to grant a hearing to occur no later than five court days after the form was filed. The requirement for notice is addressed in (c)(2).

One commenter also recommended that the rule specify when the clerk must provide notice of the hearing. Like rule 5.651(e), the proposed rule does not specify when notice must be provided because the court clerk must provide notice quickly (within five days).

The contents and timing of the report. Several commenters addressed both the timeline required for the filing of the report and its contents, with some noting that the more that the placing agency is required to report on, the more time is needed to produce a report. Many of the commenters expressed concern that the rule's requirement of providing a report no later than two days after the hearing is set is unrealistic because two days is not enough time.

With the removal of subdivisions (d)(1), (d)(3), and portions of (d)(5), the reporting requirements are somewhat lessened. Information in section 14717.1 related to the presumptive transfer process is, however, required to be documented in the report and is, therefore, addressed in the rule. These reporting requirements are meant to ensure that the placing agency has met these responsibilities and ensures a more meaningful review. The items in subdivision (d) that are requirements of section 14717.1 include consulting with the child, parents, child and family team, and other professionals who serve the child (§ 14717.1(d)(3)); providing notice of the determination on the request for waiver to the person who requested the exception and all parties to the case (*ibid.*); and indicating whether services can be delivered in the county of original jurisdiction (§ 14717.1(d)(6)).

The timeline for the report is the same for the hearing to review a child's change of school placement in rule 5.651(e). Both hearings are triggered by a change in placement and both require a prompt hearing. Both issues could be heard at the same time; the timelines of rule 5.651(e) were used to create those in rule 5.467. In addition, the court may set the hearing at any time within five days of the filing of the request for hearing. Theoretically, the hearing could occur a day or two after it is requested. Under this scenario, it makes sense to have the report required two days after the hearing is ordered.

Alignment with section 361.2(h). Several commenters recommended that the timelines for a hearing to review a waiver of presumptive transfer be coordinated with the timelines for a hearing under section 361.2(h). Although a court can hold a hearing under section 361.2(h) and a hearing on presumptive transfer at the same time, the rule does not appear to be able to coordinate these two hearings because the timelines of the administrative processes differ. Nothing in the rule, however, prohibits these hearings from being held at the same time.

Section 361.2(h) requires that the court set a hearing if the parent objects to the child's being moved to an out-of-county placement. Notice to the parent of the placement is to occur 14 days before the placement, and the parent has 7 days to object and request a hearing. If the parent objects, a hearing must be set within 5 days of the parent's objection.

ACL 17-77 attempted to mirror this timeline in terms of notice (14 days before the placement change) and a request for a waiver (7 days after notice). But unlike section 361.2(h), ACL 17-77 requires further steps before someone can request a hearing. According to ACL 17-77, the

placing agency must consult the CFT, make a determination on the request for a waiver, and then inform parties to the case and the person who requested waiver. Afterward, a request for hearing can be made within 3 days.

Because the rule does not include review of the administrative timelines, it is not inconsistent with the timelines of section 361.2(h). Rather, the rule mirrors the timelines of section 361.2(h) in that a hearing must be held within five days of the request for a hearing. If the presumptive transfer process can be completed within the same timeline as required for a hearing under section 361.2(h), then the timelines could be synchronized. However, this coordination would need to be addressed by the policy guidance and regulation mentioned above.

Length of hearing. To ensure that goal of AB 1299 of ensuring timely access to specialty mental health services, proposed rule 5.647 requires that a hearing on presumptive transfer must conclude within five court days of the initial hearing, unless a showing of good cause consistent with section 352 supports a continuance (subdivision (e)(3)). The committee reasoned that a limit on how long a court may take to resolve the hearing on presumptive transfer would ensure that the hearing process does not create a lengthy delay of a resolution of presumptive transfer determination, while allowing for flexibility where good cause is found. The committee reasoned that many courts would not always be in a position to be able to complete the hearing within five days.

CDSS recommended that the rule go a step further and require that "in no event shall a hearing pursuant to this rule be continued more than 15 days beyond the initial hearing date." CDSS argued that this limit was necessary to ensure timely access to specialty mental health services. The committee believes that placing a time limit on the length of the hearing will create an unrealistic expectation for many courts. In addition, section 352 provides an appropriate safeguard: In no event should the hearing be continued if it is contrary to the child's welfare. This provision would include those situations where services could be affected during the presumptive transfer hearing.[15] If the concern is that the courts won't honor the parameters of section 352, then there is no guarantee they will honor a 15-day time limit. Section 352 offers the best approach to address the child's best interests while taking into account other factors that may require a continuance beyond 5 days.

Comments related to removed administrative responsibilities. A large portion of the comments received related to the elements of the rules that deal with the administrative requirements of ACL 17-77. The committee's determination to remove these elements from the rule has resolved the issues raised by the commenters. These comments, however, will be forwarded to CDSS and DHCS as those agencies continue to develop and implement the administrative process for presumptive transfer. A summary of some of the issues is provided in the comments chart at pages 142–188.

[15] Services will also still be provided by the county of original jurisdiction until transfer occurs.

In addition, a number of comments of a technical nature were incorporated into the rule. A summary of these comments is in the comments chart at pages 27–141.

Alternatives considered

The committee considered not proceeding with the proposal until the policy guidance and regulations mentioned above are complete and finalized. However, the committee elected instead to remove from the proposal items in the rule that addressed the administrative responsibilities of the placing agency during the presumptive transfer process. The committee elected to proceed with the proposal without addressing the administrative responsibilities of the placing agency in the rule. The committee determined that the rule should not conflict with the policy guidance and regulations that are evolving and incomplete. The committee chose not to delay the implementation of the rule because of the need for procedural clarity for these hearings, which have been authorized by section 14717.1, effective January 1, 2017.

Fiscal and Operational Impacts

The committee anticipates that there will be additional costs to the courts when a hearing on presumptive transfer is held, including the training of court staff on the conduct of the hearing. However, this burden has more to do with the implementation of AB 1299 than with the creation of the rule of court. The rule of court will provide greater clarity on the conduct of the hearing, which may provide cost savings because the court will need to spend less time determining the various requirements for a hearing under section 14717.1.

Attachments and Links

1. Cal. Rules of Court, rule 5.647, at pages 14–18
2. Forms JV-214, JV-214(A), JV-214-INFO, and JV-215, at pages 19–26
3. Comments chart, at pages 27–188

Rule 5.647. Medi-Cal: Presumptive Transfer of Specialty Mental Health Services

(a) Applicability

This rule applies to the court's review under Welfare and Institutions Code section 14717.1 of the presumptive transfer of responsibility to arrange and provide for a child's or nonminor's specialty mental health services to the child's or nonminor's county of residence. The rule applies to presumptive transfer following any change of placement within California for a child or nonminor to a placement that is outside the county of original jurisdiction, including the initial placement. Nothing in this rule relieves the placing agency of the reporting requirements and duties under section 14717.1 when no hearing under this rule is held.

(b) Requesting a hearing to review the request for waiver of presumptive transfer (§ 14717.1)

(1) The following persons or agencies may make a request to the placing agency that presumptive transfer be waived and that the responsibility for providing specialty mental health services remain in the child's or nonminor's county of residence:

(A) The foster child or nonminor;

(B) The person or agency that is responsible for making mental health care decisions on behalf of the foster child or nonminor;

(C) The child welfare services agency or the probation agency with responsibility for the care and placement of the child or nonminor; and

(D) Any other interested party who owes a legal duty to the child or nonminor involving the child's or nonminor's health or welfare, as defined by the department.

(2) The person or agency who requested the waiver, or any other party to the case who disagrees with the placing agency's determination on the request for the waiver of presumptive transfer, may request a judicial review of the placing agency's determination.

(3) A request for a hearing must be made by filing a *Request for Hearing on Waiver of Presumptive Transfer* (form JV-214). If a hearing is requested, form JV-214 must be provided to the placing agency within seven court days of the petitioner's being noticed of the placing agency's determination on the request for waiver of presumptive transfer.

(4) When a hearing is requested in (b)(3), the transfer of the responsibility for providing specialty mental health services cannot occur until the court makes a ruling as required in (c)(1).

(c) Setting of a hearing (§ 14717.1)

(1) The court on its own motion may direct the clerk to set a hearing no later than five court days after the request for a hearing was filed, or may deny the request for a hearing without ruling on the transfer of jurisdiction.

(2) If the court sets a hearing, the clerk must provide notice of the hearing date to:

(A) The parents—unless parental rights have been terminated—or guardians of the child;

(B) The petitioner;

(C) The social worker or probation officer;

(D) The mental health care decision maker for the child or nonminor, if one has been appointed under section 361(a)(1);

(E) The Indian child's tribe, if applicable, as defined in rule 5.502;

(F) The child—if 10 years of age or older—or nonminor; and

(G) All other persons entitled to notice under section 293 or section 727.4(a).

(3) If the court grants a hearing under (c)(1), responsibility for providing specialty mental health services cannot be transferred until the court makes a ruling as required in (e)(2) and section 14717.1(d)(4).

(d) Reports

When a hearing is granted under (c)(1), the social worker or probation officer must provide a report including discussion or documentation of the following:

(1) The placing agency's rationale for its determination on the request for a waiver of presumptive transfer, including:

(A) Any requests for waiver, and the exceptions claimed as the basis for those requests;

(B) The placing agency's determination of whether waiver of presumptive transfer is appropriate under section 14717.1(d)(5)(A)–(D);

(C) Any objections to the placing agency's determination in (B); and

(D) The ways that the child's or nonminor's best interests will be promoted by the placing agency's presumptive transfer determination.

(2) That the child or nonminor, his or her parents if applicable, the child and family team, and others who serve the child or nonminor as appropriate—such as the therapist, mental health care decision maker for the child or nonminor if one has been appointed under section 361(a)(1), and Court Appointed Special Advocate volunteer—were consulted regarding the waiver determination.

(3) That notice of the placing agency's determination of whether to waive presumptive transfer was provided to the individual who requested waiver of presumptive transfer, along with all parties to the case.

(4) Whether the mental health plan in the county of original jurisdiction demonstrates an existing contract with a specialty mental health care provider, or the ability to enter into a contract with a specialty mental health care provider within 30 days of the waiver decision, and the ability to deliver timely specialty mental health services directly to the foster child or nonminor.

(5) The child's or nonminor's current provision of specialty mental health services, and how those services will be affected by the placing agency's presumptive transfer determination.

(e) Conduct at the hearing

(1) The social worker or probation officer must provide the report in (d) to the court, all parties to the case, and the person or agency that requested the waiver no later than two court days after the hearing is set under (c)(1).

(2) At the hearing, the court may confirm or deny the transfer of jurisdiction or application of an exception based on the best interests of the child or nonminor. A waiver of presumptive transfer is contingent on the mental health plan in the county of original jurisdiction demonstrating an existing

contract with a specialty mental health care provider, or the ability to enter into such a contract within 30 days of the waiver decision, and the ability to deliver timely specialty mental health services directly to the child or nonminor.

(3) The person or agency that requested the waiver of presumptive transfer bears the burden to show that an exception to presumptive transfer is in the best interests of the child or nonminor by a preponderance of the evidence.

(4) The hearing must conclude within five court days of the initial hearing date, unless a showing of good cause consistent with section 352 or section 682 supports a continuance of the hearing beyond five days.

(5) When considering whether it is in the child's or nonminor's best interests to confirm or deny the request for a waiver of presumptive transfer, the court may consider the following in addition to any other factors the court deems relevant:

(A) The child's or nonminor's access to specialty mental health services, the current provision of specialty mental health services to the child or nonminor, and whether any important service relationships will be affected by the transfer of jurisdiction or a waiver of presumptive transfer;

(B) If reunification services are being provided, the impact that the transfer of jurisdiction would have on reunification services;

(C) The anticipated length of stay in the child's or nonminor's new placement;

(D) The position of the child or nonminor, or of the child's or nonminor's attorney, on presumptive transfer; and

(E) The ability to maintain specialty mental health services in the county of original jurisdiction or to arrange for specialty mental health services in the county of residence after the child or nonminor changes placements.

(6) The court may make its findings and orders on *Order after Hearing on Waiver of Presumptive Transfer* (form JV-215).

(f) Existing out-of-county placement

This rule applies to presumptive transfer for any child or nonminor who resided in a county other than the county of original jurisdiction after June 30, 2017, and who continues to reside outside his or her county of original jurisdiction after December 31, 2017, and has not had a presumptive transfer determination as required under Welfare and Institutions Code section 14717.1(c)(2). Unless amended by Judicial Council action effective after the effective date of this rule, this subdivision will be repealed effective January 1, 2020.

Advisory Committee Comment

The exceptions to the presumptive transfer of the responsibility to provide for and arrange for specialty mental health services to the county of the child's or nonminor's out-of-county residence are found in Welfare and Institutions Code section 14717.1(d)(5)(A–D). A court review hearing under this rule may not necessarily be common, but under section 14717.1(d)(7), for all cases, a request for waiver, the exceptions claimed as the basis for the request, a determination whether a waiver is appropriate under Welfare and Institutions Code section 14717.1, and any objections to the determination must be documented in the child's or nonminor's case plan under Welfare and Institutions Code section 16501.1. The Department of Health Care Services and California Department of Social Services are responsible for providing policy guidance and regulations to implement Assembly Bill 1299 (Ridley-Thomas; Stats. 2016, ch. 603). The policy guidance and regulations should be used during the administrative process related to presumptive transfer. This would include determining who is entitled to make a request for waiver under (b)(1)(D) of the rule and section 14717.1(d)(2), where "department" refers to the Department of Health Care Services. In the policy guidance and regulations, the Department of Health Care Services and California Department of Social Services will determine who owes a legal duty to the child or nonminor and thus may request a waiver of presumptive transfer. In addition, the policy guidance and regulations will address the timelines for the period to request a hearing.

JV-214 Request for Hearing on Waiver of Presumptive Transfer

Clerk stamps date here when form is filed.

Use this form to request a court hearing to challenge the decision made by the placing agency on the request for waiver of presumptive transfer of the responsibility for specialty mental health services. (Read form JV-214-INFO, *Instructions for Requesting a Hearing to Review Waiver of Presumptive Transfer of Specialty Mental Health Services*).

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Child's/Nonminor's Name:

Date of Birth:

Court fills in case number when form is filed.

Case Number:

1 My relationship to the child or nonminor:

a. ☐ Self
b. ☐ Person or agency responsible for making mental health decisions on behalf of the child or nonminor
c. ☐ The child's or nonminor's attorney
d. ☐ Parent or legal guardian
e. ☐ Other: _____

2 My contact information *(if confidential, use form JV-287):*

a. Name: _____
b. Street Address: _____
c. City/State/Zip: _____
d. Telephone Number: _____
e. E-mail Address: _____

3 The child or nonminor is placed or will be placed in a county that is not the county of original jurisdiction. The out-of-county placement is in *(name county):* _____ county.

4 A request was made to the agency making this placement that the responsibility for providing specialty mental health services to the child or nonminor shoud be waived and not transferred to the new county. That request was made on *(date)* _____ by *(name):* _____.

5 On *(date):* _____, the agency making the placement informed me:

a. ☐ That an exception or waiver applies to the rule that the responsibility for providing specialty mental health services be transferred to the county where the child or nonminor lives or will live, and the responsibility should remain with the child's or nonminor's home county.
b. ☐ That the request for the waiver of the responsibility for the child's or nonminor's specialty mental health services is denied and the responsibility for those services should be transferred to the new county of residence.

6 I disagree with the agency's decision about transferring the responsibility for specialty mental health services to the new county, as follows:

a. ☐ The responsibility for the child's or nonminor's specialty mental health services should transfer to the county where the child or nonminor lives or will live.

6 b. ☐ The following exception to presumptive transfer should be applied and the responsibility for providing or arranging specialty mental health services should remain with the child's or nonminor's home county:

(1) ☐ The transfer would disrupt continuity of care or delay access to services provided to the child or nonminor.

(2) ☐ The transfer would interfere with family reunification efforts documented in the individual case plan.

(3) ☐ The child's or nonminor's placement in a county other than the county of original jurisdiction is expected to last less than six months.

(4) ☐ The child's or nonminor's residence is within 30 minutes of travel time to his or her established specialty mental health care provider in the county of original jurisdiction.

7 My request in 6 is in the child's or nonminor's best interests because *(provide a brief factual description of the exception to presumptive transfer selected in item 6b):*

_____

_____

_____

_____

_____

_____

8 I am requesting that the court grant a hearing on this matter.

9 On *(date):* _____ I informed the placing agency that I was requesting a court hearing to review the decision on presumptive transfer by providing the placing agency with a copy of this form.

Date: _____

_____ ▶ _____

Type or print your name *Sign your name*

JV-214(A)

Notice of and Order on Request for Hearing on Waiver of Presumptive Transfer

Clerk stamps date here when form is filed.

DRAFT
Not approved by the Judicial Council

The Court Finds and Orders:

1 ☐ The request for a hearing to review the request for waiver of presumptive transfer of the child's or nonminor's specialty mental health services filed on: _____, is granted and will be held as follows:

a. Date: _____ Time: _____
Dept.: _____ Div.: _____
Room: _____

b. Address of court: _____

Fill in court name and street address:

Superior Court of California, County of

2 ☐ The court has denied the request for a hearing to review presumptive transfer of the responsibility for specialty mental health services to the county of the child's or nonminor's residence. Unless a separate request was made for the court to review the waiver of presumptive transfer, the county placing agency is responsible for determining the outcome to the request for a waiver. Reason for denial:

☐ Request is not in the child's or nonminor's best interest.
☐ A valid exception to presumptive transfer is not indicated.
☐ Person or agency making the request does not have standing to request a hearing.
☐ Other: _____

Fill in child's name and date of birth:

Child's/Nonminor's Name:

Date of Birth:

Court fills in case number when form is filed.

Case Number:

Date: _____

▶ _____
Judge (or Judicial Officer)

3 **Notice to:**

a. ☐ Social worker ☐ Probation officer ☐ Attorney
Name: _____ Name: _____

b. ☐ Mother ☐ Father ☐ Legal guardian ☐ Attorney
Name: _____ Name: _____

c. ☐ Mother ☐ Father ☐ Legal guardian ☐ Attorney
Name: _____ Name: _____

3 d. ☐ Mother ☐ Father ☐ Legal guardian ☐ Attorney
Name: _____ Name: _____

e. ☐ Petitioner ☐ Attorney
Name: _____ Name: _____

f. ☐ Child, if 10 years of age or older, or nonminor ☐ Attorney
Name: _____ Name: _____

g. ☐ Legal guardian or guardians of the child
Name: _____

h. ☐ The Indian child's tribe, if applicable, as defined in rule 5.502
Name: _____

i. ☐ Mental health care decision maker for the child or nonminor, if one has been appointed under section 361(a)(1)
Name: _____

j. ☐ Child's caregiver
Name: _____

k. ☐ Known dependent siblings of the child or nonminor
Name: _____
_____

l. ☐ Other : _____
Name: _____

Date: _____

_____ ▶ _____
Type or your print name *Sign your name*

JV-214-INFO Instructions for Requesting a Hearing to Review Waiver of Presumptive Transfer of Specialty Mental Health Services

1 What is presumptive transfer?

Most foster children are eligible for specialty mental health services, such as therapy to address emotional, behavioral, and developmental problems. When a child is removed from his or her parent's or guardian's home, the county where the child lived ("home county") is responsible for arranging, paying for, and providing these services. When a child or nonminor is placed outside his or her home county, the responsibility for providing these services must transfer to the county where the child lives, unless certain exceptions apply. This process is called "presumptive transfer." The purpose of presumptive transfer is to ensure that foster children who are placed outside of their home county receive access to these services without delay, based on their individual strengths and needs.

2 What are the exceptions to the presumptive transfer of responsibility of specialty mental health services?

There are four exceptions to presumptive transfer:

a. The transfer would disrupt the continuity of care or delay access to services for the child or nonminor. In other words, the services would be interrupted or delayed in some way by the presumptive transfer.

b. The transfer would interfere with family reunification efforts documented in the individual case plan.

c. The placement in a county other than the home county is expected to last less than six months.

d. The child's or nonminor's residence is within 30 minutes of travel time to his or her established specialty mental health care provider in the home county.

3 How does the presumptive transfer process begin?

When a decision is made to place the child or nonminor outside the home county, the social worker or probation officer must inform certain individuals of the presumptive transfer requirements and a description of exceptions, the option to request a waiver of presumptive transfer if an exception exists, and the way to make such a request to the placing agency. These individuals include:

- the child or nonminor,
- the attorney for the child or nonminor,
- and the person or agency responsible for making mental health care decisions on behalf of the child or nonminor (the parent or guardian, unless the court has made an order appointing someone else).

4 Requesting a waiver of presumptive transfer

You may believe it would better if the child's or nonminor's home county remained responsible for his or her mental health services. Maybe you think so because the child or nonminor would lose an important relationship with a service provider, or reunification efforts would be affected. The child or nonminor, his or her attorney, and the person or agency responsible for making mental health care decisions on behalf of the child or nonminor can request that the placing agency consider waiving presumptive transfer based on an exception listed in 2, keeping the responsibility for mental health services in the home county.

The placing agency must inform the person or agency who requested the waiver and any party to the case of its decision on the request for waiver of presumptive transfer. The person who requested the waiver and any party to the case can ask the court to review the placing agency's decision.

If you are entitled to request a waiver of presumptive transfer, the social worker or probation officer should inform you how and when a request for waiver must be made.

5 How is a decision on a request for waiver made?

The social worker or probation officer will decide whether there is an exception to presumptive transfer. This decision must be communicated in writing or orally to the individual who requested waiver of presumptive transfer, along with all parties to the case.

Instructions for Requesting a Hearing to Review Waiver of Presumptive Transfer of Specialty Mental Health Services

6 How do I request a hearing?

The person who requested the waiver or any other party to the case may request a court hearing to review the placing agency's decision on the waiver request. To request a hearing, you must file a request for hearing on form JV-214 with the clerk in the superior court where the child's or nonminor's case is being heard. This request must be filed within seven court days of the social workers or probation officers telling you of the decision on the request for waiver.

On form JV-214, you will need to explain to the court why it would be better for the child or nonminor to have the home county maintain responsibility for mental health treatment, or to have that responsibility moved to the new county of residence. The person requesting a hearing also must inform the placing agency that they are requesting a hearing. To do so, give a copy of form JV-214 to the social worker or probation officer within seven days of being informed of the placing agency's decision on the request for the waiver of presumptive transfer.

7 What happens before and during the hearing?

The court will read the request for a hearing and decide whether to grant a hearing based on the information provided on form JV-214. If no hearing is granted, the placing agency's decision will become final. If a hearing is granted, presumptive transfer will be on hold until the court makes a ruling on the request for a waiver. The clerk of the court will contact you by phone or letter informing you of the hearing time, date, and location.

At the hearing, the judge will want to know why presumptive transfer should or should not be waived. The court will make its decision based on the best interests of the child or nonminor. Be prepared to explain to the judge why you believe it is in the child's or nonminor's best interests to keep the responsibility for mental health treatment in the home county or to move it to the new county of residence.

JV-215 Order After Hearing on Waiver of Presumptive Transfer

Clerk stamps date here when form is filed.

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Child's/Nonminor's Name:

Date of Birth:

Court fills in case number when form is filed.

Case Number:

1 a. Hearing date: _____ Time: _____
Dept.: _____ Room: _____

b. Judicial officer: _____

c. Party *(name):* Present

(1) Child: _____ ☐
Attorney: _____ ☐

(2) Mother: _____ ☐
Attorney: _____ ☐

(3) Father-presumed: _____ ☐
Attorney: _____ ☐

(4) Father-biological: _____ ☐
Attorney: _____ ☐

(5) Father-alleged: _____ ☐
Attorney: _____ ☐

(6) Legal guardian: _____ ☐
Attorney: _____ ☐

(7) Indian custodian: _____ ☐
Attorney: _____ ☐

(8) De facto parent: _____ ☐
Attorney: _____ ☐

(9) County agency social worker: _____ ☐
Attorney: _____ ☐

(10) Tribal representative: _____ ☐
Attorney: _____ ☐

(11) Other *(specify):* _____ ☐
Attorney: _____ ☐

The Court Finds and Orders

2 ☐ The social worker / probation officer provided a report no later than two days after a hearing was granted. The report included the information as required by rule 5.647(d) of the California Rules of Court.

3 ☐ The court has read and considered the report.

4 The child or nonminor:

a. ☐ Is being placed in a county outside the county of original jurisdiction on *(date):* _____.

b. ☐ Was placed in a county outside the county of original jurisdiction on *(date):* _____.

5 ☐ A request for a waiver to presumptive transfer was made to the placing agency by: _____.

6 a. ☐ The placing agency has determined an exception to the presumptive transfer of the responsibility to provide for and arrange for the child's or nonminor's specialty mental health services:

(1) ☐ The transfer would disrupt continuity of care or delay access to services provided to the child or nonminor.

(2) ☐ The transfer would interfere with family reunification efforts documented in the individual case plan.

(3) ☐ The child's or nonminor's placement in a county other than the county of original jurisdiction is expected to last less than six months.

(4) ☐ The child's or nonminor's residence is within 30 minutes of travel time to his or her established specialty mental health care provider in the county of original jurisdiction.

b. ☐ The placing agency has determined that no exception applies to the presumptive transfer.

7 a. ☐ The placing agency consulted the child and family team and others who serve the child or nonminor as appropriate regarding the waiver determination.

b. ☐ The decision on the waiver of presumptive transfer was communicated by the placing agency to the child and family team on *(date):* .

8 ☐ Notice of the placing agency's determination on the request to waive presumptive transfer of specialty mental health services was provided to the individual who requested waiver of presumptive transfer, and to all parties to the case.

9 a. ☐ After having considered the basis for the request for a hearing, the report provided for the hearing, and any other evidence presented at the hearing, the court finds that
☐ waiver of presumptive transfer ☐ presumptive transfer is in the child's or nonminor's best interests.

☐ If waiver applies, the mental health plan in the county of original jurisdiction has an existing contract with a specialty mental health care provider, or has demonstrated the ability to enter into a contract within 30 days of the waiver decision and to deliver timely specialty mental health services directly to the child or nonminor.

Date: _____

▶ _____
Judge *(or Judicial Officer)*

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	List of All Commentators, Overall Positions on the Proposal, and General Comments			
	Commenters	**Position**	**Comment**	**Committee Response**
1.	Christina Beck, M.A., Policy Analyst CWS, Policy and Program Support County of San Diego Health & Human Services Agency		• Rules should include placing agency's responsibility to consult CFT. • Placing agency should provide report to court that includes documentation of procedural efforts. • On JV-214, could petitioner have the option to put legal representative's contact info for line 2 if their own contact information is confidential? • Consider expanding language on JV-214A under 4(b) that includes possible reasons for court to deny setting a hearing such as: an exception does not apply or the party seeking judicial review is not a legal party in this matter.	This is included in the rule as subdivision (d)(2). This is required in subdivision (d). Yes. The JV-214 form has been amended to reflect that if the applicant requests their information remain confidential, to file form JV-287. Language has been added to form JV-214(A) to indicate some typical reasons for the court to deny the hearing.
2.	California Department of Social Services By Mary Sheppard, LCSW, Chief, Child Protection and Family Support Branch Children and Family Services Division		This letter provides comments from the California Department of Social Services (CDSS) on the Judicial Council's proposed rules 5.647 and 5.648 of the California Rules of Court regarding the presumptive transfer of specialty mental health services (SMHS) for children and youth in foster care. We also wish to extend our appreciation for the Judicial Council's ongoing work with State staff, and efforts to align the proposed rules with policy guidance issued in July 2017 through All County Letter 17-77/Mental Health Substance Use Disorder	

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			Services Information Notice 17-032 (ACL 17-77/MHSUDS 17-032).	
			Review of the proposed rules raised several questions with respect to the process of setting and conducting a hearing on the matter. For example, subdivision (c)(3) of Proposed Rule 5.467 provides that, in the event the court sets a hearing, the transfer of responsibility for SMHS cannot be transferred until the court's decision is final. Juvenile court rulings are normally final only after the 60-day period for filing a notice of appeal has elapsed. If there is an appeal or if a decision is made by a referee, it may be even longer before a decision is considered final. Given that the intent of WIC Section 14717.1 is to facilitate access to and delivery of timely services to children and youth placed outside of their county of jurisdiction, we hope the court will draft this section to limit the time within which this transfer cannot occur, thus not creating any delays in delivery of mental health services to children and youth.	The language of subdivision (c)(3) has been amended as follows: "(3) If the court grants a hearing under (c)(1), responsibility for providing specialty mental health services cannot be transferred until the court makes a ruling as required in (e)(2) and section 14717.1(d)(4)." This will clarify that for the purpose of presumptive transfer, it is no longer on hold when the court makes its ruling. Unless a stay is granted by the juvenile court pending an appeal, there does not appear to be any reason that the court's determination of waiver of presumptive transfer would be on hold after this.
			The Department identified subdivision (d) of the proposed rules as being particularly problematic. • This subdivision requires social workers or probation officers to provide the court with a detailed	The committee has removed many of the requirements for the report for the reasons indicated above, this should reduce some of the workload required for the creation of a report.

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			report. This will impose a cost and workload on county agencies that they are not currently performing. As an alternative, the department requests the court consider developing a form that placing agencies could complete. The level of detail proposed for this report is likewise problematic.	Given the timelines and procedures required to create a new JV form, and the fact that policy guidance on AB 1299 is the responsibility of DHCS and CDSS, the committee believes that it would be more appropriate for CDSS and DHCS to create a report template. Many of the reporting requirements in subdivision (d) of the proposed rule are also required by section 14717.1(d)(7), which applies even when a hearing under section 14717.1(d)(4) is not held.
			• Subdivision (d)(2) requires the report include documentation of the placing agency's rationale for the presumptive transfer decision. Presumptive transfer is not a decision point, making the court's interest unclear. When a child or youth is placed in a county other than his or her county of jurisdiction, the responsibility for SMHS is presumptively transferred to the child or youth's new county of residence. The decision that placing agencies are responsible to make, and that seems likely to be of interest to the court, is in response to requests to waive presumptive transfer.	The language of subdivision (d)(2) (now (d)(1)) has been amended to reflect that the placing agency address the "rationale for their determination on the request for a waiver of presumptive transfer."

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			On the pages below, we have included a table with our comments to specific subdivisions of Proposed Rule 5.467. We hold these same concerns for the corresponding provisions of Proposed Rule 5.468. We hope you find our input helpful, and appreciate the opportunity to participate in the public comment process. Please be assured that we are available to you to answer any questions that arise. You can reach us at CWSCoordination@dss.ca.gov.	
			Citation: Rule 5.467(b)(4) A request for a hearing may be made by filing a Request for a Hearing on the Determination of Presumptive Transfer of the Responsibility for Mental Health' Services (form JV-214), or by the filing of substantially similar information. This document must be filed with the court and provided to the placing agency within three court days of being informed of the placing agency's determination on the application of a waiver of presumptive transfer. Comment: The request for hearing should not be on the determination of presumptive transfer but rather on the agency's determination regarding a request for a waiver of presumptive transfer.	The form's name has been changed to "*Request for Hearing on Waiver of Presumptive Transfer*." Because the hearing will always address a waiver

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			Presumptive transfer itself is automatic absent a request for a waiver. We recommend the form's name be changed to reflect this.	of presumptive transfer, this seemed to be a concise and appropriate title.
			Additionally, the sample form reflects that it is for mandatory use, but this rule permits some other method of bringing substantially similar information to the court's attention. Making the form mandatory is preferred. This would require striking the phrase "or by the filing of substantially similar information."	The form has been made mandatory and the reference in the rule to "substantially similar information" has been deleted. The committee agrees that this will promote conformity in the requests for hearings.
			Citation: Rule 5.647(b)(5) The transfer of the responsibility for providing specialty mental health services cannot occur until the court makes a ruling on the application in (4).	
			Comment: This provision appears to conflict with subdivision (c)(l) which permits the court to deny the request for a hearing without a ruling on the application for review of the agency's determination regarding a waiver. It also appears unnecessary because subdivision (c)(3) precludes transfer until the court's ruling after granting a hearing is final. CDSS recommends this provision be stricken or replaced with a cross-reference to subdivision (c)(3).	Subdivision (b)(5) [now (b)(4)] prevents presumptive from occurring while the court is considering the request for a hearing. If the court grants a hearing, then (c)(3) becomes controlling. There will be a period of time prior the court ruling on the request for a hearing when presumptive transfer should not occur. The subdivision has been amended to reference the court's determination in (c)(1) to grant or deny a hearing.
			Citation: Rule 5.647 (c) Setting of a hearing. (§14717.1)	

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			(1) The court on its own motion may direct the clerk to set a hearing, or deny the request for a hearing without a ruling on the application of a waiver of presumptive transfer. Comment: CDSS suggests the court consider different wording to gain clarity and avoid confusion: Upon receipt of a request for hearing on the application of a waiver of presumptive transfer, the court clerk shall immediately forward the request to the juvenile court to which the specific child's or nonminor dependent's case is assigned. The court must immediately review the request for hearing and: (A) Direct the clerk to set a hearing no later than five days from the date the application was received by the court; (B) Deny the request for a hearing. Citation: Rule 5.467 (c)(2) If the court sets a hearing, the clerk must provide notice of the hearing date no later than five court days after the form was filed. Notice must be provided to: (A) The parents unless parental rights have been terminated, or guardians of the child; (B) The petitioner; (C) The social worker or probation officer; (D) The developmental rights holder or surrogate parent;	The committee agrees that the language in subdivision (c)(1) could be confusing. The language in (c)(1) has been amended to remove the reference to "application." Section (c)(1) will read as follows: (c)(1): The court on its own motion may direct the clerk to set a hearing no later than five court days after the request for a hearing was filed, or may deny the request for a hearing without ruling on the transfer of jurisdiction. The committee does not believe the other suggested additions are necessary as the court will have five days to set a hearing, and further admonitions on considering the request for a hearing immediately appear unnecessary.

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			(E) The child or nonminor if the child is 10 years of age or older; and (F) All other persons entitled to notice under section 293. Comment: The meaning of the first paragraph of this provision is unclear. Does the clerk provide notice no more than five days after the application is filed or must the hearing date be no more than five days after the application is filed? CDSS believes the rule's meaning is to provide the latter. CDSS requests the court consider language stating that the clerk will provide notice of the hearing date set pursuant to (c)(l) no later than the next business day after the court grants a request for a hearing. If language other than what is suggested above for (c)(l) is used, the provision here should specify that the hearing shall be no more than five days after the application for hearing was filed.	The commentator is correct that the language in (c)(1) references the setting of the hearing. The committee however agrees that the language is confusing and has amended (c)(1) as follows: (c)(1) The court on its own motion may direct the clerk to set a hearing no later than five court days after the request for a hearing was filed, or may deny the request for a hearing without ruling on the transfer of jurisdiction. Notice of the hearing will be addressed in (c)(2).
			Subdivision (c)(2)(B) should refer to the "applicant" rather than "petitioner." Because the hearing here is triggered by an application for a hearing rather than a petition, use of the term "petitioner" could be confusing.	The committee agrees with this suggestion and the revision has been made.
			Subdivision (c)(2)(D) is unclear. There are no surrogate parents in dependency or delinquency proceedings. The CDSS is unsure why the developmental rights holder would be noticed of	This language was taken from rule 5.651(e)(1)(A)(ii), which addressed notice to "the educational rights holder or surrogate parent." Surrogate parent may make more sense in the

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			the hearing. CDSS thinks it makes more sense to refer to the person responsible for making mental health care decisions on behalf of the foster child or nonminor.	context of a hearing related to the child's education. The committee therefore agrees the language should be changed. The court's authority to limit a parent's or guardian's ability to make mental health decisions is derived from section 361(a)(1). Section 361(a)(1) refers to the child's "developmental decision maker." However, the committee agrees that this language might create confusion because developmental decision making does not necessary denote decisions on mental health care. The language therefore has been changed to "(D) The mental health care decision maker for the child or nonminor if one has been appointed under section 361(a)(1);" The reference to "surrogate parent" has also been removed. Although consent laws allow for consent for mental health care decisions in certain situations to be made by licensed caregivers (Cal. Health & Saf. Code section 1530.6) or relative caregivers (section 366.27(a)), the reference to surrogate parents may not be clear enough to reference these individuals. In addition, it appears unnecessary as caregivers are required to be noticed under subdivision (c)(2)(G) of the proposed rule.
			It is unclear why all persons entitled to notice of dependency review hearings under WIC Section 293 would receive notice of this hearing. That provision includes siblings, whose positions regarding an exception to presumptive transfer would not necessarily be relevant.	A sibling has a fundamental interest in their relationship with their siblings. A hearing on the waiver of presumptive transfer addresses the status and well-being of the child or nonminor, like a status review hearing in which siblings are entitled to notice. The committee believes that

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				treating notice akin to a status review hearing is appropriate for a hearing on waiver of presumptive transfer.
			Additionally, WIC Section 293 does not apply to delinquency proceedings, but presumptive transfer does apply to wards placed in foster care pursuant to delinquency court orders. The CDSS recommends that this cross-reference to WIC Section 293 be deleted and that the specific individuals and entities to be noticed be identified. A catch-all for other persons deemed relevant by the court could be added.	Subdivision (c)(2)(G) has been amended to add a reference to parallel notice statute for wards: section 727.4(a).
			Citation: (c)(3) If the court grants a hearing under (c)(l), responsibility for providing specialty mental health services cannot be transferred until the court's determination is final	
			Comment: This provision is problematic. In dependency proceedings, the dispositional judgment and all subsequent orders are appealable unless expressly made reviewable subject to writ proceedings. A ruling on an application for hearing on a determination regarding an exception to presumptive transfer would presumably be appealable. The court's determination would therefore not be final until the 60-day period for filing a notice of appeal has elapsed or, in the case where an appeal has been taken, the appeal is final. Such a result is	The language has been amended to ensure the transfer will occur when the juvenile court's order is final: (c)(3) If the court grants a hearing under (c)(1), responsibility for providing specialty mental health services cannot be transferred until the court~~'s determination is final~~ makes a ruling as required in (e)(2) and section 14717.1(d)(4).

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			contrary to the purpose of presumptive transfer, which is to facilitate uninterrupted provision of specialty mental health services to children and nonminors placed out of county. Additionally, all juvenile court rulings made by referees are subject to rehearing. The timelines for rehearing are not as lengthy as the timeline for an appeal, but again cause unwarranted delay of presumptive transfer in the event the court does not overturn the decisions. CDSS recommends that this provision be revised to reflect that the responsibility for providing specialty mental health services cannot be transferred until the court has either denied the application for hearing on the determination of waiver to presumptive transfer or has issued a ruling after a hearing. Citation: (d) Reports When a hearing is granted under (c)(l), the social worker or probation officer must provide a report including discussion or documentation of the following: Comment: Requiring court reports raises funding issues under realignment (Prop. 30). While requiring a response from the placing agency is appropriate and necessary, CDSS recommends the JCC create a form for agency	This should address those situations where the decision is appealed or when there is a rehearing for an order by a referee. The committee understands that there is an additional workload for social workers and probation officers when they are required to provide a report for the hearing. To have a meaningful hearing, the court will however have to rely on information from the placing agency.

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			response to facilitate this process. Creating a form would simplify the response process for the placing agency. The form could use check boxes to identify who received notice of the right to request a waiver of presumptive transfer and who made such a request. The form also could allow for narrative, similar to the JV-180 form used for WIC Section 388 petitions. This would emphasize that the information regarding who participated in the decision regarding a waiver and the rationale for the placing agency's decision is the most critical information to present to the court. Citation: (d)(2) The placing agency's rationale for the presumptive transfer decision, including: (A)Any request for waiver, and the exceptions claimed as the basis for that request; (B) A determination whether a waiver is determined to be appropriate under section 14717.1(d)(5)(A-D); (C) Any objections to the placing agency's determination; and (D) How the child's or nonminor's best interests will be promoted by the placing agency's presumptive transfer determination. Comment: Under WIC Section 14717.1, the placing agency does not make a decision on presumptive transfer. Transfer occurs	The reporting requirements were lessened when subdivisions (d)(1) and (d)(3) were removed (these addressed notice of presumptive transfer requirements and the subsequent notice of the placing agency's determination on the request for waiver). In addition, the reporting requirements of former subdivision (b)(2) [now (b)(1)], includes reporting requirements under section 14717.1(d)(7) that are required when a hearing is not granted. In addition, subdivision (d) is clear in terms of what information is needed, and it doesn't appear that a separate template would be needed to address this. In addition, at the request of several counties, CDSS has indicated their intent to develop a template addressing the various requirements of the placing agency that can be used by placing agencies to document their responsibilities during the presumptive transfer process. For these reasons, the committee does not believe that a template created by the Judicial Council is necessary. The language in subdivision (b)(2) [now (b)(1)] has been changed to address "The placing agency's rational for their determination on the request for a waiver of presumptive transfer"

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			automatically under the statute. The placing agency is responsible to determine, on a case by case basis, if any exceptions to presumptive transfer exist and whether a waiver of presumptive transfer is appropriate. It is this latter decision that is subject to judicial review under Section 14717.1(d)(4). The rule should therefore require the placing agency to provide its rationale for its decision on a request for a waiver, rather than its decision regarding presumptive transfer. Subdivision (d)(2)(A)-(C) appears to shift the burden from the applicant for a hearing on the decision on a waiver to the placing agency. The applicant for the hearing should be required to provide this information and then present his or her reasons why the decision is contrary to the child's or nonminor's best interests. Only if the placing agency has different or more information regarding these items should it be required to address it to the court.	The committee elected to indicate in the rule that the person or agency who is requesting an exception or waiver to presumptive transfer should bear the burden to show that waiver is in the child or nonminor's best interests. This decision was made because the transfer of the responsibility for providing specialty mental health services is a presumption. The person requesting that the presumption should be rebutted should carry the burden at the hearing. The placing agency would carry the burden when they are indicating that a waiver applies to presumptive transfer. The committee also decided to indicate that the standard of proof for this determination would the preponderance of evidence. Although section 14717.1(d)(4) does not specify an evidentiary standard, when not provided, the burden of proof requires proof by a preponderance of the evidence. (Evidence Code section 115)

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			Subdivision (d)(2)(D) is the critical issue. WIC Section 14717.1(d)(4) permits the court to "confirm or deny the transfer of jurisdiction or application of an exception based on the best interests of the child." The best interests determination is therefore the only issue before the court under the statute. CDSS recommends that this be the focus of a narrative and that it include who was involved in the decision-making process regarding application of an exception and a request for a waiver and what their positions were. Citation: (d)(4) That the Child and Family Team, and others who serve the child or nonminor as appropriate, such as the therapist, developmental decision maker, and Court Appointed Special Advocate volunteer, were consulted regarding the waiver determination. Comment: CDSS believes this should be addressed in the discussion of the rationale for the decision on the request for a waiver. That rationale should include who were consulted, their positions, and how those positions were considered in the ultimate decision.	As mentioned above, the reporting requirements of (d)(2)(A-C) [now (d)(1)] are required under section 14717.1(d)(7) regardless of whether a hearing on presumptive transfer is held. While the best interest analysis is the key issue before the court, the committee also wants to provide judicial oversight of the process of requesting presumptive transfer and the resolution of the request for waiver. The rule does include those involved in the decision-making process in subdivision (d)(2). The items in subdivision (d) are requirements of section 14717.1, including consulting with the child, parents, the Child and Family Team and other professionals who serve the child (section 14717.1(d)(3)), providing notice of the determination on the request for waiver to the person requested the exception and all parties to the case (*id.*) and whether services can be delivered in county of original jurisdiction (section 14717.1(d)(6)). The committee wants to ensure that the placing agency has meet the requirements of section 14717.1(d)(3).

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			Citation: (d)(5) That notice of the placing agency's determination of whether to waive presumptive transfer was provided to the individual who requested waiver of presumptive transfer, along with all parties to the case, within three court days of the placing agency's decision on the application of waiver to presumptive transfer. Comment: CDSS believes this should only be an issue if this is raised by the applicant for a hearing as a reason for a hearing to review the placing agency's decision on a request for a waiver. Additionally, it incorporates timelines created by the joint guidance, which remain subject to change and subject to the regulatory process. Incorporating those timelines into a court rule will limit the DHCS and CDSS in executing their regulatory functions. Citation: (e) Conduct of the hearing. (1) The social worker or probation officer must provide a report no later than two court days after the hearing is set under (c)(l) that includes the information required in (d). Comment: This creates an unrealistic timeline for a court report. If the social worker or probation officer does not receive notice immediately after the court sets a hearing, it is unlikely a report will be able to be produced two court days after the hearing is set. Creation of a	The committee has removed the requirement in subdivision (d)(5) [now (d)(3)] that the notice be provided within three days, as this is a timeline for the CDSS and DHCS to determine in their policy guidance and regulations. The committee has however elected to keep this requirement in the rule to ensure that the placing agency has meet its obligation to provide notice of their determination on the request for waiver as required by section 14717.1(d)(3). The requirement to provide a report no later than two days after the hearing is set is taken from a similar rule involving placement changes, rule 5.651(e)(4), which addresses hearings related to change of placement affecting the child's education stability. Because these hearings are

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			responsive form, as discussed above, could alleviate that problem.	both based on a change of placements and the provision of important time sensitive services, the timeframe for the social worker's report was adopted from rule 5.651(e)(4). Rule 5.651(e) also includes the same timeframes as the proposed rules in terms of the setting of a hearing. These hearings could potentially be heard at the same time. In addition, the court may set the hearing at any time within five days of the request for hearing being filed. Theoretically, this could occur a day or two after the hearing is requested. Under this scenario, it makes sense to have the report required two days after the hearing is ordered.
			There should be a requirement, as suggested above, that the court clerk immediately notify the parties of a hearing being set. The report or responsive form should be due no later than two court days after the clerk notifies the placing agency of the hearing date. Citation: (e)(3) The hearing must conclude within five court days of the initial hearing date, unless a showing of good cause consistent with section 352 supports a continuance of the hearing beyond five days.	Like rule 5.651(e), the proposed rule does not specify when notice must be provided, due to the fact that the court clerk must provide notice on a short timeframe (within five days).

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			Comment: WIC Section 352 sets no outside limits for continuances. Given the purpose of the presumptive transfer process and the requirement that presumptive transfer be on hold until the court denies an application for hearing or rules on the merits, there should be an outside limit on how long a continuance may be. COSS suggests adding a sentence that states "In no event shall a hearing pursuant to this rule be continued more than 15 days beyond the initial hearing date."	The committee believes that placing a time limit on the length of the hearing will create an unrealistic expectation for many courts. In addition, section 352 provides an appropriate safeguard. In no event should the hearing be continued if it is contrary to the child's welfare. This would include those situations where services could be impacted during the presumptive transfer hearing. If the concern is that the courts won't honor the parameters of section 352, then there is no guarantee they will honor a fifteen-day time limit. Section 352 offers the best approach to address the child's best interests while taking into account other factors that may require a continuance beyond five days.
			Additionally, Section 352 applies only in dependency proceedings. It may be confusing to probation officers to cross-reference a dependency statute.	The rule has been amended to add references to parallel statutes for wards, including section 682 for continuances in subdivision (e)(4) and section 727.4(a) for notice in subdivision (c)(2)(F).
			Citation: (e)(5) The court may make its findings and orders on Hearing on the Determination of Presumptive Transfer of the Responsibility for Mental Health Services 23 (form JV-215).	
			Comment: This provision makes it permissive to use the form, but the form is identified as mandatory. CDSS supports making the form mandatory.	The committee agrees and the form has been made mandatory.

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			Additionally, there should be a provision for the clerk to provide notice of the court's ruling to the placing agency and the parties and that a copy of the notice should be served within a certain time frame. Because of the purpose of the presumptive transfer process, CDSS suggests that the clerk should serve a copy of the court's ruling on the hearing on the placing agency and all persons who received notice of the hearing no later than two court days after the hearing has concluded.	The committee does not believe that this requirement should be added to the rule because the placing agency will be present in court, either the social worker or county counsel. This will ensure that the placing agency will be aware of the court's order when it is made and a copy of the order can be requested at the hearing. The committee does not want to require this notice as it puts an extra burden on court clerks.
3.	Chua Chao Program Manager Marin County Children and Family Services San Rafael, CA		Thank you for the opportunity to comment on the proposed rules and forms on AB1299. Below are my comments: 1) I have a couple of comments regarding JV-214 (Request for a hearing on the Determination of Presumptive Transfer of the Responsibility for Mental Health Services). 1) I think the placing agency's reasons for denying the presumptive transfer waiver request should be available to the court in order to assist the court in deciding whether or not to hold a hearing. This could be accomplished by adding another line to the form or attaching the waiver denial response which would have all the reasons why presumptive transfer waiver is not in the child's best interest.	Placing the burden on the petitioner to explain the placing agency's reasoning could create an unfair burden on the petitioner. While the committee agrees that this could be helpful to the court, the petitioner may not be in a position to provide this information. The committee believes the court can adequately resolve the request for a hearing based on the information the petitioner provides on how their request furthers the child's best interests in item 7.

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			In most cases, the reason for denying a waiver request is due to the inability of the jurisdiction county's mental health plan to provide services or establish contracts with providers within 30 days as required even if one of the exceptions exist, which would be very helpful information for the court to have. 2) Maybe it's just me but the language in question 6A seems a bit confusing. I'm assuming this box is for when someone disagrees with the placing agency's approval of a waiver request and they want services to transfer to the county of residence but it's not very clear. 2) I don't like the idea of having to prepare a report for the hearing but I'm not sure it's avoidable based on the findings the court is required to make on JV-215. I am also concerned that the two day timeline for submitting a report to the court after a hearing is set does not provide placing agencies sufficient time to prepare and file a report. This timeline does not account for mail delivery so parties will not likely get the report before the hearing.	The commentator is correct that 6A addresses those situations where the applicant requests a hearing to review the placing agency's determination that a waiver apply to presumptive transfer. The committee has amended the language to provide more clarity. The timeline for the report is the same for the hearing to review a child's change of school placement in rule 5.651(e). Both hearings are triggered by a change in placement and both require a prompt hearing. Both issues could be heard at the same time, so the timelines of rule 5.651(e) were used to create the rules that are the subject of this proposal. In addition, the court may set the hearing at any time within five days of the request for hearing being filed. Theoretically, this could occur a day or two after the hearing is requested. Under this scenario, it makes sense to have the report required two days after the hearing is ordered.

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4.	Department of Health Care Services Erika Castro Branch Chief (Staff Services Manager III) Sacramento, CA	A	The Department of Health Care Services (DHCS) appreciates the opportunity to provide public comment on the proposed Family and Juvenile Law Advisory Committee California Rules of Court 5.647 and 5.648 and forms JV-214, JV-214(A), JV-214-INFO, and JV-215. As indicated in the Invitation to Comment, proposed rules 5.647 and 5.648 address the timelines, notice requirements, and request for a hearing to review the presumptive transfer determinations and the application of exceptions. Rule 5.647 will apply to any placement change to an out-of-county placement after the rule becomes effective September 1, 2018. Rule 5.648 will apply to those children and nonminors who are placed out-of-county as of December 31, 2017 and continue to reside in an out-of-county placement. While we marked "agree with proposed changes" on the online form, please note that many of the changes do not directly impact areas that DHCS oversees and in many cases we defer to the California Department of Social Services (CDSS) in our responses. Please see DHCS' responses below to the questions posed in the Invitation to Comment W18-07 ("Request for Specific Comments" – page 10).	

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			• Should the rule include factors that the court may consider when making its determination of the child's best interests as it relates to transfer of jurisdiction? If so, what factors should be included in the rule?	
			DHCS defers to CDSS.	No response required, see comment from CDSS above.
			• Should the rule require that the social worker or placing agency prepare a report for a hearing on presumptive transfer?	
			DHCS defers to CDSS.	No response required, see comment from CDSS.
			• Is there any concern with requiring the applicant requesting a hearing to provide their contact information on the JV form requesting a hearing?	
			DHCS has no concerns regarding the applicant providing their contact information on the JV form requesting a hearing.	The form has been amended to indicate that if the individuals contact information is confidential, to submit form JV-287.
			• Do you have any suggested changes to make JV-214 or JV-214-INFO easier for a lay person to understand? Can any items be removed to simplify or clarify the form and process?	

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			DHCS believes the forms are clear and include the essential information, and do not have any comments regarding the forms. The advisory committee also seeks • Would the proposal provide cost savings? If so, please quantify. N/A • What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems. N/A • Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? DHCS defers to CDSS. • How well would this proposal work in courts of different sizes?	No response required. No response required. No response required. No response required, see comment from CDSS.

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	Commenters	**Position**	**Comment**	**Committee Response**
			N/A	No response required.
5.	Executive Committee of the Family Law Section of the California Association Andrew Cain San Francisco, CA	AM	Dear Judge Borack and Judge Juhas: The Executive Committee of the Family Law Section of the California Lawyers Association ("FLEXCOM") submits the following comments concerning the above-referenced Invitation to Comment. FLEXCOM agrees with the proposal, with changes. We believe the proposal is generally sound. It establishes timelines for when certain actions related to the presumptive transfer process are to take place and requirements for information provided to the court. The changes we recommend build upon a sound proposal framework. They are as follows: 1. Rule 5.647(a) and Rule 5.648(a) – These subdivisions outline the applicability of each rule. It is clear that the rule applies following any change of placement outside the county of original jurisdiction. This should include changes from the original county to another county, as well as between differing non-jurisdiction counties. It is not unusual for a dependent to be moved between two counties outside the county of jurisdiction. We believe the language can be strengthened to clarify it applies in this latter instance. We recommend inserting the following language prior to the final sentence: "This includes changes in	The committee agrees that subdivision (a) should provide more clarity on the rules application to situations where the child moves from one out of county placement to another. However, in the interest of brevity and the simplicity, the committee recommends that the sentence at issue read as follows: The rule applies to presumptive transfer following any change of placement within California for a child or nonminor to a placement *that is* outside the county of original jurisdiction, including the initial placement. By inserting "that is" in front of "outside the county of jurisdiction" the rule should reflect that the rule's application is to any change of placement including between

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			placement between two counties that are outside the county of jurisdiction."	two out of county placements. The suggestion does not appear to be applicable to rule 5.648(a), as the language is different in that rule in that it only states that the rule applies to "any child or nonminor that resides outside their county of original jurisdiction as of December 31, 2017."
			4. Rule 5.647(c)(1) and Rule 5.648(c)(1) – This provision would give the court the ability to either deny the request for judicial review or set it for a hearing. We recommend adding language that allows the court to grant the motion upon all parties' agreement. This language would align with the Rule of Court governing requests to modify prior court orders.	Section 14717.1(d)(4) gives the court the option to "set the matter for hearing and may confirm or deny the transfer of jurisdiction…" The statute does not state that the application may be granted without a hearing. In addition, it does not seem likely that all parties will be in agreement when a hearing is requested. If all parties agree, then the placing agency can make the presumptive transfer determination that aligns with the agreement, making the court's involvement unnecessary. Therefore, this recommendation was not incorporated into the rule.
			5. Rule 5.647(c) and Rule 5.648(c) – The proposal sets timelines for requesting judicial review; the filing of the social worker's report; the court concluding the hearing after it has started; and a variety of other things. The proposal does not appear to provide a timeline for the initial setting of the hearing. We believe this to be an oversight. We recommend the following language added to subdivision (c)(1): "A hearing set pursuant to this subdivision shall take place no later than the seventh court day after filing of the request for a hearing."	The committee agrees that language in the rule related to the timing of the setting of a hearing could be clearer. The language of subdivision (c)(2) was intended to require a hearing date to be set within five days of the filing of the request for a hearing. The committee agrees that it is difficult to distinguish whether the five-day timeline applies to notice or the setting of the hearing. The committee has revised subdivision (c)(2) to include the language as follows: "If the court sets a hearing, the clerk must provide notice of the

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				hearing date *which will be* no later than five court days after the form was filed." Like rule 5.651(e), the proposed rule does not specify when notice must be provided, due to the fact that the court clerk must provide notice on a short timeframe (within five days).
			6. Rule 5.647(c)(2) and 5.648(c)(2) – The proposal requires the clerk of the court to provide notice of the hearing date no later than five court days after the request for hearing was filed. Based on our recommendation above for the timing of the hearing, we recommend changing the timeline for notice. We believe it should be two court days.	
			9. Rule 5.647(d) and Rule 5.648(d) – These subdivisions have various subparagraphs outlining what the social worker must include in the court report prepared for this hearing. There are six subparagraphs. We recommend adding a seventh subparagraph that requires the social worker to include information concerning any current mental health services currently provided to the minor. It makes sense for the court to know the extent of those services when determining whether transfer of responsibility to the county of residence is in the child's best interest. The language we propose is as follows: "Information as to current mental health services provided, including the types of services and the length of time the child or nonminor has utilized the service."	The committee agrees that this information warrants inclusion into subdivision (d). The rule has been amended to include the following language as a new (d)(5): "The child's or nonminor's current provision of specialty mental health services and how these services will the impacted by the placing agency's presumptive transfer determination."
			10. Rule 5.647(e)(1) and Rule 5.648(e)(1) – This subdivision sets forth a timeline for the	The requirement to provide a report no later than two days after the hearing is set is taken from a

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			social worker's report discussed above. It must be provided no later than two days after the hearing is set. Given the proposal's timeline for providing notice of the hearing date, as well as our recommended timelines, this would need to be changed. We recommend the report be required no later than "two court days before the hearing." This would create the following sample timeline: Court Day 1 – court sets a hearing date. Court Day 3 – latest by which the clerk can distribute notice of hearing date. Court Day 5 – social worker's report is due. Court Day 7 – hearing.	similar rule involving placement changes, rule 5.651(e)(4), which addresses hearings related to change of placement affecting the child's education stability. Because these hearings are both based on a change of placements and the provision of important time sensitive services, the timeframe for the social worker's report was adopted from rule 5.651(e)(4). Rule 5.651(e) also includes the same timeframes as the proposed rules in terms of the setting of a hearing. In addition, the court may set the hearing at any time within five days of the request for hearing being filed. Theoretically, this could occur a day or two after the hearing is requested. Under this scenario, it makes sense to have the report required two days after the hearing is ordered. Therefore, the committee believes that these timelines are appropriate.
			12. Rule 5.648(a) – Most youth who were placed out of county prior to September 1, 2018 will already have undergone the entire presumptive transfer process. There would be no need for this rule to apply in those instances. Thus, language should be added that clarifies this rule applies only when the presumptive transfer process has not been applied. We recommend the following language be added to subdivision (a). "This rule shall apply only if a determination on transfer has not been made."	The committee agrees with adding this clarification to subdivision (a) of rule 5.647 and has added clarifying language. Rule 5.648 has been removed but the language has been added to rule 5.647.

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			15. Proposed JV-214(A) – The proposed form is to be used by the court upon receiving the request for a hearing. The current draft only allows for the court to deny the request or set the request for a hearing. For the reasons mentioned above, we believe the form should allow the court to grant the application, if all parties agree. Thus, we would add an option for the court to make such an order.	See comment above related to subdivision (c)(1).
6.	Kern County Department of Human Services Terrie Martinez, MSW Program Specialist, Assistant Director's Office	NI	Managers from the Kern County Department of Human Services have reviewed **Juvenile Law: Presumptive Transfer of Specialty Mental Health Services**. Thank you for your time and consideration. Request for specific comments: • Should the rule include factors that the court may consider when making its determination of the child's best interests as it relates to transfer of jurisdiction? If so, what factors should be included in the rule? Yes – relationship with current mental health provider. • Should the rule require that the social worker or placing agency prepare a report for a hearing on presumptive transfer?	The committee believes that this will fall under proposed subdivision (e)(5)(A): "The child's or nonminor's access to specialty mental health services, the current provision of specialty mental health services to the child or nonminor, and whether any important service relationships will be impacted by the transfer of jurisdiction or a waiver of presumptive transfer;"

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			Yes. • Is there any concern with requiring the applicant requesting a hearing to provide their contact information on the JV form requesting a hearing? No. • Do you have any suggested changes to make JV-214 or JV-214-INFO easier for a lay person to understand? Can any items be removed to simplify or clarify the form and process? No.	The committee agrees and the rule requires that a report be submitted when a hearing is granted. No response required. No response required.
7.	Los Angeles County Department of Children and Family Services By Ruena Borja, LCSW Children Services Administrator I DCFS Policy Section Norwalk, CA	NI	**LA DCFS' Response to the Request for Specific Comments Regarding AB 1299** - If there is a request for a judicial review thereafter, the Court shall schedule the hearing within 5 calendar days and the decision is not made final until the court has made the necessary orders. • **Should the rule include factors that the court may consider when making its determination of the child's best interests as it relates to transfer of**	These findings are found in the rule in subdivision (c)(1) and (c)(3).

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			jurisdiction? If so, what factors should be included in the rule?	
			In the past, case law has determined that "It has been said that the best interest of the child is an "elusive guideline that belies rigid definition". (See State Dept. of Social Services v Superior Court (2008) 162 Cal. App. 4th. 273, 286) .So if the rule outlines specific factors that should be considered this would be consistent with other dependency statutes that set forth specific standards - see WIC 319, 361 (c), 366.21 (e). As indicated in Siser Section 2.11.(4): When such specific standards are followed, the interest of the child is inherently served in the manner the legislature has determined is best. As such, providing the specific factors to follow would result in the court making a decision that would be in the child's best interest.	As the comment indicates, guidance when determining the child's or nonminor's best interest can help facilitate the court making a best interest determination. The standard provided by statute when the court is making a determination on confirming or denying transfer of jurisdiction is the child's best interests. The factors listed in subdivision (e)(5) are some factors that the court may consider, but they are not intended to be the only factors that the court may consider. In response to comments received, language has been added to subdivision (e)(5) to clarify that "the court may consider the following *in addition to any other factors the court deems relevant*." The language cited by the commentator is a statutory ground for a waiver to presumptive transfer.
			However, the current proposed rule 5.647(e)(4), under 'Conduct of Hearing' section: it states that "When considering whether it is in the child's best interests to confirm or deny the request for a waiver to presumptive transfer, the court may consider the following: (A)The access to mental health services and the child's current provision of specialty mental health services, and whether *any important service relationships will be impacted*;	As the comment indicates, the best interest standard cannot always be rigidly defined. The committee believes however that the current language can help to focus the court attention on one very important factor when making a decision on the transfer of the responsibility for mental health services: the child's or nonminor's service relationships. While the language is different than what is listed in the statute, the committee believes that phrased this way, the rule will help insure that the court considers these important

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			The above is a different threshold/standard than the one set by WIC section 14717.1(d)(5) which is that "the transfer would disrupt continuity of care or delay access to services provided to the foster child". We suggest that the rule be consistent with the WIC language.	relationships when determining the child's or nonminor's best interests. In addition, in response to comments, a new subdivision (e)(5)(E) is being added as an additional factor: "The ability to maintain specialty mental health services in the county of original jurisdiction or to arrange for specialty mental health services in the county of residence after the child changes placements." Both these factors relate to the continuity of care. Because disruption to the continuity of the care is a basis to waiver presumptive transfer, the committee believes that the topic will sufficiently covered.
			• **Should the rule require that the social worker or placing agency prepare a report for a hearing on presumptive transfer?** Yes, the requirement of a report would ensure the Court has all relevant information needed to make the appropriate determination in accord with the "factors" outlined above for the Court to consider. However rather than setting the date of receipt of the report two days from when the court set the hearing as currently proposed, it should instead set the date of receipt of the report certain number of days *prior* to the court hearing date.	The timeline for the filing of the placing agency's report mirrors the timeline from a similar rule involving placement changes, rule 5.651(e)(4), which addresses hearings related to change of placement affecting the child's education stability. Because these hearings are both based on a change of placements and the provision of important time sensitive services and could potentially be heard in conjuncture, the timeline for the filing of the report was adopted from rule 5.651(e)(4). Many of the reporting requirements of the rules as originally proposed have been

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				removed when the committee removed elements in the rule that relate to administrative functions.
			Similarly, the current proposed rule for the court clerk to provide notice of the hearing date (including to the social worker) no later than five court days *after the form was filed*, should be changed to instead set the time of when notice is to be provided by a certain number of days *prior to the hearing,* to ensure that the social worker has sufficient and reasonable time to prepare the report.	This language was intended to apply the date the hearing must be set. As such, subdivision (c)(1) has been amended to reflect this: "The court on its own motion may direct the clerk to set a hearing *no later than five court days after the form was filed*, or deny the request for a hearing without making a ruling on the application of a waiver of presumptive transfer."
			• **Is there any concern with requiring the applicant requesting a hearing to provide their contact information on the JV form requesting a hearing?**	
			Due to WIC 827 confidentiality requirements, release of contact information would remain confidential so there shouldn't be a concern with the release the applicant's contact information.	While section 827 should protect the confidentiality of the juvenile case file, the committee still elected to amend the JV-214 form to reflect that if the applicant requests their information remain confidential, to file form JV-287.
			• **Do you have any suggested changes to make JV-214 or JV-214-INFO easier for a lay person to understand? Can any items be removed to simplify or clarify the form and process?**	

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			It is unclear how the JV forms are going to be disseminated. It seems that the JV 214-INFO is made available only at the point that the party is filing for a judicial review. It would be ideal that the information on the form JV 214-INFO is sent prior to or upon notification of the presumptive transfer. Can these forms be integrated with a written notice template that CDSS indicated they will develop and provide for counties' use? We also suggest that the forms provided to the public also be available in Spanish to address limited-English-proficiency court users. Please note that the Judicial Council established two new rules of court (Rule 2.850 and 2.851), both effective January 1, 2018 which in pertinent part, require the each superior court to designate a Language Access Representative (LAR), and establish a language access services complaint form and process by December 31, 2018.. See also link: http://www.courts.ca.gov/lap-toolkit-courts.htm In addition, please note, HIPAA requires Covered Entities to ensure meaningful access for individuals with limited English Proficiency and states " In each state, covered entities are required to post taglines in the top 15 languages spoken by individuals with limited English proficiency in that state that indicate the availability of language assistance." (see Section	CDSS and DHCS have prepared and are expected to release forms related to notice of presumptive transfer requirements and exceptions, a request for waiver, and notice of the placing agency's presumptive transfer determination. Circulation of these forms and the JV-214 INFO form can occur in any number of ways and counties have the option to determine when and how forms should be used to inform individuals of the presumptive transfer process (consistent with the policy guidance required by section 14717.1). The JV-214 INFO form will be translated into Spanish. The rule will not be addressing the administrative process of presumptive transfer, but only the setting and conduct of the hearing. The Judicial Council and the courts are not covered entities under section 1557 of the ACA. As such, the Judicial Council is not in a position to advise DCFS how to comply with HIPAA and ACA regulations during the administrative presumptive transfer process. This would more appropriately be addressed by the CDSS and DHCS, who are responsible for creating policy guidance and regulations for the presumptive transfer process.

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			1557 of the Affordable Care Act of 2010). However, DCFS is not a covered entity so the above provisions apply to Department of Mental Health. However, since ACL 17-77 references compliance with HIPAA, it would be worth noting DCFS is aware of the concern to ensure access by limited English proficiency families and is seeking guidance from the Judicial Council to determine how best to comply with the new Local rules and ACL 17-77 requirement to ensure compliance with HIPAA.	
8.	Kim Narvaez, MFT Children's Mental Health Program Manager Yolo County Health and Human Services Agency, Child and Family Branch	NI	**Request for Specific Comments** • Should the rule include factors that the court may consider when making its determination of the child's best interests as it relates to transfer of jurisdiction? If so, what factors should be included in the rule? Prescribing Psychiatrist's recommendation, they're usually not in CFTs but the court should ask them. • Should the rule require that the social worker or placing agency prepare a report for a hearing on presumptive transfer? Yes	The committee believes that the opinion of the prescribing psychiatrist can be important to determining the child's best interests, but considers it to be too case specific to be included in this subdivision of the rule. No response required.

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			• Is there any concern with requiring the applicant requesting a hearing to provide their contact information on the JV form requesting a hearing? No • Do you have any suggested changes to make JV-214 or JV-214-INFO easier for a lay person to understand? Can any items be removed to simplify or clarify the form and process? 5b is confusing "exception to the rule" could be changed to a non-legal jargon.	 No response required. The committee agrees that the language in 5b could be simplified and has revised the language.
9.	Office of County Counsel County of Santa Clara By James R. Williams & Michaela L. Lewis San Jose, CA		4. Should the rule require that the social worker or placing agency prepare a report for a hearing on presumptive transfer? Yes. The social worker and the placing agency are likely to have much of the relevant information that will inform the court's consideration of whether the waiver is appropriate. 5. Is there any concern with requiring the applicant requesting a hearing to provide their contact information on the JV form requesting a hearing?	 No response required.

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			A party may need to keep their address confidential (e.g., a domestic violence survivor, or confidential placement). The form at least should include an option for a party to keep his or her contact information confidential. 7. Do you have any suggested changes to make JV-214 or JV-214-INFO easier for a lay person to understand? Can any items be removed to simplify or clarify the form and process? The forms and instructions refer to the "home county," which could be confused with county of residence. Instead of using the term "home county," it would be clearer to use "sending county," and "receiving." The form and rules use the term "biological" in relation to parent or father. Because biological parents are not necessarily involved with all dependency proceedings, not necessarily entitled to reunification services, and not necessarily able to make legal decisions for their children, it would be more accurate to use the term “parent or legal guardian."	The JV-214 form has been amended to reflect that if the applicant requests their information remain confidential, to file form JV-287. Referring to the child’s home county references the child’s county of original jurisdiction. The use of the term home county is intended clearly define where the child comes and to identify the county of original jurisdiction. The form explains that “When a child is removed from their parent's or guardian's home, the child's home county where the child lived is responsible for arranging, paying, and providing these services.” Referring to the sending and receiving county may create confusion in those situations when a child or nonminor moves from one out-of-county placement to another out-of-county placement. In those situations, it would not be clear that the “sending county” is the child’s county of original jurisdiction, as required. References to “biological parents” have been removed from the forms and rules, as this language was taken from ACL17-77 to refer to those individuals who should be noticed of the initial presumptive transfer determination.

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10.	Orange County Bar Association Nikki P. Miliband, President Newport Beach, CA	AM	Comment: 12 for consistency within the Rules and within the practice of dependency court. • Should the rule include factors that the court may consider when making its determination of the child's best interests as it relates to transfer of jurisdiction? If so, what factors should be included in the rule? Comment: The Rules are acceptable as written. • Should the rule require that the social worker or placing agency prepare a report for a hearing on presumptive transfer? Comment: Yes. • Is there any concern with requiring the applicant requesting a hearing to provide their contact information on the JV form requesting a hearing? Comment: No, because these files are already confidential.	No response required. No response required. No response required.

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			• Do you have any suggested changes to make JV-214 or JV-214-INFO easier for a lay person to understand? Can any items be removed to simplify or clarify the form and process? Comment: No, they are accurate and straight forward. • Note: There could be Medi-Cal coverage issues when the child changes residence from county to county.	No response required. The committee acknowledges that there may be issues with Medi-Cal coverage when a child changes placements for other services provided under Medi-Cal. However, the scope of this proposal is limited to the implementation of AB 1299 which addresses only access to Specialty Mental Health Services under Medi-Cal.
11.	Orange County Social Services Agency By Alix Kaainoa-Thomas		**3. Proposed rule of court: 5.648(e)(1)-** 2 **(e) Conduct of the hearing** 3 4 (1) The social worker or probation officer must provide a report no later than two 5 court days after the hearing is set under (c)(1) that includes the information 6 required in (d). **Orange County Comment to proposed rule of court 5.648 (e)(1)-** Proposed Rule 5.648 (e)(1) indicates that the social worker or probation officer must provide a report addressing a number of items indicated in Rule 5.648 (d) within two court days after the hearing is set. There is concern that two court	The timeline for the report is the same for the hearing to review a child's change of school placement in rule 5.651(e). Both hearings are triggered by a change in placement and both require a prompt hearing. Both issues could be

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			days may not be enough time for social workers/probation officers to obtain the information (especially as it is related to information that is requested from the Mental Health Plan that the social worker or probation officer would need to contact and obtain from them), write the report, and file it. Perhaps the timeline could read "at least one court day before the date of the hearing" in order to provide a more appropriate amount of time.	heard at the same time, so the timelines of rule 5.651(e) were used to create the rules that are the subject of this proposal. In addition, the court may set the hearing at any time within five days of the request for hearing being filed. Theoretically, this could occur a day or two after the hearing is requested. Under this scenario, it makes sense to have the report required two days after the hearing is ordered. The committee is also removing from the rule reporting requirements that address the placing agency's responsibilities during the presumptive transfer process found in ACL 17-77 because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change. This should help to reduce the burden on the placing agency's report.
12.	Sacramento County Department of Health and Human Services Sacramento County Office of the County Counsel By Robyn Truitt Drivon County Counsel & Traci Lee Assistant County Counsel Sacramento, CA	NI	By and through counsel, Sacramento County Department of Health and Human Services (DHHS) provides the comments below pertaining to Presumptive Transfer of Specialty Mental Health Services (SMHS) proposed Rules of Court and Judicial Counsel (JV) forms in response to the Invitation to Comment (IC) W18-07. Sacramento County Child Protective Services, Behavioral Health and Probation departments have been diligently working to develop and implement policies and procedures to ensure compliance with the legislation. Through this work it has become evident that	

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			the legislation effectuating the Presumptive Transfer of SMHS is complicated involving systems with differing terminology and practices that will need to coordinate closely at both a State and County level to ensure the goals of the legislation are met. **Comment 2:** It appears the intention of the legislation and of the proposed Rules of Court is to allow for judicial review of the placing agency's determination on presumptive transfer which would include whether to waive presumptive transfer (assuming an exception applies) or to transfer (irrespective if there is an applicable exception.) This is not easily discernable from the current legislation and proposed Rules of Court and it would be recommended that these options be more clearly identified. **Comment 3:** The clear goal of AB1299 was to ensure prompt access to SMHS for children irrespective of their county of original jurisdiction and county of placement. It is the concern of Sacramento County DHHS that the current legislation and proposed Rules of Court have the potential to delay such access. The majority of Sacramento youth that are placed out-of-county are placed on an immediate need thus the 14 day notice period prior to any placement is not applicable. The youth requiring immediate placement is	Subdivision (b)(3) (now subdivision (b)(2)) has been amended to clarify that a hearing can be requested when the applicant disagrees with the placing agency's determination on the request of a waiver of presumptive transfer. This would include both when the placing agency determines a waiver applies to presumptive transfer or when the placing agency determines that a waiver does not apply. The committee very much appreciates the issues raised in this comment, however, they are directed at issues that the committee is unable to address and can only be addressed either by the legislature or the policy guidance and regulations that are being created by DHCS and CDSS. Section 147171.1(d)(3) requires that the individual who requested the exception to presumptive transfer or any other party to the case may request a judicial review *prior to the county's determination*

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			also likely in need of access to SMHS on an expedited basis as contemplated by AB1299. However, if the initial determination by the placing agency that presumptive transfer is appropriate cannot be communicated to the out-of-county mental health plan (MHP) until the determination if final, that youth is without necessary SMHS. Depending on whether there is a hearing requested, that could vary from 7 days to 25 or more. Additionally, the MHP in the county of placement now has a youth that is placed in their county, in need of SMHS, but not receiving said services potentially creating liability for that county's mental health agency. It appears that the desire to give those involved in the child's case the opportunity to seek judicial intervention at this stage may actually result in further delays at a time the youth is most in need of the SMHS. Clearly having services stop and start in different counties is not preferable, but it is the recommendation of Sacramento County DHHS that the initial determination of the placing agency, after consultation with the Child and Family Team (CFT) be implemented immediately. It is unlikely there is a juvenile court in the State that is not overburdened and will be able to receive timely reports from the child welfare or probation departments, get hearings scheduled and heard without delay, and ensure all parties are informed and prepared to address the complicated issues of SMHS. Better to start the	*becoming final*. The Rule of Court cannot supersede the statute in the way recommended. The comment will however be forwarded to CDSS and DHCS as they implement regulations to implement AB 1299.

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			services in the out-of-county placement, or maintain the services of the county of origin if waiver is recommended, than to have no services in place until a final determination is made. **Comment 5:** Proposed Rule of Court 5.647(e)(1) – given the timelines involved, the time for filing of the report should be two days before the hearing to give the placing agency more time to gather the necessary information required. **Comment 6:** To be consistent, in the Advisory Committee Comment in the second to last sentence (pg. 17 of IC) should read "A waiver to the presumptive transfer…" instead of "An exception to the presumptive transfer…" **Comment 7:** Should the rule reflect any new timelines for requesting a hearing that are introduced by subsequent ACLs/ACINs?	The timeline for the report is the same for the hearing to review a child's change of school placement in rule 5.651(e). Both hearings are triggered by a change in placement and could be heard at the same time, so the timelines of rule 5.651(e) were used to create the rules that are the subject of this proposal. There will be a reduction in the report requirements than the original proposal because the committee has elected to remove the requirement that the placing agency report on administrative responsibilities as found in ACL 17-77. The committee agrees with this suggested revision and has updated the Advisory Comment accordingly.

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			Yes, but please review Sacramento County's recommendation in comment 3 above. **Comment 11:** Though the placing agencies are already overburdened with mandates, given the specific findings the court must consider when it is evaluating the evidence on the presumptive transfer decision, it would be wise to have a succinct report addressing only those required elements to avoid confusion and delay and assist the court in making and informed and timely ruling. **Comment 12:** Is there any concern with requiring the applicant requesting the hearing to provide their contact information on the JV form requesting the hearing? No, but there should be a mechanism for the applicant to request information remain confidential if necessary. **Comment 14:**	See the response above related to the removal of administrative requirements from the rule. Many of the reporting requirements related to the administrative process of presumptive transfer of the rule as originally proposed have been removed. Doing so lessens the burden on the placing agency's reporting requirements. As mentioned above however has elected to require in subdivision (d) that the report address requirements found in section 14717.1 related to the presumptive transfer process. In addition, at the request of several counties, CDSS has indicated their intent to develop a template addressing the various requirements of the placing agency that can be used by placing agencies to document their responsibilities during the presumptive transfer process. The JV-214 form has been amended to reflect that if the applicant requests their information remain confidential, to file form JV-287.

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			Do you have any suggested changes to make JV-214 or JV-214-INFO easier for lay person to understand? A layperson is going to have a difficult time understanding any of this as a team of attorneys, mental health professionals, child welfare and probation professionals are still struggling to understand the legislation, the rules, the forms as well as the attendant implications. We are not sure how you would simplify further a very complex law.	The committee recognizes that this process is complex and strove to make it as clear as possible. An information sheet has been created as part of this proposal to help participants in understanding the presumptive transfer process.
13.	San Bernardino County Program Development Division By Robert Silva Supervising Program Specialist Program Development Division County of San Bernardino San Bernardino, CA	NI	**Comment Request:** Should the rule reflect any new timelines for requesting a hearing that are introduced by subsequent ACLs or ACINs? The rule further proposes a hearing be set within five court days and the hearing should be resolved within five days of the initial hearing. **Notes:** It is anticipated that the timeline to request hearing will be extended from three court days to seven court days. The goal is to ensure the hearing process does not create a lengthy delay, while allowing for flexibility where good cause is found. **County Comment:**	

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			Given the kinds of services that may be needed, court may wish to have the option to rule if services should be provided while awaiting the hearing. **Comment Request:** Should the rule include the requirements of the placing agency's responsibilities during the presumptive transfer individualized exception determination as laid out in section 14717.1 and ACL 17-77? And should the rule require the court to review these efforts to ensure compliance? **Notes:** The responsibilities include determining if the Mental Health Plan (MHP) in the County of Jurisdiction (COJ) has Specialty Mental Health Services (SMHS) available or can contract for such services with 30 days. **County Comment:** Yes, the placing agencies should have a clear plan for service through the MHP in the COJ.	DHCS does not anticipate that services will be on hold during the presumptive transfer process when the responsibility for providing mental health services remains with the county of original jurisdiction. If the commentator is suggesting that presumptive transfer proceed prior to the hearing being completed, this suggestion would need to be addressed by the legislature, as section 14717.1(d)(4) states that judicial review may be requested prior to the county's determination becoming final. The committee agrees that the placing agency must have a plan for services through the MHP in the county of jurisdiction. The committee

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			This may even allow for the use of Service Authorization Requests.	however cannot address whether Service Authorization Requests (SOR) can be incorporated into the rule. However, they could be relevant to the how the placing agency, CFT, and the court make a determination on a waiver to presumptive transfer.
			The court should allow, to some extent, comparison of services in the County of Residence (COR). That is, if there is an objection to a waiver, the party objecting must also clearly demonstrate services are available through the MHP in the COR. For example, some counties do not have services – including the ability to assess for medical necessity for SMHS - for some age groups; others have limited services in certain areas.	The committee agrees that this is an important analysis when the court is determining the best interest of the child as it applies to presumptive transfer. The committee has amended subdivision (e)(5)(E) of the proposed rules to reflect that court may consider the ability to maintain specialty mental health services in the county of original jurisdiction AND the county residence after the child changes placement.
			Comment Request: Should the rule include factors that the court may consider when making its determination of the child's best interests as it relates to transfer of jurisdiction? If so, what factors should be included in the rule?	
			County Comment: It should be the strong presumption that completing the reunification plan is in the child's best interests. A primary purpose of therapeutic services is to facilitate reunification;	The committee agrees that these are very important aspect of therapeutic services. The committee believes that facilitating reunification services is sufficient addressed in the rule by its

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			and therapeutic services should facilitate placement, not the other way around. Services should demonstrate that they enhance Placement Stability, Permanent caring relationships, integration into the community, and connection with siblings. Therapeutic services need to be seen as one aspect in the milieu of services. Practical and logistical considerations that interfere with other services – education, physical health, even extracurricular activities – should be evaluated on a case by case basis. The desires and preferences of the youth and the family need to be considered in the CFT and should be reviewed by the court. **Comment Request:** Should the rule require that the social worker or placing agency prepare a report for a hearing on presumptive transfer? **Notes:** The suggested court report information included: • The rationale for the SW determination on the waiver request, and • How and when the SW fulfilled their responsibilities during the presumptive	inclusion in subdivision (e)(5)(B) and that it is one of the statutorily bases for the application of a waiver to presumptive transfer. The committee further believes that the desire and preference of the youth is sufficiently covered by subdivision (e)(5)(D), which specifically lists the child or nonminor's position on presumptive transfer. The committee agrees that these are factors that the court should consider when making a determination on the child's or nonminor's best interests. However, the committee elected not to expand the list to include these suggestions to promote brevity in the rule and because it believes that these issues fall into the categories that are already listed. No response required.

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			transfer process, including how and when the following were performed: o Notice of a description of presumptive waiver and exceptions and how to request a waiver of presumptive transfer, o Informing certain individuals and the CFT of the initial determination on presumptive transfer, o Consulting the CFT and other professionals as appropriate on the presumptive transfer determination, and o Notice to the individual who requested waiver and any party to the case of the determination of the application of a waiver. **Comment Request:** Is there any concern with requiring the applicant requesting a hearing to provide their contact information on the JV form requesting a hearing? **County Comment:** If the entire CFT is informed and the JV form is used as part of that informing, then contact information may need to be redacted.	Because form JV-214 is a form that is filed with the court and is a part of the juvenile court case file, it should not be disseminated beyond what section 827 permits. As such, members of the CFT should not have access to the document and should not be informed by receiving a copy of the

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			Comment Request: Do you have any suggested changes to make JV-214 or JV 214 INFO easier for a lay person to understand? Can any items be removed to simplify of clarify the form and process? **Notes:** Forms are pictured below.	JV-214. However, the committee has amended the form to indicate that if the preparer of the JV-214's contact information is confidential, to file a JV-287 along with the JV-214. No comments were included with the attached forms.
14.	Santa Clara County Department of Family and Children Services By Francesca LeRue, Director San Jose, CA	AM	Proposal W18-07 is issued for public comment relating to **Juvenile Law: Presumptive Transfer of Specialty Mental Health Services**. The proposal has been reviewed by Santa Clara County Department of Family and Children's Services (DFCS) who is in agreement with the proposal if it is modified. Our comments are below: 1. Recommend that CDSS/State coordinates/maintains a website to include all 58 counties' Specialty Mental Health Plan contact information. 2. When someone requests a waiver or any party requests a judicial review, clarify how long it	Points of contact for presumptive transfer can be found at the following webpage, maintained by CDSS: http://www.cdss.ca.gov/county-offices The rule does require that the hearing be concluded within five days.

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			will take for court to review and make a final decision. Current referrals timeline to the Mental Health Plan is four business days. The proposed rules of court (subdivision (e)(3)) say that if a hearing is set, it must conclude "within five court days of the initial hearing date." 5. Should the rule include factors that the court may consider when making its determination as laid out in section 14717.1 and ACL 17-77? • Yes, the description of factors the court may consider is a useful guide for the county agency when reporting to the court upon a hearing being requested. 6. Should the rule require the social worker or placing agency prepare a report for a hearing on presumptive transfer? • While we understand the desire for a report from the social worker when a hearing is set, if it is determined a report is necessary then we recommend the list in subdivision (d) of the proposed rules be pared down to require the report to include only the information listed in (d)(2), and a more general statement that the required notice was provided. The social workers are signing their reports under penalty of perjury, and an attestation that proper notice	No response required. Due to the reasons stated above related to policy guidance, the committee has elected to remove subdivisions (d)(1), (d)(3) and (d)(5) from the rule. The committee however has elected to include the remaining portions of the subdivision (d) to ensure a more meaningful review of the presumptive transfer determination.

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			was provided should suffice for purposes of the court making its findings. 7. Do you have any suggested changes to make to JV-214? • The order of subdivisions (a) and (b) on #6 should be switched to be consistent with the order of information in #5. The form may be a little more user-friendly if the reason for disagreeing with the agency decision in 6(a), for example, matches the placement decision described in 5(a). The placement agency decision listed in 5(a) is that "the agency thinks that it is best to transfer the responsibility…to the new county" and in (b) is "there is an exception…and the responsibility should remain with the child or nonminor's home county." However, in #6, where the requestor has to select a reason why they disagree, the reason for disagreeing described in (a) does not coincide with the decision listed in (a) in #5. Switching (a) and (b) in #6 may eliminate confusion. • As to form JV-214(A), we recommend adding the following language to #4b: "The decision of the county agency is final."	The committee agrees with this revision and the revision to the form has been made. The reason for disagreeing with the placing agency can be addressed in the item 7 where the petitioner explains why it is in the child's best interest to depart from the placing agency's recommendation. The committee agrees that this will help to clarify that once the court denies the request for a hearing, the placing agency's determination on the request for a waiver of presumptive transfer is final. The underlined language has been added to the form in item 4b as follows: 4b. The court has

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				denied the request for a hearing to review presumptive transfer of the responsibility for specialty mental health services to the county of the child's or nonminor's residence. Unless a different request was made for the court to review the waiver of presumptive transfer, the county placing agency is responsible for determining the outcome to the request for a waiver of presumptive transfer. The committee has removed this language from the rule and has made the JV-214 mandatory. The JV-214 form will not will now be required when requesting a hearing on presumptive transfer. The committee reasoned that making the form mandatory will provide clarity when someone is requesting a hearing, and avoid the situation mentioned in the comment.
			• **Use of JV-214 form/subdivision (b)(4):** The language in subdivision (b)(4) includes two options for requesting a hearing – utilization of form JV-214, or "by the filing of substantially similar information." There is no further description of what the "substantially similar information" should include, and unless it is more specifically defined in the rule, the court will receive requests in various formats and likely missing key information, including a statement about why the request for hearing to reconsider the presumptive transfer decision is in the child's best interest. Form JV-214 is fairly straightforward, and includes important information not only for the court but also to inform the county agency of the basis for the request for hearing. This is especially important given that the proposed rules include a requirement that the county agency prepare a report to the court addressing not only the	

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			objection but also providing a best interests analysis. We recommend the form be mandatory and that the "substantially similar information" language be eliminated from the proposed rules. If it is not eliminated, then the inclusion of specific information should be required and described by the rule.	
			• **Possible Inconsistency between proposed rules and WIC 14717.1?** Under subdivision (c)(1) of both proposed Rules of Court, the language reads, "The court on its own motion may direct the clerk to set a hearing, or deny the request for a hearing without a ruling on the application of a waiver of presumptive transfer." This language differs slightly from WIC 14717.7(d)(4), which reads: "The court may set the matter for hearing *and* may confirm or deny the transfer of jurisdiction or application of an exception based on the best interest of the child." (Emphasis added.) The WIC language does not explicitly authorize the court to deny a hearing based solely on the paperwork, but we support the court having the ability to do so. The WIC language reads as though only if the court decides to set for a hearing can it then "confirm or deny the transfer of jurisdiction or application of the exception," whereas the Rule of Court reads as though	The language in the rule is intended to give the court the option to deny the hearing without ruling on the presumptive transfer determination as found in section 147171.1(d)(4). If the court denies a hearing, the placing agency's determination would become final. The commentator is correct that section 14717.1(d)(4) does not give the option to deny the request for the hearing. The committee however seeks to provide clarity for when it is considering an application for a hearing on presumptive transfer. Subdivision (c)(1) provides the court with the option to deny the request for a hearing without ruling on whether a waiver applies to presumptive transfer. Section 14717.1(d)(4) indicates that the court *may* set a hearing. The committee believed that it was important to clarify in the rule that not setting a hearing does not require the court to make a determination on waiver to presumptive transfer. The language only addresses the setting of a hearing or the denying of a hearing. It does not address making a ruling on waiver to presumptive transfer.

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			the court can *either* set a hearing or deny the request for the hearing without ruling on the county agency's determination. Subdivision (e)(2) of the proposed rules reads consistent with the WIC language (and inconsistent with (c)(1)). We recommend these inconsistencies be reconciled in both proposed rules. Clarification should also be included that specifies the court may not rule on the application of a waiver of presumptive transfer based solely on the request for hearing paperwork.	
			• **Subdivision (c) is not clear as to the requirement for when court hearing must be set.** We recommend rewording (c)(2) to read: "If the court sets a hearing, the hearing must occur within five court days of the filing of the form. The clerk must provide notice the next court day after receipt of the form, and notice must be provided to:…"	The committee agrees with this comment and has moved the language "no later than five court days after the form was filed" from subdivision (c)(2) to (c)(1). This will reflect that the court has the option to grant a hearing to occur no later than five court days after the form was filed.
			• **Length of time to submit report under (e)(1):** This subdivision could benefit from some clarifying as to the language requiring the social worker to provide a report "…no later than two court days after the hearing is set…" If the hearing is occurring within five court days, and there is no specific requirement as to when the clerk must provide notice, this short timeframe sets up a situation where the agency may not be	The committee appreciates the concerns raised in this comment, but for consistency with rule 5.651(e), has elected to maintain the timeline for the report in subdivision (e)(1). The requirement to provide a report no later than two days after the hearing is set is taken from a similar rule involving placement changes, rule 5.651(e)(4), which addresses hearings related to change of placement affecting the child's education stability. Because these hearings are both based on a

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			notified of a hearing date (and subsequent due date for the report) until after the report is due. We recommend the report be required to be submitted one court day in advance of the hearing, especially if the rule is adopted as written.	change of placements and the provision of important time sensitive services, the timeframe for the social worker's report was adopted from rule 5.651(e)(4). Rule 5.651(e) also includes the same timeframes as the proposed rules in terms of the setting of a hearing. These hearings could potentially be heard at the same time. In addition, the court may set the hearing at any time within five days of the request for hearing being filed. Theoretically, this could occur a day or two after the hearing is requested. Under this scenario, it makes sense to have the report required two days after the hearing is ordered.
15.	Solano County Counsel's Office By Clarisa P. Sudarma Deputy County Counsel Fairfield, CA	NI	General Comments: - P 9 of the proposal indicates the committee anticipates there will be additional costs to courts when a hearing under the rule is granted, but does not address anticipated costs to the Department in terms of generating reports and/or potentially testifying in court. We would propose the committee consider generating a fillable form report for CWS to complete, one that could be brought and/or filled out during CFTs to lessen potential redundancies in work - P 9 acknowledges that hearings are anticipated to be rare. We agree. This	Because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance. This should help to somewhat reduce the burden on the placing agency when they must provide a report. CDSS has received requests for a template that addresses the presumptive transfer process and is in the process of creating such a template that can be used by counties. The committee appreciates this comment, however issues related to releases of information

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			process focusses on appropriate procedures if there is a dispute between parties who owe a duty to the health of welfare to the child with the Department's determination regarding presumptive transfer, which has not been a large area of contention in our County that has caused delay in meeting children MH needs. Instead, delays have more frequently been caused by inconsistent release of information requirements between counties, inconsistent order requirements between counties, etc. We would encourage the committee to consider those areas as ripe for procedural clarification.	are not within the scope of this proposal. This proposal addresses the setting and holding of a hearing under section 14717.1(d)(4). The committee however notes the issue may require procedural clarity and will consider addressing the issue in future proposals. The comment will also be forwarded to CDSS and DHCS as they implement policy guidance and regulations related to the administrative process of presumptive transfer.
			- If the rule requires the court to review CWS's compliance, it seems like CWS would need more time to generate reports	The timeline for the report is the same for the hearing to review a child's change of school placement in rule 5.651(e). Both hearings are triggered by a change in placement and both require a prompt hearing. Both issues could be heard at the same time, the timelines of rule 5.651(e) were used to create the rules that are the subject of this proposal. In addition, the court may set the hearing at any time within five days of the request for hearing being filed. Theoretically, this could occur a day or two after the hearing is requested. Under this scenario, it makes sense to have the report required two days after the hearing is ordered.

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			- The factors the court considers when making its best interest determination should coincide with the same listed for CWS to consider - No concern regarding the contact information requirement as a JV 287 can be completed if necessary - We would encourage the committee to consider whether or not lay people would even need to fill out the form, see Specific Comment number 3 above. Making the forms too simple may encourage persons who are not entitled to request a hearing to request one.	Factors related to how the child or nonminor's best interest will be promoted by the placing agency's decision will coincide with many of the factors that the court may consider. The committee has added this clarifying information to the form. While the committee doesn't want to create a situation where those that are not entitled to apply for a hearing do so, there will be individuals who are entitled to request a hearing who will be lay people, such as the person or agency that is responsible for making mental health care decisions on behalf of the foster child or nonminor, and parents, guardians and children who are not represented by attorneys. For this reason, the committee wants to ensure that the forms are understandable for laypersons.
16.	Kim Suderman, LCSW California County Behavioral Health Directors Association Sacramento, CA	NI	**We have the following comments, and have listed them by page, with our feedback/comments in *Italics:*** **Page 3:** The individual who requested the waiver, or any party to the case, may request a judicial review of the placing agency's determination prior to the county's determination becoming final. This would	

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			include the situation where the placing agency's initial determination was that an exception to presumptive transfer applies and no waiver request was made. This is Under section 14717.1(d)(4), the court may set the matter for hearing and confirm or deny the transfer of SMHS jurisdiction or application of an exception based on the best interests of the child. *Is the Judicial Council recommending that the Court may set a hearing, even if one was not requested, and overturn the placing agency's decision to not waive presumptive transfer??*	Section 147171.1(d)(2) lists the county probation agency or the child welfare services agency with responsibility for care and placement of the child as one of the individuals who may request waiver of presumptive transfer. Because the placing agency and the social worker/probation officer often appear to be synonymous, the committee believes that there may be situations in which it may be confusing to other parties to the case who made a waiver request when it was the social worker or the probation officer. A hearing would only be granted under this scenario if the placing agency determined that an exception to presumptive transfer applied and it was unclear that the social worker or probation officer actually made a request for waiver. A hearing can still only be requested by the individual who requested the waiver or a party to the case. The proposed however shouldn't create this confusion, as it states the person or agency who

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				requested waiver or any party to the case may request a hearing.
			Page 4: Is Rule 5.647 only about a 7 day timeline which isn't in place yet? Is that why there is a September 2018 effective date? How'd they pick that date?	The September 2018 effective date is the soonest date that the proposal can be approved by the Judicial Council giving the normal process required for the adoption of a Rule of Court and Judicial Council forms. It is not related to the seven-day timeline mentioned.
			Both the MHP of jurisdiction and the receiving MHP need to know when responsibility shifts. It would be a major problem if the pending ACL is not released in sync with this document.	Because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance. The rule will only reflect that presumptive transfer is on hold when a hearing is requested until the court either denies the request for a hearing or concludes the presumptive transfer hearing, which is required by section 14717.1(d)(4). Comments related to administrative functions will however be forwarded to CDSS and DHCS as they implement policy guidance and regulations to implement AB 1299.
			There are concerns that the judicial review process could delay the provision of SMHS. It is inappropriate to begin services with one provider, and then change providers due to presumptive transfer waived or not waived, because the court changed the placing agency's decision.	The committee agrees with this concern and is seeking to minimize delays in the provision of SMHS as much as possible. Section 14717.1(d)(4) does however allow an individual to request a judicial review of the presumptive transfer determination *prior to the determination becoming final*. The committee believes that the

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

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			Thank you again the opportunity to submit feedback. If you would like this in a different format, please let me know.	timeline created for the hearing provides for an as expedited hearing as possible while giving the parties enough time to request a hearing, prepare a report and accommodate the court's schedule.
17.	Superior Court of Riverside County By Susan D. Ryan Chief Deputy of Legal Services	A	5. Should the rule include factors that the court may consider when making its determination of the child's best interests as it relates to transfer of jurisdiction? If so, what factors should be included in the rule? It seems that these are clearly defined in WIC 1417.1(d)(5), however including them in the rule could provide clarification. 6. Should the rule require that the social worker or placing agency prepare a report for a hearing on presumptive transfer? Yes. 7. Is there any concern with requiring the applicant requesting a hearing to provide their contact information on the JV form requesting a hearing? It could be an issue if the applicant's address is the same as the minor's placement. The court will need the address this, but an option for the applicant to designate their address as confidential could also address this concern. .	No response required. No response required. The JV-214 form has been amended to reflect that if the applicant requests their information remain confidential, to file form JV-287.

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			9. Do you have any suggested changes to make JV-214 or JV-214-INFO easier for a lay person to understand? Can any items be removed to simplify or clarify the form and process? No changes to the JV214 or JV214 INFO. For clarity and consistency with other forms the JV-215 should be retitled "Order after Hearing on the Determination of Presumptive Transfer of the Responsibility for Mental Health Services" 10. Would the proposal provide cost savings? No. Depending on the number of petitions that need to be processed and heard there could be cost increases. 11. What would the implementation requirements be for courts? Clerk's office and courtroom staff would need to be trained on how to process these types of requests (approximately 1 hour). Procedures would need to be created for filing the petitions, setting the hearings and completing minute entries. Codes would need to be created in the case management system for processing the documents and hearings. Coordination with	The committee agrees and form JV-215 has been renamed to: "*Order After Hearing on Waiver of Presumptive Transfer*." The committee understands that the implementation of AB 1299 may result in cost increases to court. The rules however are anticipated to assist courts in providing a procedural framework for hearings on presumptive transfer that have already been statutorily created. The committee understands that the implementation of AB 1299 may result in increased workloads for the courts and staff. The rules however are anticipated to assist courts in providing a procedural framework for hearings on presumptive transfer that have already been statutorily created.

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			agencies with also need to occur regarding timelines for filing reports. 12. Would three months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? Given that the court would have to coordinate with other agencies implementation may take as long as six month. 13. How well would this proposal work in courts of different sizes? No difference.	 Because this proposal creates a framework for a hearing that is already required by statute, the committee believes that the proposal should proceed with an effective date of January 1, 2019. No response required.
18.	Superior Court of San Diego By Mike Roddy, Executive Officer San Diego, CA	AI	**Comments:** 4. Should the rule include the requirements of the placing agency's responsibilities during the presumptive transfer individualized exception determination as laid out in section 14717.1 and ACL 17-77? And should the rule require the court to review these efforts to ensure compliance? It appears the court will receive information on whether the agency has met its responsibilities because that information is required in the report to the court. (See rules 5.647(d) & 5.648(d).) However, that report is required only	 The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g) because these are administrative functions that are the responsibility

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			if the court grants a hearing. Note also that the proposed rules and form JV-214(A) do not include a finding that the court has considered evidence (other than the information provided on the request for hearing) before making its decision to grant or deny a hearing. As a result, the court could deny a hearing without knowing whether the placing agency has met its responsibilities in making the waiver decision. It is therefore suggested that subd. (d) be revised as follows: "When a hearing is ~~granted under (e)(1)~~ requested under (b)(4), the social worker or probation officer must provide a report …." It is likely such a revision will be resisted, however, due to the potential impact on SW/PO workloads. 5. Should the rule include factors that the court may consider when making its determination of the child's best interests as it relates to transfer of jurisdiction? If so, what factors should be included in the rule? Yes. The factors which are listed in subdivision (e)(4)(A)-(E). 6. Should the rule require that the social worker or placing agency prepare a report for a hearing on presumptive transfer?	of CDSS and DHCS to be developed and implemented. The committee appreciates with this suggestion but believes requiring a report in this situation would be an extra burden on the placing agency that may not be necessary. The reporting requirements in section 14717.1 (d)(7) address presumptive transfer issues when a hearing is not granted. These issues can be addressed at a status review hearing under section 366. No response required.

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			Yes, isn't such a requirement already proposed in rules 5.647(d) & 5.648(d)? (Or does this question ask about preparing a report for the agency's decision on waiver?) 7. Is there any concern with requiring the applicant requesting a hearing to provide their contact information on the JV form requesting a hearing? Yes. The applicant should have an opportunity to keep his or her address and/or phone number confidential if necessary for safety reasons. 9. Do you have any suggested changes to make JV-214 or JV-214-INFO easier for a lay person to understand? Can any items be removed to simplify or clarify the form and process? Please see comments below. **CRC 5.647** Subd. (a): *For consistency* -- This rule applies to the court's review under Welfare and Institutions Code section 14717.1 of the presumptive transfer of the responsibility to arrange and provide for the child's or nonminor's specialty mental health services to the child's or nonminor's county of residence. …	The proposal does include the reporting requirement in subdivision (d). The committee sought feedback on whether the rule should include this requirement. The JV-214 form has been amended to reflect that if the applicant requests their information remain confidential, to file form JV-287. The revision has been made.

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			Subd. (b)(1): *For consistency and brevity --* The following ~~individuals~~ persons or agencies may ~~request that~~ ask the placing agency to consider ~~the application of~~ a request for a waiver ~~to the~~ of presumptive transfer of the responsibility for providing specialty mental health services to the child's or nonminor's county of residence:	The following revisions have been made to be consistent with the language in section 14717.1(d): "(b)(1) The following persons or agencies may make a request to the placing agency that presumptive transfer be waived and that the responsibility for providing specialty mental health services to the child's or nonminor's county of residence:"
			Subd. (b)(1)(C): *Does it make sense to include in subd. (b)(1) the agency "with responsibility for the care and placement of the child" as an agency that "may request that the placing agency consider [a request for waiver]"? Isn't this the equivalent of the placing agency requesting that the (same) placing agency consider a request for waiver?*	The committee agrees with this assessment; however, the committee believes the rule should be consistent in this regard with section 14717.1(d)(2).
			For consistency – The child welfare services agency or the probation agency with responsibility for the care and placement of the child or nonminor; or	The revision has been made.
			Subd. (b)(3): *For consistency and clarity --* The ~~individual~~ person or agency who requested the waiver, or any other party to the case who	Because "determination" is used in section 14717.1(d)(4), the committee has elected to keep

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			disagrees with the placing agency's ~~determination~~ decision on the ~~application of an exception to~~ request for waiver of presumptive transfer, may request a judicial review of the placing agency's ~~determination~~ decision.	that language in the rule. The subdivision has been amended as follows: "The person or agency who requested the waiver, or any other party to the case who disagrees with the placing agency's determination on the request for the waiver of presumptive transfer, may request a judicial review of the placing agency's determination."
			Subd. (b)(4): *For consistency and clarity --* A request for a hearing may be made by filing a *Request for ~~a~~ Hearing on ~~the Determination of Presumptive Transfer~~ Decision Regarding ~~the~~ Responsibility for Specialty Mental Health Services* (form JV-214), or by ~~the~~ filing ~~of~~ substantially similar information. This document must be filed with the court and provided to the placing agency within three court days of being informed of the placing agency's ~~determination~~ decision on the ~~application of a~~ request for waiver of presumptive transfer.	For the reason stated above, the committee has elected to keep the language "Determination." The other revisions have been made. In addition, the committee has elected to amend the subdivision to remove the option to submit "substantially similar information," as this could lead to confusion. The committee proposes making JV-214 a mandatory form.
			Subd. (c): *Delete period; insert space after section symbol.* Setting of a hearing~~.~~ (§ 14717.1)	The revision has been made.
			Subd. (c)(1): *For clarity --* The court on its own motion may direct the clerk to set a hearing~~,~~ or may deny the request	The revisions have been made, but the instead of referring to an application or request for waiver,

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			for a hearing without ~~a~~ ruling on the ~~application of a~~ request for waiver of presumptive transfer. Subd. (c)(2): *For clarity* -- If the court sets a hearing, the clerk must provide notice of the hearing date no later than five court days after the ~~form~~ request for hearing was filed. Notice must be provided to: Subd. (c)(2)(D): *For consistency with WIC § 361(a)(1)* -- The developmental services rights holder or surrogate parent; Subd. (c)(2)(E): *For clarity* -- The child, if 10 years of age or older, or nonminor ~~if the child is 10 years of age or older~~; and Subd. (d)(2)(B): *For consistency and to correct citation style* -- A ~~determination~~ decision whether a waiver is ~~determined to be~~ appropriate under section 14717.1(d)(5)(A~~)~~ ~~(~~D); Subd. (d)(2)(C): *For consistency* --	the rule will mirror section 14717.1(d)(4) and will refer to the "transfer of jurisdiction." The revision has been made, in addition this language has been moved to (c)(1) for clarity. In response to other comments related to the need to specify the mental health care decision maker, the language has been changed to: The mental health care decision maker for the child or nonminor if one has been appointed under section 361(a)(1). The revision has been made. Subdivision (d)(1) has been amended as follows: (B) The placing agency's determination whether waiver of presumptive transfer is appropriate under section 14717.1(d)(5)(A)–(D);

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			Any objections to the placing agency's ~~determination~~ decision; and Subd. (d)(2)(D): *For consistency* -- How the child's or nonminor's best interests will be promoted by the placing agency's presumptive transfer ~~determination~~ decision. Subd. (d)(4): *For consistency and brevity* -- That the Child and Family Team, and others who serve the child or nonminor as appropriate, such as the therapist, developmental services decision maker, and 6 Court Appointed Special Advocate volunteer, were consulted regarding the waiver ~~determination~~ decision. transfer. Subd. (d)(6): *Per language in WIC § 14717.1(d)(6)* -- Whether the mental health ~~provider~~ plan in the county of original jurisdiction ~~demonstrates~~ has demonstrated an existing contract with a specialty mental health ~~services~~ care provider, or the ability to enter into such a contract ~~with a specialty mental health services provider~~ within 30 days of the waiver decision, and the ability to	The committee prefers "determination" because this is language used in section 14717.1. See comment above. For the reasons stated above, the committee has chosen not to make this revision. Revisions have been made or not made to reflect the language in section 14717.1(d)(6) and consistency with the rest of the rule.

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			deliver timely specialty mental health services directly to the foster child or ~~youth~~ nonminor. Subd. (e): *Delete period.* Subd. (e)(1): *For clarity --* The social worker or probation officer must provide a report to the court no later than two court days after the hearing is set under (c)(1) that includes the information required in (d). *Shouldn't copies of the report be provided **to all parties** entitled to notice of the hearing?* The social worker or probation officer must provide a report to the court, and copies of the report to all parties entitled to notice of the hearing, no later than two court days after the hearing is set under (c)(1) that includes the information required in (d). Subd. (e)(2): *Per the language of WIC § 14717.1(d)(6) and for consistency and brevity --* At the hearing, the court must confirm or ~~deny~~ prohibit the transfer of the responsibility ~~to arrange and provide~~ for the child's or nonminor's specialty mental health services to the county of placement ~~or the application of an exception to presumptive transfer~~ based on the best interests of the child or nonminor. A waiver	 The revision has been made. The revision has been made. The revision has been made to read as follows: (e)(1): The social worker or probation officer must provide a report to the court, all parties to the case and the person or agency that requested waiver no later than two court days after the hearing is set under (c)(1) that includes the information required in (d). The language of subdivision (e)(2) has been revised to more closely reflect the language of section 14717.1(d)(4): (e)(2): At the hearing, the court may confirm or deny the transfer of jurisdiction or application of an exception based on the best interests of the child or nonminor. A waiver of presumptive

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			of presumptive transfer is contingent on the mental health ~~provider~~ plan in the county of original jurisdiction demonstrating an existing contract with a specialty mental health ~~services~~ care provider, or the ability to enter into such a contract ~~with a specialty mental health services provider~~ within 30 days of the waiver decision, and the ability to deliver timely specialty mental health services directly to the child or nonminor. Subd. (e)(4): *For consistency and to correct grammar* -- When considering whether it is in the child's or nonminor's best interests to ~~confirm~~ grant or deny the request for a waiver ~~to~~ of presumptive transfer, the court may consider the following: Subd. (e)(4)(A): *For consistency and clarity* -- The child's or nonminor's access to specialty mental health services, ~~and~~ the ~~child's~~ current provision of specialty mental health services to the child or nonminor, and whether any important service relationships will be impacted; Subd. (e)(4)(D): *For clarity and brevity* -- The ~~child's or nonminor's~~ position of the child or nonminor, or of the child's or nonminor's attorney, on presumptive transfer~~, or the child's~~	transfer is contingent on the mental health plan in the county of original jurisdiction demonstrating an existing contract with a specialty mental health care provider, or the ability to enter into such a contract within 30 days of the waiver decision, and the ability to deliver timely specialty mental health services directly to the child or nonminor. To be consistent with section 14717.1(d)(4) and previous subdivisions, confirm is preferable to grant. The other suggested revisions have been made. The suggested revisions have been made. The suggested revisions have been made.

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			~~or nonminor's attorney's position on transfer~~; and Subd. (e)(4)(E): *For consistency and clarity* -- The ability of the county of original jurisdiction to ~~maintain~~ deliver specialty mental health services ~~in the county of original jurisdiction~~ to the child or nonminor after the child or nonminor ~~changes placements~~ is placed in another county. Subd. (e)(5): *For consistency and brevity* -- The court may make its findings and orders on *Orders After Hearing on ~~the Determination of Presumptive~~ Transfer of ~~the~~ Responsibility for Specialty Mental Health Services* (form JV-215). Advisory Committee Comment: *For clarity and to correct citation style* -- This rule describes the process for presumptive transfer of the responsibility for specialty mental health services when a child or nonminor is placed in ~~another~~ a California county other than the county of original jurisdiction. … The exceptions to the presumptive transfer of the responsibility ~~to provide for and arrange~~ for	Based on previous suggested revisions, this subdivision was revised to include whether services can be arranged in both the county of original jurisdiction and the county or residence. Because the suggested revision here would limit this inquiry to only the ability of the county of original jurisdiction to arrange for services, the committee has elected to not make the suggested revision. The forms name has been updated. This sentence has been removed from the advisory comment because it relates to administrative responsibilities which are no longer addressed in the rule.

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			specialty mental health services to the county of the child's or nonminor's ~~out-of-county~~ residence are found in Welfare and Institutions Code section 14717.1(d)(5)(A) ~~–~~ (D). … **FORM JV-214** Title and center footers: *Suggested changes for consistency with other Judicial Council forms (e.g., JV-539) and for brevity.* Request for ~~a~~ Hearing on ~~the Determination of~~ Decision Regarding ~~Presumptive Transfer of the~~ Responsibility for Specialty Mental Health Services Item 1.b.: *For brevity* -- Person or agency ~~that is~~ responsible for making mental health decisions on behalf of the child or nonminor Item 4: *For consistency, clarity, and brevity* -- A request was made to the agency ~~that is~~ making this placement ~~asking~~ that the responsibility for providing ~~the~~ specialty mental health services ~~for~~ to the child or nonminor *not* be transferred to the new county. That request was made on:	The form was created in plain language format because it will be used by individuals who are not experienced in providing information to courts. To reflect that the hearing relates to the review of a request for waiver of presumptive transfer, the title of the JV-214 form has been changed to: "*Request for Hearing on Waiver of Presumptive Transfer*." The suggested revision has been made. The suggested revisions have been made.

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			Item 5: *For consistency, clarity, and brevity* --	
			On (date): , the agency ~~that is~~ making the placement informed me:	The suggested revision has been made.
			a. ~~That the agency~~ It thinks ~~that it is best to transfer~~ the responsibility for the child's or nonminor's specialty mental health ~~care~~ services should be transferred to the new county.	The item has been amended as follows: "That the responsibility for the child's or nonminor's specialty mental health services should be transferred to the new county of residence and denied the request for waiver."
			b. ~~That the agency~~ It agrees ~~that~~ there is an exception to the ~~rule that~~ presumptive transfer of the responsibility for ~~providing~~ specialty mental health care services ~~be transferred~~ to the county where the child or ~~non-minor~~ nonminor lives or ~~is being moved to~~ will live, and ~~that~~ the responsibility should remain with the child's or nonminor's home county.	The item has been amended as follows: "That an exception or waiver applies to the rule that the responsibility for providing specialty mental health services be transferred to the county where the child or nonminor lives or will live, and the responsibility should remain with the child's or nonminor's home county."
			Item 6: *For consistency, clarity, and brevity* --	
			I disagree with the agency's decision about transferring the responsibility for specialty mental health ~~care~~ services to the new county, as follows:	The suggested revisions have been made.
			a. The responsibility for ~~providing or arranging for~~ the child's or nonminor's specialty mental health services should transfer to the	The suggested revisions have been made.

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			county where the child's or nonminor's lives or ~~is being moved to~~ will live. b. The following exception to presumptive transfer should be applied and the responsibility for ~~providing or arranging~~ specialty mental health services should remain with the child's or nonminor's home county: *N.B. I suggest switching "a." and "b." so that the petitioner's argument is consistent with the decision in Items 5.a. or 5.b.* **FORM JV-214(A)** Title and center footers: *Suggested changes for consistency with other Judicial Council forms (e.g., JV-573) and for brevity.* Order on ~~the~~ Request and Notice of Hearing ~~to Review Presumptive Transfer of the~~ on Decision Regarding Responsibility for Specialty Mental Health Services Paragraph re Notice: *For clarity and brevity* -- The court must provide notice to the parents unless parental rights have been terminated, or guardians of the child; the petitioner; the social	The suggested revisions have been made. The suggested revision has been made. See comment above. To reflect that the hearing relates to the review of a request for waiver of presumptive transfer, the title of the JV-214(A) form has been changed to: "*Notice of and Order on Request of Hearing on Waiver of Presumptive Transfer*." The suggested revisions have been made, except that "services" has not been added after "developmental" for the reasons discussed above.

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			worker or probation officer; the developmental services rights holder or surrogate parent~~,~~; the child, if 10 years of age or older, or nonminor ~~if the child is 10 years of age or older,~~; and all other persons entitled to notice under Welfare and Institutions Code section 293.	
			*Change font to match "***The court finds and orders:***" – i.e., boldface Arial in same font size.*	The suggested revision has been made.
			Notice to *(name and address)*:	
			Item 4: *For clarity and brevity --*	
			a. The court has granted a hearing on the above date to review the presumptive transfer of ~~the~~ responsibility for ~~providing~~ specialty ~~responsibility to provide for~~ mental health services to the county of the child's~~/~~ or nonminor's residence.	The suggested revisions have been made.
			b. The court has denied the request for a hearing to review the presumptive transfer of ~~the~~ responsibility for ~~providing~~ specialty mental health services to the county of the child's~~/~~ or nonminor's residence ~~has been denied~~.	The suggested revisions have been made.
			FORM JV-214-INFO	
			Title and center footers: *N.B. Title on page 1 differs from title on page 2 and footers. Suggested changes for consistency with other*	The form has been revised to be consistent on page 1 and page 2.

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			Judicial Council forms (e.g., JV-290-INFO) and for brevity. Instructions ~~Sheet~~ for Requesting ~~a Hearing to~~ Review ~~the~~ of Transfer of ~~the~~ Responsibility for ~~Arranging and Providing for~~ Specialty Mental Health Services *Alternative revision (see JV-464-INFO):* ~~Instruction Sheet for Requesting~~ How to Request ~~a Hearing to~~ Review ~~the~~ of Transfer of ~~the~~ Responsibility for ~~Arranging and Providing for~~ Specialty Mental Health Services Item 1: Most foster children are eligible for specialty mental health services~~, which consist of services~~ such as therapy to address emotional, behavioral, and developmental problems. When a child is removed from ~~their~~ his or her parent's or guardian's home, the ~~child's home~~ county where the child lived ("home county") is responsible for arranging, paying for, and providing these services. When a child or nonminor ~~changes placement and~~ is placed outside the~~ir~~ home county, the responsibility for providing these services ~~is required to~~ must transfer to the county where the child lives, unless certain exceptions apply. This process is called [*close up space*] "presumptive transfer."	The title of the form has been changed to: "*Instructions for Requesting a Hearing to Review Waiver of Presumptive Transfer of Specialty Mental Health Services*." See comment above. The revisions have been made, except that "their" has been kept in front of "home county" so as to specify that it is the child's or nonminor's home county that is being referenced.

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

	List of All Commentators, Overall Positions on the Proposal, and General Comments			
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			The purpose of presumptive transfer is to ensure that foster children who are placed outside of the~~ir~~ home county receive access to these services without ~~any~~ delay, based upon their individual strengths and needs. Item 2: What are the exceptions to the presumptive transfer of ~~the~~ responsibility for ~~arranging of~~ specialty mental health services? There are four exceptions to presumptive transfer: a. The transfer would disrupt continuity of care or delay access to services ~~provided to~~ for the child or nonminor. In other words, the ~~child's~~ services would be interrupted in some way by the presumptive transfer. b. The transfer would interfere with family reunification efforts documented in the individual case plan. c. The ~~child or nonminor's~~ placement in a county other than the home county is expected to last less than six months. d. The child's or nonminor's residence is within 30 minutes of travel time to his or her established specialty mental health care provider in the home county ~~of original jurisdiction~~. Item 3:	The suggested revisions have been made.

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	List of All Commentators, Overall Positions on the Proposal, and General Comments			
	Commenters	**Position**	**Comment**	**Committee Response**
			Who is ~~noticed~~ notified of the decision?	The title of item 3 has been amended to read: "How does the presumptive transfer process begin?"
			When a decision is made to ~~move~~ place the child or nonminor ~~to a placement~~ outside the home county, the social worker or probation officer must inform certain ~~individuals~~ persons of the presumptive transfer, ~~and~~ a description of exceptions, ~~and~~ the option to request a waiver of presumptive transfer if an exception exists, and how to make such a request to the placing agency.	These revisions have been made.
			These ~~individuals~~ persons include the following: • the child (if ~~12~~ 10 years ~~old~~ of age or older) or nonminor,[1] • the attorney ~~of~~ for the child or nonminor,	The suggested revision of replacing individuals with persons was not made because it does not provide greater clarity for the form. The reference to the child's age has been removed because this is an administrative determination that policy guidance from CDSS and DHCS must address.
			• and the person or agency responsible for making mental health care decisions on behalf of the child or nonminor (the parent or guardian unless the court has ~~made an order~~ appoint~~ing~~ed someone else).	The revision has not been made because the committee would like to be clear that only when the court makes a specific order will a parent or legal guardian lose their ability to make mental health decision for the child.

[1] See WIC § 361.2(h); ACL 17-77, p. 4.

	List of All Commentators, Overall Positions on the Proposal, and General Comments			
	Commenters	**Position**	**Comment**	**Committee Response**
			Item 4: Requesting ~~that~~ a waiver ~~be applied to~~ of presumptive transfer You may believe it would better if the child's or nonminor's home county remained responsible for ~~the child's or nonminor's~~ his or her mental health services. Maybe this is because the child or nonminor would lose an important ~~service~~ relationship~~,~~ with a service provider or reunification services ~~might~~ would be impacted. The child or nonminor, ~~the~~ his or her attorney ~~of the child or nonminor~~, and the person or agency responsible for making mental health care decisions on behalf of the child or nonminor can ~~request that~~ ask the placing agency ~~consider applying an exception~~ to waive presumptive transfer and keep the responsibility for mental health services in the home county. The placing agency ~~is required to~~ must inform the person ~~that~~ who requested the waiver and any party to the case of ~~their~~ its decision. The person ~~that~~ who requested the waiver and any party to the case can ask the court to review the placing agency's decision.	Unless otherwise indicated, the suggested revisions to item 4 have been made. "Request" as opposed to "ask" was maintained as the language because it is more specific and more closely identifies the language used for procedures required for presumptive transfer. In addition, "consider applying an exception to presumptive transfer" was amended as follows, to indicate that an exception is found in item 2 of the form: "The child or nonminor, his or her attorney, and the person or agency responsible for making mental health care decisions on behalf of the child or nonminor can request that the placing agency consider waiving presumptive transfer based on an exception listed in item 2 above, keeping the responsibility for mental health services in the home county."

	List of All Commentators, Overall Positions on the Proposal, and General Comments			
	Commenters	**Position**	**Comment**	**Committee Response**
			A request for waiver must be made to the placing agency within seven calendar days of the ~~determination~~ decision that the child or nonminor will be ~~moved to a placement~~ placed outside the home county. The social worker or probation officer should inform you of the best way to ~~make the~~ request ~~for~~ a waiver. Item 5: How is a ~~determination~~ decision on ~~a request for~~ waiver made? The social worker or probation officer will ~~make a determination of~~ decide whether ~~or not~~ there is an exception to presumptive transfer. This decision must be communicated in writing or orally, within three business days of the decision, to the ~~individual~~ person who requested waiver of presumptive transfer~~, along with~~ and all parties to the case~~, within three business days of the placing agency's decision~~. ~~This could be communicated in writing or orally.~~ Item 6: The person who requested ~~the~~ waiver or any other party to the case may ~~request a court hearing~~ ask the court to review the placing agency's decision on the waiver request. ~~If you~~	The last paragraph of item 4 was amended to remove the specific timeline required for the request for waiver because this is an administrative function that is subject to change as discussed above. The paragraph has been amended as follows: "If you are entitled to request a waiver of presumptive transfer, the social worker or probation officer should inform you how and when a request for waiver must be made." The suggested revisions to item 5 have been made unless otherwise indicated. The reference to "three days" has been removed because this is an administrative function that is subject to change as discussed above. In addition, the reference to the decision being communicated in writing or orally has not been changed, as this is an administrative function that is subject to change. The suggested revisions to item 6 have been made unless otherwise indicated.

	List of All Commentators, Overall Positions on the Proposal, and General Comments			
	Commenters	**Position**	**Comment**	**Committee Response**
			~~want to ask the court to review that decision, you must~~ To do this, file a request for hearing on form JV-214 with the ~~C~~clerk in the ~~Superior C~~court where the child's or nonminor's case is being heard. This request must be filed ~~with the clerk~~ within three court days of the agency telling you ~~their~~ its decision. ~~To request a hearing, you will need to file~~ On form JV-214,~~. The form requires certain information. You will need to~~ explain ~~to the court~~ why it would be better for the child or nonminor to continue ~~to have~~ having the home county maintain responsibility for mental health ~~treatment~~ services~~,~~ or ~~if~~ to have that responsibility ~~should be~~ moved to the new county. The person requesting a hearing ~~is~~ also ~~required to~~ must inform the placing agency that ~~they are~~ he or she is requesting a hearing. To do this, ~~you will need to~~ give a copy of the JV-214 form to the social worker or probation officer within three days of being informed of the placing agency's ~~determination of the request for the~~ decision on waiver. Item 7: The court will read the request for a hearing and ~~make a decision on~~ decide whether to grant a hearing based on the information ~~that was~~	The suggested revisions to the first sentence were not made because the committee wants the form to specify that the request for a court hearing, not just a review of the decision. The beginning of the sentence has been amended as follows: "To request a hearing,.." "You will need.." was kept in the form so as to provide more specific instructions for the person requesting the hearing. The last sentence is to read as follows: "To do this, give a copy of the JV-214 form to the social worker or probation officer within three days of being informed of the placing agency's decision on the request for the waiver of presumptive transfer." The suggested revisions to item 7 were made unless otherwise indicated.

	List of All Commentators, Overall Positions on the Proposal, and General Comments			
	Commenters	**Position**	**Comment**	**Committee Response**
			provided ~~in~~ on the JV-214 form. If no hearing is granted, the placing agency's decision will become final. If a hearing is granted, presumptive transfer will be on hold until the court ~~makes a ruling~~ rules on the request for a waiver. The clerk of the court will contact you ~~either~~ by phone or letter informing you of the ~~court~~ hearing time, date, and location. At the ~~court date~~ hearing, the judge will want to know why presumptive transfer should or should not be waived ~~or not~~. The court will makes its decision based on the best interests of the child or nonminor. ~~Therefore,~~ ~~b~~Be prepared to explain to the judge why you believe ~~that~~ it is in the child's or nonminor's best interests to keep the responsibility for mental health treatment in the home county or to move it to the ~~child's~~ new county ~~of residence~~. **FORM JV-215** Title and center footers: *Note: The title on page 1 differs from the title on page 2 and in the footers. Suggested changes for consistency with other Judicial Council forms (e.g., JV-573) and for brevity.* Orders After Hearing on ~~the Determination of Presumptive Transfer of the~~ Responsibility for Specialty Mental Health Services	"Makes a ruling.." was kept as the language in the form because it makes it clearer for the reader that the court must make a ruling on the waiver request. On the form that circulated for comment, a title was not included at the top of page two. The title in the footer matches the title on the first page. The title of the form however is being amended to the following: "*Order After Hearing on Waiver of Presumptive Transfer*."

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	Commenters	**Position**	**Comment**	**Committee Response**
			Item 1.c.: *For clarity* -- (3) ~~Father p~~Presumed father: (4) ~~Father b~~Biological father: (5) ~~Father a~~Alleged father:	The suggested revision is not made because the format is used in other Judicial Council forms, such as JV-405, and the committee would like to be consistent with other forms if possible.
			Item 5: *To correct grammar* -- The placing agency provided notice as ~~required~~ described in rule 5.647(d)(1) or 5.648(d)(1) of the requirement of presumptive transfer, ~~and~~ a description of exceptions, ~~and~~ the option to request a waiver of presumptive transfer, and how to make such a request to the placing agency.	Item 5 has been removed because it references a portion of the rule that was removed because it addressed administrative responsibilities that are being developed by CDSS and DHCS.
			Item 6: *For consistency* -- A request ~~to apply~~ for a waiver to presumptive transfer was made to the placing agency on (*date*):	The suggested revision has been made.
			Item 7.b.: *For consistency* -- (1) The transfer would disrupt continuity of care or delay access to services provided to the ~~foster~~ child or nonminor.	The suggested revisions have been made.

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	Commenters	**Position**	**Comment**	**Committee Response**
			(2) The transfer would interfere with family reunification efforts documented in the individual case plan. (3) The child's or nonminor's placement in a county other than the county of original jurisdiction is expected to last less than six months. (4) The child's or nonminor's residence is within 30 minutes of travel time to his or her established specialty mental health care provider in the county of original jurisdiction. Item 9: *For consistency, clarity, and brevity* -- Notice of the placing agency's ~~determination of whether to waive~~ decision on waiver of presumptive transfer was provided within three court days of the decision to the ~~individual~~ person who requested waiver of presumptive transfer~~, along with~~ and all parties to the case~~, within three court days of the placing agency's determination~~.	The requirement that the notice be within three days of the placing agency's determination has been removed from the rule because it references an administrative function that is the responsibility of CDSS and DHCS to create and implement. The suggested revisions were made except replacing "determination" with "decision" and "individual" with "person" so as to be consistent with the rest of the form.
			Item 10: *For consistency* -- After having considered the basis for the ~~application~~ request for ~~the~~ a hearing, the report provided for the hearing, ….	The suggested revisions have been made.

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			Item 10.a.: *Per language in WIC § 14717.1(d)(6) --* If waiver applies, the mental health ~~provider~~ plan in the county of original jurisdiction has demonstrate~~d~~sd an existing contract with a specialty mental health ~~services~~ care provider, or the ability to enter into a contract ~~with a specialty mental health services provider~~ within 30 days of the waiver decision, and the ability to deliver timely specialty mental health services directly to the child or nonminor.	The suggested revisions have been made.
19.	Lynn Thull, Ph.D., Mental Health Policy and Practice Improvement Consultant, California Alliance of Child and Family Services Sacramento, CA	NI	Please accept the attached document with comments imbedded. Two major comments: 1. There are several places where the document talks about the "mental health provider" needing to demonstrate that it has a contract with a provider in the county of residence. That should be changed to "mental health plan" in the county of original jurisdiction. The individual provider does not have any control over contracting. From Invitation to Comment Report page 2: SMHS jurisdiction must presumptively transfer from the county of original jurisdiction to the county of residence unless an exception applies.	The suggested revisions have been made.

	List of All Commentators, Overall Positions on the Proposal, and General Comments			
	Commenters	**Position**	**Comment**	**Committee Response**
			and other conditions exist Section 14717.1(d)(5) provides for four possible exceptions: **Comment**: The presence of an exception does not automatically waive the presumptive transfer. Other conditions must exist (ie: waiver is in the best interest of the youth, the county MHP has an existing contract with a provider in the county where the child will reside, etc). From Attachment 1 Rule 5.647, (b)(3) page 12: (3) The individual who requested the waiver, or any other party to the case who disagrees with the placing agency's determination on the application of an exception to presumptive transfer, may request a judicial review of the placing agency's determination. **Comment:** The only people who can request a judicial review are those listed in (1). It is not open to "any other party to the case" From Attachment 1 Rule 5.647, (c)(2)(D) page 13: (D) The developmental rights holder or surrogate parent; **Comment:** I don't know what this means, but it should be the mental health rights holder, not developmental.	The committee agrees with this statement. The language in the report could have been phrased differently to incorporate the conditions that must be meet to apply a waiver to presumptive transfer. Section 14717.1(d)(3) specifies that "any other party to the case who disagrees with the determination" may request judicial review. When the court limits the parent's ability to make decisions on the child's mental health care, section 361(a)(1) refers to the child's

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			From Attachment 1 Rule 5.647, (c)(2)(F) page 13: (F) All other persons entitled to notice under section 293.	"developmental decision maker." However, the committee agrees that this language might create confusion because developmental decision making does not necessary denote decisions on mental health care. The language therefore has been changed to "(D) <u>The mental health care decision maker for the child or nonminor if one has been appointed under section 361(a)(1);</u>"
			Comment: Who are these individuals? It should be the short list provided here.	This is the same list required for notice for a status review hearing and from a similar rule involving placement changes, rule 5.651(e)(4), which addresses hearings related to change of placement affecting the child's education stability. The individuals listed have the same interest in being noticed of a hearing on presumptive transfer.
			From Attachment 1 Rule 5.647, (d)(6) page 15: (6) Whether the mental health provider in the county of original jurisdiction demonstrates an existing contract with a specialty mental health services provider, or the ability to enter into a contract with a specialty mental health services provider within 30 days of the waiver decision, and the ability to deliver timely specialty mental health services directly to the foster child or youth.	

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	List of All Commentators, Overall Positions on the Proposal, and General Comments			
	Commenters	**Position**	**Comment**	**Committee Response**
			Comment: this should be "mental health plan" and not "mental health provider" From Attachment 1 Rule 5.647, (e)(2) page 15: (2) At the hearing, the court must confirm or deny the transfer of the responsibility to arrange and provide for the child or nonminor's specialty mental health services or the application of an exception to presumptive transfer based on the best interests of the child or nonminor. A waiver of presumptive transfer is contingent on the mental health provider in the county of original jurisdiction demonstrating an existing contract with a specialty mental health services provider, or the ability to enter into a contract with a specialty mental health services provider within 30 days of the waiver decision, and the ability to deliver timely specialty mental health services directly to the child or nonminor. **Comment:** Again, this should be "mental health plan" and not "mental health provider" From Attachment 1 Rule 5.648, (c)(2)(D) page 18: (D) The developmental rights holder or surrogate parent;	The suggested revision has been made. The suggested revision has been made.

	List of All Commentators, Overall Positions on the Proposal, and General Comments			
	Commenters	**Position**	**Comment**	**Committee Response**
			Comment: This should be "mental health care rights holder" and not "developmental rights holder". From Attachment 1 Rule 5.648, (d)(6) page 20: (6) Whether the mental health provider in the county of original jurisdiction demonstrates an existing contract with a specialty mental health services provider, or the ability to enter into a contract with a specialty mental health services provider within 30 days of the waiver decision, and the ability to deliver timely specialty mental health services directly to the foster child or youth.	See comment above. Section 361(a)(1) refers to developmental decision maker but the language has been amended.
			Comment: This should be "mental health plan" and not "mental health provider" From Form JV-214(A) item 4b page 25: b. The request for a hearing to review the presumptive transfer of the responsibility for providing specialty mental health services to the county of the child's/nonminor's residence has been denied.	The suggested revision has been made.
			Comment: It would be helpful to all parties if a reason for the denial of the hearing was included on this form. From Form JV-214-INFO item 2a page 26:	The committee has amended the form to include a checklist of reasons for why the court denied the request for a hearing.

	List of All Commentators, Overall Positions on the Proposal, and General Comments			
	Commenters	**Position**	**Comment**	**Committee Response**
			a. The transfer would disrupt continuity of care or delay access to services provided to the child or nonminor. In other words, the child's services would be interrupted in some way by the presumptive transfer. **Comment:** interrupted or delayed. From Form JV-214-INFO item 4 page 26: You may believe it would better if the child's or nonminor's home county remained responsible for the child's or nonminor's mental health services. **Comment:** Since a decision could go either way - the child's MH services stay with the original county (presumptive transfer is waived) or even if an exception exists, the placement worker choses to go ahead and move the responsibility to the county of residency. So the instructions should provide information about both circumstances. From Form JV-215 item 10a page 29: a. If waiver applies, the mental health provider in the county of original jurisdiction demonstrates an existing contract with a specialty mental health services provider, or the ability to enter into a contract with a specialty	The suggested revision has been made. Since item 4 addresses how to request a waiver to presumptive transfer, the suggestion will be included in item 6, which addresses requesting a hearing. It would be more fitting in item 6 because at this point, someone may object to either waiver of presumptive transfer or the denial of a waiver of presumptive transfer.

	List of All Commentators, Overall Positions on the Proposal, and General Comments			
	Commenters	**Position**	**Comment**	**Committee Response**
			mental health services provider within 30 days of the waiver decision, and the ability to deliver timely specialty mental health services directly to the child or nonminor. **Comment:** "mental health PLAN" not "mental health provider"	The suggested revision has been made.
20.	Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC) Sacramento, CA	AM	Recommended JRS Position: Agree with proposed changes if modified. *Response to Specific Questions* **5. Should the rule include factors that the court may consider when making its determination of the child's best interests as it relates to transfer of jurisdiction? If so, what factors should be included in the rule?** **6. Should the rule require that the social worker or placing agency prepare a report?** A report should be prepared by the placing agency for the hearing. That is another reason the notice should be 7, not 3, calendar days. **7. Is there any concern with requiring the applicant requesting a hearing to provide their contact information on the JV form requesting a hearing?**	No response required. The committee agrees that a report should be required when a hearing is granted. No response required.

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	Commenters	**Position**	**Comment**	**Committee Response**
			9. Do you have any suggested changes to make JV-214 or JV-214-INFO easier for a lay-person to understand? Can any items be removed to simplify or clarify the form and process? It would be helpful to the court that the rule include factors for a court to consider, as long as it is clear that the factors listed are not the only or exclusive factors.	The committee agrees and has added clarifying language to subdivision (e)(5) of the proposed rules. The language will now read that the court may consider the list of factors "in addition to any other factors the court deems relevant."

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	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
1.	Christina Beck, M.A., Policy Analyst CWS, Policy and Program Support County of San Diego Health & Human Services Agency		• Expanding the timeline to request a judicial review hearing from 3 days to 7 days seems reasonable.	The committee elected to not include a timeline for when a hearing may be requested. This is because including a timeline will require that the rule mirror the policy guidance and regulations of DHCS and CDSS that are subject to change. Presumptive transfer is on hold until court rules on the request for a hearing or gives a ruling at the hearing. Therefore, the timelines to request a hearing should mirror the administrative timeline so that the administrative process of presumptive transfer does not proceed before someone entitled to a hearing has the chance to request a hearing or to have the hearing complete itself if one is granted. If the rule and policy guidance aren't coordinated, the presumptive transfer process could proceed before the court addresses the request for a hearing or holds a hearing. ACL 17-77 indicated that a person will have three days to request a hearing, but in their comment, DHCS indicated that the timeline will be changed to seven days. The committee elected to avoid having the rule addressing this administrative function that are responsibility of DHCS and CDSS to implement.
			• Agree that CASA, guardian, and tribe should be included as parties to request judicial review.	The committee elected to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2). While it would benefit courts to

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	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
				specify in the rule who may request a hearing, doing so requires the rule to mirror the policy guidance and regulations of DHCS and CDSS which are subject to change. Section 14717.1(b)(4) allows the person or agency that requested the waiver or any party to the case to request a hearing. Section 14717.1(d)(2) lists who may request a waiver. Of those who section 14717.1 lists as being able to request a hearing, one requires the policy guidance of DHCS and CDSS, that of "any other interested party who owes a legal duty to the child involving the child's health or welfare, *as defined by the department*." (italics added) The committee considered including the individuals that DHCS has listed in ACL 17-77 and in their comment related to the proposal in the rule to provide clarity to the court on who may request a hearing. However, the committee decided that the rule should not address items that directly relate to the policy guidance and regulations. The committee instead elected to have the rule mirror the language of section 14717.1(d)(2) in terms of who may request waiver and thus a hearing. The Advisory Committee Comment indicates that to determine who owes a legal duty to the child readers should consult the policy guidance and regulations of DHCS and CDSS.
2.	Diane Boyer Senior Policy Analyst County Welfare Directors Association	NI	With apologies because I just missed the 2/9 deadline, but we need to weigh in on one specific part of this proposal. We have concerns	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
	Sacramento, CA		with the proposed addition of the Court Appointed Special Advocate (CASA) and suggest a modification to the tribal representative, with respect to those who may request a waiver of presumptive transfer. AB 1299 did not specifically list those individuals CWDA worked with the sponsors of the legislation so that only those who "own a legal duty" to the child may request a waiver. This was intended to identify those who make are a position of legal authority to make such decisions. A CASA owes a duty to the court, and the court rules on the child. The addition of CASA is potentially a conflict of interest. We should point out that nothing prohibits a CASA from providing his or her own opinion to the court, should the presumptive transfer case reach the court for a hearing. With respect to the tribal representative, there should be an established finding that the child is connected to a specific tribe before such authority is granted. Our concern also stems from the fact that for any individual with whom a legal duty is owed, there are additional noticing requirements, which will add workload and cost to county agencies not contemplated nor supported by the Legislature.	Conduct of the Hearing), the committee elected to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2).

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	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
3.	California Department of Social Services By Mary Sheppard, LCSW, Chief, Child Protection and Family Support Branch Children and Family Services Division		The proposed rules apply more broadly than is provided for under WIC Section 14717.1, and the scope of the court's review is unclear. For example, the proposal defines individuals and entities that may request a waiver, which occurs prior to any filing with the court. It is unclear why the court proposes to define this and other detailed process requirements that take place before a request for judicial review is filed with the court. The Department welcomes judicial oversight, but is concerned about possible separation of powers issues when our policy guidance is formalized into the Rules of Court. Citation: Rule 5.647(b)(1) The following individuals may request that the placing agency consider the application of a waiver to the presumptive transfer of the responsibility for providing specialty mental health services to the child or nonminor's county of residence: (A) The foster child or nonminor; (B) The person or agency that is responsible for making mental health care decisions on behalf of the foster child or nonminor; (C) The child welfare services agency or the probation agency with responsibility for the care and placement of the child; or (D) The attorney of the child or nonminor.	Including the individual or agency who may request waiver is included in the rule because it relates to an important piece of information related to the conduct of the hearing, that being who is entitled to request and be granted a hearing to review the determination on the waiver of presumptive transfer. As section 147171.1(d)(4) indicates, a party to the case or the individual or agency who requested the exception may request a hearing. The committee therefore feels that it is important for the rule to specify who is entitled to request a hearing, as this will easily provide the court with the information it needs to be ascertain who is entitled to a hearing.

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			Comment: While the first three persons identified as having the authority to request a waiver are taken directly from WIC Section 14717.1(d)(2), the third individual identified is taken from the joint guidance issued by DHCS and CDSS. That guidance has interpreted the statutory language "or any other interested party who owes a legal duty to the child involving the child's health or welfare, as defined by the department." {WIC Section 14717.1(d)(2)} That definition is currently under further consideration by DHCS and CDSS, with stakeholder input. Putting it in a court rule could limit the DHCS's and CDSS's ability to further exercise their authority to define this term through policy guidance and the regulatory process.	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2).
4.	Chua Chao Program Manager Marin County Children and Family Services San Rafael, CA		3) I am in favor of the three court day timeline for requesting a hearing, seven days is too long. I'm assuming this means after a waiver request is denied, the placing agency cannot initiate presumptive transfer for 7 court days even if a hearing is not being requested.	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to not include a timeline for when a hearing may be requested.
5.	Department of Health Care Services Erika Castro Branch Chief (Staff Services Manager III)	A	• Should the rule reflect any new timelines for requesting a hearing that are introduced by subsequent ACLs or ACINs? It is anticipated that the timeline to request a	

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
	Sacramento, CA		hearing after being informed of the placing agency's determination on the request for waiver will be extended from three court days to seven court days. The proposed rule 5.647 provides timelines for requesting a hearing on the issue of presumptive transfer. DHCS agrees that the rule of court should reflect a timeline for requesting a hearing. The All County Letter (ACL) 17-77 /Mental Health and Substance Use Disorder Services (MHSUDS) Information Notice (IN) NO. 17-032 did not address a timeframe for requesting a hearing. However in current draft guidance DHCS and the California Department of Social Services (CDSS) will provide further guidance on the time frame. Current guidance specifies that upon issuance of a final determination by the placing agency, the individual who requested the waiver or any other party to the case who disagrees with the determination made by the placing agency has seven (7) days from the issuance of the placing agency's determination to make a formal request to the court for a hearing. While the proposed rule of court 5.647 specifies a three (3) court day timeframe from being noticed, in order ensure timely and prompt access to specialty mental health services (SMHS), DHCS and CDSS have determined that the period of time for an individual to request a hearing be seven (7) calendar days. DHCS and	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to not include a timeline for when a hearing may be requested.

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			CDSS opted for seven (7) calendar days, rather than three (3) court days to allow for individuals to have sufficient time to prepare and submit the information required by the court. Additionally, the draft DHCS and CDSS guidance aligns with the proposed rule 5.647, establishing that the court may set the matter for hearing within five (5) court days of receipt of the notification for a request for hearing and may confirm or deny the transfer of the responsibility or application of an exception based on the best interest of the child. • Should any other individuals be included as those that may petition the court for review of the placing agency's presumptive transfer individualized exception determination? W&I Code 14717.1(d)(2) list those who may request a waiver in a manner established by the department as: o The foster child o The person or agency that is responsible for making mental health care decisions on behalf of the foster child; o The county probation agency or the child welfare services agency with responsibility for the care and placement of the child; or	No response required. For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to include in the rule who is allowed to request waiver, but to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2).

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			o Any other interested party who owes a legal duty to the child involving the child's health or welfare, as defined by the departments. ACL 17-77/MHSUDS IN 17-032 currently defines those individuals responsible for mental health care decisions on behalf of the foster child, as the person or entity who has the legal authority to consent to mental health treatment on behalf of the child. In a foster care case this is usually the parent or legal guardian. In addition, DHCS and CDSS defined any interested party who owes a legal duty to the child, involving the child's health or welfare to be the child's guardian or the child's attorney. DHCS defers to the Judicial Council regarding the following additional individuals being included as interested parties who may owe a legal duty to the child involving the child's health or welfare: child's court appointed special advocate (CASA) and tribal representative.	
6.	Kern County Department of Human Services Terrie Martinez, MSW Program Specialist, Assistant Director's Office		Please see our responses to the Request for Specific Comments attached to this email. In addition to the Specific Comments, we had the following comments on the proposal as a whole and recommend the following modifications: • As to "Timeliness" addressed on page 4 of the proposal, we recommend that an individual has **3 court days** to request a	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			hearing after being notified of the placing agencies determination regarding waiver of presumptive transfer. • As to "Who may request a judicial review hearing" addressed on pages 6 and 7 of the proposal, we do not think that additional individuals should be added to those already identified as able to request a judicial review. • Should the rule reflect any new timelines for requesting a hearing that are introduced by subsequent ACLs or ACINs? It is anticipated that the timeline to request a hearing after being informed of the placing agency's determination on the request for waiver will be extended from three court days to seven court days. Yes. • Should any other individuals be included as those that may petition the court for review of the placing agency's presumptive transfer individualized exception determination? No.	Conduct of the Hearing), the committee elected to not include a timeline for when a hearing may be requested. For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to include in the rule who is allowed to request waiver, but to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2). See comment above. See comment above.
7.	Los Angeles County Department of Children and Family Services	NI	• **Should the rule reflect any new timelines for requesting a hearing**	

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
	By Ruena Borja, LCSW Children Services Administrator I DCFS Policy Section Norwalk, CA		**that are introduced by subsequent ACLs or ACINs? It is anticipated that the timeline to request a hearing after being informed of the placing agency's determination on the request for waiver will be extended from three court days to seven court days.** Yes, for consistency, the rules should reflect the anticipated updated guidelines from CDSS/DHCS. We also suggest that the rules' effective date is coordinated with the date of release of the updated ACL/ACIN so counties have uniform guidelines. <u>With regards to the timeline, we suggest the following:</u> - Set the timeline from the date of receipt of notice, rather than the date of the placing county's *determination,* as the former would be clearer. • **Should any other individuals be included as those that may petition the court for review of the placing agency's presumptive transfer individualized exception determination?**	The committee has elected to proceed with the proposal and remove items related to policy guidance and pending regulations. For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to not include a timeline for when a hearing may be requested.

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			The current proposed rule language adding the last section 'any other interested party who owes a legal duty to the child involving the child's health or welfare, as defined by the department" as one of the parties that can petition, would be vague and therefore must be defined and specified in the rules if it were to be included. We recommend that the guardian may be included as one of the parties, otherwise the other parties mentioned such as CASA and other members of the CFT who are not already able to petition etc. can go through the minor's attorney or the placing agency to provide input.	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to include in the rule who is allowed to request waiver, but to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2).
8.	Kim Narvaez, MFT Children's Mental Health Program Manager Yolo County Health and Human Services Agency, Child and Family Branch	NI	• Should the rule reflect any new timelines for requesting a hearing that are introduced by subsequent ACLs or ACINs? YES. • Should any other individuals be included as those that may petition the court for review of the placing agency's presumptive transfer individualized exception determination? It already states "or any other interested party who owes a legal duty to the child involving the child's health or welfare", that seems broad	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to not include a timeline for when a hearing may be requested. For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			enough and no need to specify, and it should be included because it will allow for other CFT members who are non-providers to be able to petition	Conduct of the Hearing), the committee elected to include in the rule who is allowed to request waiver, but to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2).
9.	Office of County Counsel County of Santa Clara By James R. Williams & Michaela L. Lewis San Jose, CA		1. Should the rule reflect any new timelines for requesting a hearing that are introduced by subsequent ACLs or ACINs? Yes, the rules, and prior and subsequent ACLs and ACINs should provide clear and consistent timelines for requesting a hearing. Inconsistencies in the existing ACLs and ACINs will result in confusion in practice and implementation of this new process. 3. Should any other individuals be included as those that may petition the court for review of the placing agency's presumptive transfer individualized exception determination?	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to not include a timeline for when a hearing may be requested.

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			The rule should provide greater clarity on what entities may request a waiver of presumptive transfer, including clarifying that a county mental health department receiving a presumptive transfer is entitled to request a waiver of that transfer. The statute states that a waiver may be requested by a "person or agency that is responsible for making mental health care decisions on behalf of the foster child" (Welf. & Inst. Code, l4717.l(d)(2)). It is somewhat ambiguous, however, as to which entities the statute envisions fall under the category of "person[s] or agenc[ies] that [are] responsible for making mental health care decisions on behalf of the foster child." Specifically, while we presume that the statute is intended to cover both the county mental health department and the child welfare agency responsible for the child (including the county mental health department responsible for the child posttransfer), we request that the rule make that more explicit. This clarification would be particularly helpful in light of the fact that some counties, including the County of Santa Clara, structure their operations such that their mental health department and child welfare department are part of two separate county agencies, whereas other counties structure them as part of the same agency. Thus, for counties like ours, it is not entirely clear whether our mental health department is considered part of	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to include in the rule who is allowed to request waiver, but to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2). A person or entity responsible for making mental health decisions for the child refers to the individual that may consent to treatment for the child. This will be the parent or legal guardian of the child unless the court makes an order under section 361(a)(1) appointing someone else. There are situations where the placing agency may consent for treatment, and the child may consent to treatment in certain situations as well. The juvenile court may even consent for treatment in certain situation. The committee does acknowledge medical consent laws for children in foster are complicated and there are numerous individuals who at different times and in different circumstances may consent for the child's treatment. (see section 305, 366.27(a), 369(a), 369(b), 369(d), Cal Health & Saf. Code section 1530.6) Attempting to provide clarity on this intricate area however would require the rule to take on complications that the committee doesn't believe is warranted at this time. The language at issue is

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	Commentator	**Position**	**Comment**	**Committee Response**
			the "agency" responsible for making mental health care decisions on the part of the child, whereas in other counties the mental health department is clearly part of that agency. And in any event, all county mental health departments can and do play a role in making mental health care decisions for the children they serve, particularly because, for Medi-Cal beneficiaries including foster children, they are both the service provider and the entity tasked with managing the mental health component of their Medi-Cal benefit. CITE. To provide further clarity on this point, we request that the rules make clear that the county mental health departments responsible for the minors care pre- and posttransfer, as well as those persons or agency with legal authority to consent to mental health treatment on behalf of the child may request a waiver to the presumptive transfer. The concept of authority to consent to treatment is well established in statute and case law, and provides a clear framework for determining the individuals or entities with standing to request a waiver of presumptive transfer. Further, ensuring that both the mental health department responsible for the child's case pre- and post-transfer have the ability to request a waiver will best effectuate the presumptive transfer statute's intent to ensure children	taken from section 14717.1(d)(2), which the rule must follow. The court will have to determine whether the person or agency has the relationship that is listed in section 14717.1(d)(2) based on the individual circumstances of the case.

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	Commentator	**Position**	**Comment**	**Committee Response**
			receive mental health services as quickly as possible when they move between counties. For example, there may be instances when a minor is placed for a short time period with a residential services provider (e.g., a Short Term Residential Treatment Program (STRTP)), with which the local mental health department has no existing contract. In that instance, the county mental health department that has been responsible for the child over the last many years is equally well-situated to contract with the residential facility, and can more efficiently provide information to the residential provider than a county mental health department unfamiliar with the child. In such an instance, the mental health department where the residential facility is located would request a waiver of transfer in order to expedite service provision for the child.	
10.	Orange County Bar Association Nikki P. Miliband, President Newport Beach, CA	AM	• Should the rule reflect any new timelines for requesting a hearing that are introduced by subsequent ACLs or ACINs? It is anticipated that the timeline to request a hearing after being informed of the placing agency's determination on the request for waiver will be extended from three court days to seven court days. Comment: Yes.	For the reason stated above in comment number one of this portion of the comment chart

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			• Should any other individuals be included as those that may petition the court for review of the placing agency's presumptive transfer individualized exception determination? Comment: No.	(Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to not include a timeline for when a hearing may be requested. For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to include in the rule who is allowed to request waiver, but to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2).
11.	Orange County Social Services Agency By Alix Kaainoa-Thomas		**1. Proposed rule of court: 5.647(b)(1)(C)-(b) Request for the waiver of presumptive transfer (§ 14717.1)** 19 20 (1) The following individuals may request that the placing agency consider the 21 application of a waiver to the presumptive transfer of the responsibility for 22 providing specialty mental health services to the child or nonminor's county 23 of residence: 24 25 (A) The foster child or nonminor; 26 27 (B) The person or agency that is responsible for making mental health care	

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	Commentator	**Position**	**Comment**	**Committee Response**
			28 decisions on behalf of the foster child or nonminor; 29 30 (C) The child welfare services agency or the probation agency with 31 responsibility for the care and placement of the child; or **Orange County Comment to proposed rule of court 5.647 (b)(1)(C)-** Proposed Rule 5.647 (b)(1)(C) indicates that the social worker or probation officer with responsibility for care/placement of the child has the right to request a waiver of presumptive transfer. However, the placing agency is the one making the determination on the waiver request. This seems like a conflict of interest when the agency requesting a waiver, is the same agency making the determination on the waiver request. Is the availability of the judicial review process an attempt to mitigate this apparent conflict? **2. Proposed rule of court: 5.647(b)(4)-** 23 **(b) Request for the waiver of presumptive transfer (§ 14717.1)** 11 (4) A request for a hearing may be made by filing a Request for a Hearing on the 12 Determination of Presumptive Transfer of the Responsibility for Mental	This requirement is derived from section 14717.1(d)(2). In constructing the rule, the committee could not leave out an individual that is listed in the statute as entitled to request a waiver to presumptive transfer. Essentially, when the placing agency determines a waiver should apply to presumptive transfer, the social worker/probation officer should make the waiver request and then follow the administrative process of the issued policy guidance on presumptive transfer. The committee does however agree with the comment that this could create confusion.

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			13 Health Services (form JV-214), or by the filing of substantially similar 14 information. This document must be filed with the court and provided to the 15 placing agency within three court days of being informed of the placing 16 agency's determination on the application of a waiver of presumptive 17 transfer. **Orange County Comment to proposed rule of court 5.647 (b)(4)-** Proposed Rule 5.647 (b)(4) indicates that the request for hearing must be filed with the court and provided to the placing agency "within three court days of being informed" of the …..determination……of a waiver". This timeline should be more specific, it is too vague when you are talking about a person's right to be heard in court. What does "of being informed" mean? From the date it was mailed? From the date of the postmark? From the date the recipient actually read it (hard to prove)?	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to not include a timeline for when a hearing may be requested.
12.	Sacramento County Department of Health and Human Services Sacramento County Office of the County Counsel By Robyn Truitt Drivon County Counsel & Traci Lee Assistant County Counsel Sacramento, CA	NI	**Comment 9:** Should any other individuals be included as those that may petition the court for review of the placing agency's presumptive transfer individualized exception determination?	

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	Commentator	**Position**	**Comment**	**Committee Response**
			The child's tribe if the tribe has intervened, legal guardians, as well as the minor's CASA.	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to include in the rule who is allowed to request waiver, but to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2).
13.	San Bernardino County Program Development Division By Robert Silva Supervising Program Specialist Program Development Division County of San Bernardino San Bernardino, CA	NI	**Comment Request:** Should any other individuals be included as those that may petition the court for review of the placing agency's presumptive transfer individualized exception determination? **Notes:** The WIC currently lists: Foster child, Person or agency responsible for making the mental health care decisions on behalf of the foster child, Probation officer, or CFS SW. It then mentions - Any other interested party who owes a legal duty to the child involving the child's health or welfare, as determined by CFS. CDSS only included the child's attorney in this last group. Other suggested individuals under this category may include: • Child's legal guardian, • Court Appointed Special Advocate (CASA) volunteer, • Tribal representative.	

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			County Comment: Not the biological parents? The Caregiver? Does being in a CFT count as a 'legal duty' under this rule? The current therapist? Expanding the list means increasing the noticing and informing requirements.	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to include in the rule who is allowed to request waiver, but to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2).
14.	Solano County Counsel's Office By Clarisa P. Sudarma Deputy County Counsel Fairfield, CA	NI	Specific Comments: - Currently the proposal is not entirely clear on who may request a hearing. The proposed JV 214 lists child, person or agency that is responsible for MH decision, minor's attorney, parent or legal guardian, and other. The proposed WIC 14717.1(b)(1) indicates the following individuals are the only ones who may request a presumptive transfer waiver: child, person or agency responsible for making MH decisions for the minor, CWS, attorney's child. The current 14717.1(d)(1) allows "any other interested party who owes a legal duty to the child involving the child's health or welfare, as defined by the department." We would propose the committee limit the parties who may request a hearing, and make it explicit – not have the "other" checkbox – and	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to include in the rule who is allowed to request waiver, but to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2).

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	Commentator	**Position**	**Comment**	**Committee Response**
			limited it to those in the proposed WIC 14717.1(b)(1) listed on p. 12.	
15.	Superior Court of Riverside County By Susan D. Ryan Chief Deputy of Legal Services	A	1. Should the rule reflect any new timelines for requesting a hearing that are introduced by subsequent ACLs or ACINs? It is anticipated that the timeline to request a hearing after being informed of the placing agency's determination on the request for waiver will be extended from three court days to seven court days. We agree that the timeline should be extended to seven court days, and consequently that the extension should be reflected in the new rule. Any new timelines introduced by ACLs or ACINs should also be added to the rule for consistency. 3. Should any other individuals be included as those that may petition the court for review of the placing agency's presumptive transfer individualized exception determination? We agree that the minor's legal guardian, CASA and tribe should be added to the list of individuals that may petition the court for	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to not include a timeline for when a hearing may be requested. For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			review. There certainly may be others who are interested (adult siblings, grandparents, extended family, etc.) however, it is not clear if they would owe a legal duty so would they may not qualify under Section 14717.1(d)(2). Clarification on this could be useful for court staff when accepting petitions for filing.	Conduct of the Hearing), the committee elected to include in the rule who is allowed to request waiver, but to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2).
16.	Superior Court of San Diego By Mike Roddy, Executive Officer San Diego, CA		1. Should the rule reflect any new timelines for requesting a hearing that are introduced by subsequent ACLs or ACINs? It is anticipated that the timeline to request a hearing after being informed of the placing agency's determination on the request for waiver will be extended from three court days to seven court days. If the timeline is extended to seven court days, the rules should reflect that timeline. (See rules 5.647(b)(4) & 5.648(b)(4).) 3. Should any other individuals be included as those [who] may petition the court for review of the placing agency's [decision on waiver]? As drafted, rules 5.647(b)(3) and 5.648(b)(3) already include "the individual who requested the waiver, or any other party to the case who disagrees with the placing agency's [decision]" as those who may petition the court for review of the agency's decision. Those who may request a waiver are listed in subd. (b)(1)(A)-(D): child/nonminor, person/agency responsible	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to not include a timeline for when a hearing may be requested. For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to include in the rule who is allowed to request waiver, but to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2).

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			for mental health care decisions, placing agency, attorney for child/nonminor. It is **strongly suggested** that subd. (b)(1)(D) be changed from "The attorney of the child or nonminor" to the language in WIC § 14717.1(d)(2): any other interested party who owes a legal duty to the child or nonminor involving the child's or nonminor's health or welfare. As stated in the proposal: "The department currently limits this group to the child's attorney. The committee requested that the department consider also adding the child's legal guardian, CASA volunteer, and the child's tribe to the list of those who can request a waiver and thus a hearing. Staff to the department agreed to include these additional individuals, and it is expected that these individuals will be included as those that may request a waiver of presumptive transfer in a new information notice that is currently under construction." (Proposal, p. 7.) Using the statutory language ("any other interested party who owes a legal duty …") in subd. (b)(1)(D) would effectively include the "additional individuals" suggested by the Advisory Committee, as well as the child's caregiver. Thus, if the statutory language is	

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			adopted, those who may petition the court for review would include: - child/nonminor, - person/agency responsible for mental health care decisions for child/nonminor, - placing agency (child welfare or probation), - interested party who owes a legal duty to the child, i.e.: - attorney for child/nonminor - parent or legal guardian of child/nonminor - CASA volunteer - child's tribe, if any - child's caregiver Subd. (b)(1)(C): *Replace*: "The attorney of the child or nonminor." *with language from WIC § 14717.1(d)(2)*: "Any other interested party who owes a legal duty to the child or nonminor involving the child's or nonminor's health or welfare." *(See response to question 3,* ante.*)*	
17.	Lynn Thull, Ph.D., Mental Health Policy and Practice Improvement Consultant, California Alliance of Child and Family Services Sacramento, CA	NI	From Invitation to Comment Report page 7: As to this last category, the department currently limits this group to the child's attorney. The committee requested that the department consider also adding the child's legal guardian, ~~CASA volunteer, and the child's~~	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to include in the rule who is allowed to request

	Administrative Responsibilities that Address the Conduct of the Hearing			
	Commentator	**Position**	**Comment**	**Committee Response**
			~~tribe to the list of those who can request a waiver and thus a hearing. Staff to the department agreed to include these additional individuals, and it is expected that these individuals will be included as those that may request a waiver of presumptive transfer in a new information notice that is currently under construction.~~	waiver, but to avoid attempting to define who owes a legal duty to the child as defined by the department under section 14717.1(d)(2).
18.	Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC) Sacramento, CA	AM	**1. Should the rule reflect any new timelines for requesting a hearing that are introduced by subsequent ACLs or ACINs? It is anticipated that the timeline to request a hearing after being informed of the placing agency's determination on the request for waiver will be extended from three court days to seven court days.** 3 court days is too short. DPSS is likely to extend the time in the next ACL. Our recommendation is 7 court days. **3. Should any other individuals be included as those that may petition the court for review of the placing agency's presumptive transfer individualized exception determination?**	For the reason stated above in comment number one of this portion of the comment chart (Administrative Responsibilities that Address the Conduct of the Hearing), the committee elected to not include a timeline for when a hearing may be requested. No response required.

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Juvenile Law: Presumptive Transfer of Specialty Mental Health Services (Adopt Cal. Rules of Court, rules 5.647 and 5.648; adopt forms JV-214, JV-214(A), JV-214-INFO, and JV-215; renumber current form JV-215 as JV-212)

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

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
1.	Christina Beck, M.A., Policy Analyst CWS, Policy and Program Support County of San Diego Health & Human Services Agency		Following initial submission of this comment, the commentator sent this follow-up comment: …after further consider, I no longer agree with Notification of PT to occur at age 12 for the following reason: *Notification of Out of County Placement needs to be provided to youth age 10 and up (WIC 361.2(h)). When counties combine notification of Out of County Placement with notification of Presumptive Transfer, the age of the child to be noticed should be consistent or these notices will need to be provided separately with separate procedures established by the counties.* • Notification of PT at age 12 or older seems reasonable.	The committee has elected to remove subdivision (d)(1) which addresses notice to the child of presumptive transfer requirements because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance. The committee appreciates this comment, but the it addresses a portion of the rule that will be removed for reason mentioned above. The comment however be forwarded to representatives at the CDSS and DHCS. who are creating policy guidance and regulations implementing AB 1299. No response required. See comment above.
2.	California Department of Social Services By Mary Sheppard, LCSW, Chief, Child Protection and Family Support Branch Children and Family Services Division		CDSS and the Department of Health Care Services (DHCS) are responsible for implementing Welfare and Institutions Code (WIC), Section 14717.1, and continue to work together with counties, providers, advocates, and others to ensure the mental health needs of children and youth are met in an effective and timely manner. The following comments	The committee is appreciative of the comments from CDSS and from all the commentators on this proposal. Based on this and other comments, the committee has elected to remove from the rule a review of the administrative responsibilities during the presumptive transfer process. As CDSS indicates in this comment, policy guidance on the implementation of AB 1299, required by section

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			describe broad areas of concern or where CDSS thinks clarity is needed. We have also included a table that provides more specific feedback to individual subdivisions of the proposed rules. Our primary concern relates to the applicability of the proposed rules and what is subject to the court's review. Judicial review is provided for in WIC Section 14717.1 (d)(4) as a recourse in the event there is disagreement with a county placing agency's determination about a waiver. With respect to presumptive transfer, CDSS sees the role of the court's review as applying to the placing agency's decision on a request to waive presumptive transfer. This would require the court to review the county placing agency's determination as to whether or not any exceptions to presumptive transfer existed, and also whether the agency consulted with the child or youth, his or her parent, the child and family team, and any other professionals who may serve the child or youth. If the matter is set for a hearing, the court will confirm or deny the agency's decision based on the best interests of the child or youth. Section 14717.1 (g) requires DHCS and CDSS to promulgate regulations implementing the statute. It permits us to provide policy guidance until such regulations are finalized. Providing details of the agency process in a rule of court will limit the flexibility CDSS and DHCS	14717.1(b)(1-2) and (g), is incomplete and subject to change. While the committee initially elected to include the administrative process in the rule to ensure meaningful review, the committee does not want to create the situation mentioned, that including these requirements in the rule as they currently stand in ACL 17-77 would prevent CDSS and DHCS from amending these requirements, which are currently being considered for revision. As these requirements are the responsibility of CDSS and DHCS, the committee wants to ensure that the rule of court does not prohibit the departments from carrying out their responsibility in this regard. See comment above related to the removal from the rule of the review of administrative functions.

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			statutorily have to make policy and procedure changes in the future. As presumptive transfer policy continues to be implemented and evolve, CDSS and DHCS are finding that changes in policies are needed to ensure best practices. The proposed rules appear to limit our ability to promulgate regulations that differ from the Rules of Court, even if such changes are desired by the stakeholders and the courts. It would certainly mean the applicable rules would need to be updated each time the departments made process and practice changes. This seems altogether avoidable. If specific, detailed information about agency requirements is needed to inform the bench and other parties, it may be more effective to include a reference to our joint guidance and subsequent regulations. It is our position that some of the issues identified below may be addressed, at least in part, if elements of the proposed rules were aligned with the court's existing oversight of out-of-county placements for dependent and delinquent children and youth, pursuant to WIC Section 361.2. For example, aligning notification and hearing timelines and requirements could potentially benefit everyone involved.	The committee believes that the coordinating timelines with section 361.2(h) will need to be addressed in the evolving policy guidance referenced in the comment. Section 361.2(h) requires a hearing shall be set if the parent objects to the child being moved to an out of county placement. The hearing must be within seven days of the receipt of notice. According to ACL 17-77, this timeline is the same for presumptive transfer in terms of notice (14 days prior to the placement change) and a request for a waiver (seven days after notice). But unlike section 361.2(h), ACL 17-77 requires further steps before someone can request a hearing. According to ACL 17-77, the

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				placing agency must consult the CFT, make a determination on the request for a waiver, and then inform parties to the case and the person who requested waiver. After this occurs, a request for hearing can be made. Because the rule is not including review of the administrative timelines, the committee does not believe that the rule itself will be inconsistent with the timelines of section 361.2(h). The rule will mirror the timelines of section 361.2(h), in that a request for a hearing must be within seven days of being noticed of the placing agency's response to the request to waive presumptive transfer. If the rest of the process mentioned above can be completed within the same timeline as a hearing under section 361.2(h), then the hearings could be held at the same time.
			The Department identified subdivision (d) of the proposed rules as being particularly problematic. • Subdivision (d)(l) requires the report include documentation that notice provided pursuant to WIC Section 361.2(h) is consistent with requirements of presumptive transfer under WIC Section 14717.1. Notification requirements for presumptive transfer are defined in our policy guidance, not in	Subdivision (d)(1) has been removed from the rule for the reason stated above. Former subdivision (d)(1) was reflecting the notice requirements on page four of ACL 17-77, which requires that notice of the presumptive transfer requirements under AB 1299, including a description of exceptions, the option to request a waiver of presumptive transfer if an exception exists, and how to make such a request to the placing agency be included in the notice provided

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			statute, and do not match the notification requirements defined in WIC 361.2(h). The written notices required by WIC Section 361.2(h) would be impossible to facilitate within the timeframes given by our policy guidance. Citation: Rule 5.647 (b) Request for the waiver of presumptive transfer (§ 14717.1) Comment: WIC Section 14717.1 expressly places in the DHCS, in consultation with the CDSS, responsibility for creating the guidance on the conditions for and exceptions to presumptive transfer {§ 14717.1(b)(1) and (g)}. It also permits a person requesting a waiver or any other person who disagrees with the determination made by the placing agency on whether a waiver of presumptive transfer is appropriate to request review by the court {§ 14717.1(d)(4)}. Subdivision (b) of the proposed rule addresses the process for requesting a waiver of the placing agency, not the court process. While it incorporates the joint guidance that has already been issued by DHCS and CDSS, that guidance is not final and is subject to revision. Moreover, DHCS and CDSS are required to adopt regulations to implement the process {§ 14717.1(g)}. Including temporary guidance into a rule before the regulations are adopted would bind the DHCS and CDSS to the	pursuant to section 361.2(h) if such notice is provided for a new out of county placements. The notice requirement is not however going to be addressed in the rule. The rule has been amended to remove the portions of the rule that address the policy guidance and regulations required by section 14717.1(b)(1) and (g). Subdivision (b)(2) has been removed. The other portion of subdivision (b) address the process to request a hearing.

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			process incorporated into the rule and prevent the executive branch from modifying its policies to the extent they may conflict with the existing rule of court. This implicates separation of powers and appears to contradict the express provisions of the statute. If the court is going to issue a rule corresponding to the departments' joint guidance, it should wait to do so until after regulations are issued through the Office of Administrative Law. Citation: Rule 5.647(b)(2) A request for waiver must be made to the placing agency within seven calendar days of the determination that the child or nonminor will be in a placement outside the county of original jurisdiction or within two court days of the agency providing notice in subdivision (d)(1)(C). Comment: This provision is unclear. Subdivision (d)(1)(C) is one small portion of the broader provision regarding what placing agencies must address in the court report. It does not address notice, This appears to be a mistaken cross-reference. Citation: (d)(l) That notice consistent with section 361.2(h) of the presumptive transfer requirements under section 14717.1 was provided. The notice must include a description of exceptions to presumptive transfer, the option to request a waiver of presumptive transfer if an	Subdivision (b)(2) has been removed from the proposed rule. The commentator is however correct that there was a mistaken cross reference. There was a last-minute modification to the rule's numbering which resulted in the oversight. The correct reference should have been to (d)(1).

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			exception exists, and how to make such a request to the placing agency. The notice must be provided to: (A) The child if aged 12 years old or older, or nonminor; (B) The attorney of the child or nonminor; (C) The person or agency responsible for making mental health care decisions on behalf of the child or nonminor. Comment: Prescribing what the placing agency must include in its notice and the process by which that notice must be done is outside the scope of the judicial branch authority. The cross-reference to WIC Section 361.2(h) is inconsistent with the guidance that the departments have already issued. Section 361.2(h) requires written notice 14 days prior to the proposed out-of-county placement. This conflicts with the notification requirements described in our policy guidance (ACL 1777/MHSUDS 17-032). They also conflict with the timeframes for addressing a request for application of an exception and waiver of presumptive transfer addressed in that guidance. Additionally, WIC Section 361.2(h) does not apply to delinquency proceedings. The cross-reference could be confusing to probation officers.	Subdivision (d)(1) has been removed for the reasons stated above. Former subdivision (d)(1) was reflecting the notice requirements on page four of ACL 17-77, which requires that notice of the presumptive transfer requirements under AB 1299, including a description of exceptions, the option to request a waiver of presumptive transfer if an exception exists, and how to make such a request to the placing agency be included in the notice provided pursuant to section 361.2(h) if such notice is provided for a new out of county placements. The notice requirement is not however going to be addressed in the rule.

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			This is an area where check boxes on a form would be most helpful. The boxes could be used to identify who received notice of the right to request a waiver. Citation: (d)(3) That the placing agency informed the following of its initial presumptive transfer determination, which includes a determination by the placing agency that an exception to presumptive transfer applies, within three days of that determination: (A) The child or nonminor, (B) The Child and Family Team coordinator if one exists, or the placing agency's case carrying social worker or deputy probation officer, (C) The attorney of the child or nonminor, (D) The biological parents when appropriate (if they are not already a member of the Child and Family Team). Comment: It is unclear why this is required to be presented to the court. This is the process prior to the hearing, and it includes provisions that are contained in the joint guidance currently under review and subject to change. The departments are also required by WIC Section 14717.1(g) to adopt regulations addressing this process. To include it in a court rule will limit	Subdivision (d)(3) has been removed from the rule for the reasons stated above. The committee included this subdivision in the original rule to ensure a more meaningful hearing and to ensure that the placing agency followed the administrative requirements of ACL 17-77. It will not be addressed in the rule going forward however.

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			the ability of the departments to execute their statutory mandate. Additionally, it appears irrelevant to the court's review of whether the placing agency's decision on a request for waiver is in the child's best interests. Presumably, the person applying for the hearing was informed of all his or her right to request a waiver and his or her right to request a hearing or he or she would not have filed the application for a hearing. This information is only relevant if the applicant for the hearing contends a hearing is necessary because he or she was not informed of the decision and the right to seek a waiver. Subdivision (d)(3)(D) should refer to parents rather than biological parents. The parents involved in the case could be adoptive parents. There may also be more than two presumed parents, all of whom should be participating in the proceedings.	
3.	Chua Chao Program Manager Marin County Children and Family Services San Rafael, CA		4. Under rule 5.647 (d) (3) (D)-top of page 15, where it states "The biological parents ….), should this say presumed or legal parents? What about legal guardians? Adoptive parents? This may require a legislative fix but I think this will create confusions for agencies.	Subdivision (d)(3) is being removed from the proposed rules because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance. Subdivision (d)(3) was taken from the policy guidance of ACL 17-77.

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4.	Department of Health Care Services Erika Castro Branch Chief (Staff Services Manager III) Sacramento, CA		• What is the appropriate age for a minor to be notified of the presumptive transfer requirements and exceptions: 10 or 12 years old, or a different age? DHCS believes that the appropriate minimum age for a minor to be notified of the presumptive transfer requirements and exceptions is 10 years old. As indicated in the Invitation to Comment, a minor can consent to mental health treatment at the age of 12 (Family Code, Section 6924). Additionally, at the age of 10 a child is to be provided notice of their right to attend court, and a child of any age who is subject of a juvenile hearing is entitled to be present at a hearing (W&I Code Section 349). Additionally, if the child is 10 years old or older, the placing agency must provide written notification to the child at least 14 days prior to the date of placement (W&I Code, Section 361.2(h) and ACL 17-81. Establishing 10 years as the minimum age for children to receive notification of presumptive transfer conforms with existing and related notification requirements in statute. In addition, forthcoming DHCS and CDSS guidance will indicate that the appropriate age for a minor to be notified of presumptive transfer requirements and exceptions is 10 years old. • Should the rule include the requirements of the placing agency's responsibilities during	Because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance and pending regulations. The rule therefore will not review the placing agency's responsibilities to notice the child of the presumptive transfer requirements.

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			the presumptive transfer individualized exception determination as laid out in section 14717.1 and ACL 17-77? And should the rule require the court to review these efforts to ensure compliance?	
			DHCS defers to CDSS.	No response required, see comment from CDSS above.
			• Is there any concern with subdivision (b)(2) reflecting a timeline of seven calendar days as opposed to seven court days? Calendar days was used to mirror the requirements in ACL 17-77. Court days is used throughout the rest of both rules.	
			CDSS and DHCS have specified both business days and calendar days to define the range of time for notifications, requests for waivers, and hearing requests. We chose calendar days for timeframes associated with a request for waiver to expedite the process and not be delayed due to weekends, holidays, or different approaches to determining a business day (ACL 17-77/MHSUDS IN 17-032). Therefore, we agree with the proposed rule using calendar days for the request for waiver to a placing agency and setting a timeframe of two (2) court days of an agency providing notice for a request for hearing, and using court days to determine timeframes for the rule of court.	For the reasons stated above, the committee has elected to remove subdivision (b)(2) that relates to an administrative function during the presumptive transfer process.

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5.	Executive Committee of the Family Law Section of the California Association Andrew Cain San Francisco, CA	AM	2. Rule 5.647(b)(1-2) and Rule 5.648(b)(1-2) – We recommend deleting these provisions. They speak to the administrative process that occurs prior to judicial review. The procedures governing this process are outlined in an All-County letter prepared last year by the state Department of Social Services. We believe there is no need for the Judicial Council to issue similar regulatory language.	The committee agrees with the commentator as to (b)(2) because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance. Comments related to administrative functions will however be forwarded to CDSS and DHCS as they implement policy guidance and regulations to implement AB 1299. The committee however believes that (b)(1) is necessary to identify who may request waiver and thus a hearing.
			3. Rule 5.647(b)(2) and Rule 5.648(b)(2) – In the event the Advisory Committee disagrees with our opinion that the language above should be deleted, we recommend a slight change to subdivision (b)(2) of both proposed rules. The language "…or within two court days of the agency providing notice in subdivision (d)(1)(C)" should be deleted. First, we believe it references the wrong subdivision of the proposed rules. It should be (d)(1). Second, the proposed timeline is not required by statute. The statute only speaks to the seven-day requirement that is outlined in the first part of (b)(2). Third, two court days is often not enough time for counsel and/or parties to gather relevant information necessary to determine whether requesting a waiver is appropriate.	Subdivisions (b) of both rules have been removed from the proposal for the reasons stated above. The commentator was however correct that the reference in (b)(2) to (d)(1)(C) was incorrect. There was a last-minute modification to the rule's numbering which resulted in the oversight. The correct reference should be to (d)(1) and the rule has been modified. The committee inserted the language "…or within two court days of the agency providing notice in subdivision (d)(1)(C)" to protect against those situations in which the placing agency does not provide notice of the presumptive transfer requirements within seven calendar days of the decision to place the child outside the county of jurisdiction as required by the regulations as currently constructed. While two days may not be very much time, the committee had to balance the amount of time

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				given with the overall purpose of AB 1299 of not delaying access to specialty mental health services. At this point however, the matter is moot for the reasons stated above.
			7. Rule 5.647(d)(1) and Rule 5.648(d)(1) – We recommend deleting the language "consistent with section 361.2(h)" in the first sentence. That Welfare and Institutions Code Section governs, among other things, changes in placement. The notice that is required under that section is not consistent with the notice governing presumptive transfer.	For reasons stated above, subdivision (d)(1) has been removed from the proposed rules. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g).
			8. Rule 5.647(d)(1)(A) and Rule 5.648(d)(1)(A) – The statute requires notice of presumptive transfer rights to go to the foster youth, among others. This provision would require such notice to go to any foster youth 12 or older. We recommend the requirement apply to any foster youth 10 or older. The Invitation to Comment specifically asked for feedback as to whether the age should be 10 or 12. Age 10 is consistent with various rights related to juvenile dependency, including the rights to notice of hearings and the ability to participate in proceedings.	See comment above.
			11. Rule 5.648(a) – As mentioned above, Rule 5.647 applies only to placement changes that occur on or after September 1, 2018. Rule 5.648 is designed to capture all youth that are residing	Rule 5.648 applies to those youth described in section 14717.1(c)(2). These are youth who either reside in a county other than the county of original jurisdiction after June 30, 2017 and are not

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			in out of county placements that began on or before August 31, 2018. The language unnecessarily attempts to reconcile the Rule of Court with statutory language concerning where a child resided on December 31. As a result, this provision can be read as only covering youth that were placed out of county on or before that date. This interpretation would leave youth placed out of county between January 1 and August 31 without the same remedies as their earlier-placed peers. In order to make the rule clearer, we recommend deleting the language "…for any child or nonminor that resides outside their county of original jurisdiction as of December 31, 2017" and replacing it with "for any child or nonminor that resides outside their county of original jurisdiction as of the effective date of this rule." Further, we would delete the last sentence. The reference to the rule sunsetting is duplicative of subdivision (f). We also believe the language regarding timing is confusing, for the reasons already stated. 13. Rule 5.648(d)(1) – The notice provision unnecessarily references statutory language. As a result, it is too limiting. It should not	receiving specialty mental health services consistent with his or her mental health needs and requests transfer of responsibility or for a foster child who resided in a county other than the county of original jurisdiction after December 31, 2017. For these youth, the presumptive transfer determination is required to happen prior to their first scheduled section 366 hearing in the year 2018. Foster youth placed out of county after December 31, 2017 are therefore covered by 14717.1(c)(1), which requires the presumptive transfer process to start when the change placement decision is made as addressed in rule 5.647. While the committee agrees that there may be a gap in the rules' coverage for youth who are placed in an out-of-county placement after December 31, 2017 but before the effective date of these proposed rules, the rules can only provide a framework for hearings as specified in section 14717.1(c). For those youth that had a placement change in 2018 prior to the effective date of these rules, the presumptive transfer process is still required to occur as specified in section 14717.1(c)(1). A hearing may be requested and held under section 14717.1 even if there is no rule of court. Subdivision (d)(1) has been removed from the rules for the reasons stated above. The committee has elected to remove items in the rule related to

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			necessarily tie to the first status review hearing of 2018. Rather, it should read identically to the provision proposed in Rule 5.647(d)(1). 14. Rule 5.648(d)(3) – For the reasons stated in our comment to proposed Rule 5.648(d)(1), the language here should be identical to its companion in Rule 5.647.	the policy guidance required by section 14717.1(b)(1-2) and (g) because policy guidance are evolving and regulations are pending. The purpose of rule 5.648 is address procedures for youth described in section 14717.1(c)(2). These are youth who have an existing out-of-county placement. The procedures of rule 5.647 are triggered when a determination is made that the youth will be placed in an out of county placement. For these youth, the Judicial Council is required to adopt the procedural requirements as they are found in the Welfare and Institutions Code. However, because this subdivision relates to an administrative function of the placing agency, it is being removed. See comment above.
6.	Kern County Department of Human Services Terrie Martinez, MSW Program Specialist, Assistant Director's Office		• As to "Report from the social worker or probation officer" addressed on page 6 of the proposal, we do **NOT** think that the "agency's responsibilities during the presumptive transfer process as found in the ACL" are appropriate to be included in the social worker's report to the court. • We suggest that a Rule of Court should not be created prior to release of clarifying ACLs or implementation of	The committee agrees. Because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance. Because the committee is removing administrative responsibilities from the rules, the committee believes that the proposal should proceed.

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			regulations which will be adopted by 7/1/19. • What is the appropriate age for a minor to be notified of the presumptive transfer requirements and exceptions: 10 or 12 years old, or a different age? 10 years.	Subdivision (d)(1) is being removed from the proposed rule for the reasons stated above.
			• Should the rule include the requirements of the placing agency's responsibilities during the presumptive transfer individualized exception determination as laid out in section 14717.1 and ACL 17-77? No.	The committee agrees and has removed from the rules the review of administrative responsibilities of the placing agency during the presumptive transfer process found in ACL 17-77. However, the responsibilities of the placing agency during the presumptive transfer process found in section 14717.1 will remain in the rule.
			• And should the rule require the court to review these efforts to ensure compliance? No!	See comment above.

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			• Is there any concern with subdivision (b)(2) reflecting a timeline of seven *calendar* days as opposed to seven *court* days? Calendar days was used to mirror the requirements in ACL 17-77. Court days is used throughout the rest of both rules. Should be 7 court days-ACL should be amended.	For the reasons stated above related to administrative functions in the rule, subdivision (b)(2) will be removed from the rules.
7.	Los Angeles County Department of Children and Family Services By Ruena Borja, LCSW Children Services Administrator I DCFS Policy Section Norwalk, CA		<u>With regards to the hearing process, we suggest the following</u>: - Following the receipt of a presumptive transfer notice, the rule should reflect and clarify that the requesting party has the option to request a waiver directly from the placing agency. The placing agency should make a decision on this request and notify the requesting party and parties entitled to receive notice, regarding the decision on the request. Should the requesting party disagrees with the decision, then the party can opt to request a judicial review. - This process would be similar with many grievance processes already in place.	Because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance. Comments related to administrative functions will however be forwarded to CDSS and DHCS as they implement policy guidance and regulations to implement AB 1299. Therefore, the rule will not address the notice of presumptive transfer requirements and exceptions or the notice of the placing agency's determination on the request for waiver of presumptive transfer. The rule will not address the presumptive transfer process prior to the request for a hearing, because

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			This suggested procedure will streamline the process and minimize unnecessary court proceedings when the matter can otherwise be resolved amongst the placing agency, CFT and requesting party first.	section 14717.1 requires that this developed and implemented by CDSS and DHCS. The rule will however address who may request a hearing, when a hearing must be requested, how to request a hearing and the conduct of that hearing.
			- The contest/waiver request must be made to the placing agency within 7-calendar days of the contesting party's receipt of the notice of presumptive transfer. This will be similar to the timeline given to parties when objecting to an out of county placement per WIC 361.2(h).	Subdivision (b)(2) has been removed for the reasons stated above.
			- The placing agency should make the transfer effective no less than 14 days from the date of the presumptive transfer notice to allow time to determine if a waiver request/contest will be received (14 days account for the 7-days given to the contesting party from the date of receipt of notice, and mail processing time when the party sends a request for a waiver). This 14-day timeline is similar to WIC 361.2(h)'s stipulation to send the notice 14-days prior to placing out of county, unless unless the child's health or well-being is endangered by delaying the action or would be endangered if prior notice were given.	See comment above. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g). The rule does not place a requirement on when the transfer must occur except to require that it not occur until a decision has been made on the request for a hearing or a final judicial determination, which is a requirement of section 14717.1(d)(4). As mentioned above, the committee has elected to not include administrative functions in the rules.

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	Administrative Responsibilities Removed from the Rule			
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			- If the request is made to the placing agency, the placing agency must make a determination regarding the waiver request within 10 business days from the receipt of the waiver request; and send the notification to the requesting party regarding the decision within that same 10 business days period, including information on the option to request a judicial review within 7-calendar days of the contesting party's receipt of the notice regarding the decision on the waiver request. Following this notification, the placing agency should not make the decision final no sooner than 14 days from the date of the notice to allow time to determine if a judicial review is requested/filed • **What is the appropriate age for a minor to be notified of the presumptive transfer requirements and exceptions: 10 or 12 years old, or a different age?** While acknowledging a basis for 12 years of age to be consistent with minor consent laws (Family Code § 6924 and Health & Safety Code § 124260), LA DCFS recommends 10 years of age to be consistent with existing notification statutes.	See comment above. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g). Subdivision (d)(1) has been removed from the rules for the reasons stated above. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g). Comments related to this process will be forwarded to CDSS and DHCS.

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Juvenile Law: Presumptive Transfer of Specialty Mental Health Services (Adopt Cal. Rules of Court, rules 5.647 and 5.648; adopt forms JV-214, JV-214(A), JV-214-INFO, and JV-215; renumber current form JV-215 as JV-212)

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	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			WIC 361.2(h) already requires that "whenever the social worker must change the placement of the child and is unable to find a suitable placement within the county and must place the child outside the county, the placement shall not be made until he or she has served written notice on the parent or guardian, the child's attorney, and, if the child is 10 years of age or older, on the child, at least 14 days prior to the placement…" • **Should the rule include the requirements of the placing agency's responsibilities during the presumptive transfer individualized exception determination as laid out in section 14717.1 and ACL 17-77? And should the rule require the court to review these efforts to ensure compliance?** In reviewing the legislative analysis for AB 1299, there's reference to existing law which indicates: "… that the purpose of foster care law is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, neglected, or exploited, and to ensure the safety, protection, and physical, and emotional well-being of children who are at risk of harm (WIC Section 300.2)."	See comment above. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g). The reasons for this are mentioned by the commentator, policy guidance is evolving and regulations are pending. Absent their inclusion in the rule and in statute, procedures for the placing agency to follow during the presumptive transfer process will need to be promulgated by policy guidance and regulations.

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	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			In addition, the text of AB 1299 states: " (E) A party to the case who disagrees with the presumptive transfer individualized exception determination made by the county placing agency pursuant to subdivision (d) is afforded an opportunity to request judicial review prior to a transfer or exception being finalized." As such, it appears the concern stated above is to not require the Court to review compliance unless there's a disagreement with the presumptive transfer and the department would provide the court with information regarding a minor placed out of county who is receiving mental health services when DCFS submits a status review report. In addition and given that the comprehensive/updated guidelines, forms etc. from the CDSS, the JV forms and rules of court remain pending, during the court's review of the efforts, the placing agency should not be made accountable to previously set timelines (e.g. that notice be sent 10 days prior to the first status review hearing that occurs after 12/31/17). The court's review of the efforts particularly with regards to the timeliness of the notice, should commence prospectively after the Rules of Court, updated ACLs have become effective, and allow time for placing agencies to develop/update guidelines/forms for staff and	

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			train them thereafter on the new rules of court and updated timelines/procedures. • **Is there any concern with subdivision (b)(2) reflecting a timeline of seven *calendar* days as opposed to seven *court* days? Calendar days was used to mirror the requirements in ACL 17-77. Court days is used throughout the rest of both rules.** If we follow WIC 361.2(h), it states calendar days. Again for consistency, the ACL and rules should be the same.	Subdivision (b)(2) has been removed from the rules for the reasons stated above. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g) because policy guidance are evolving and regulations are pending.
8.	Kim Narvaez, MFT Children's Mental Health Program Manager Yolo County Health and Human Services Agency, Child and Family Branch	NI	• What is the appropriate age for a minor to be notified of the presumptive transfer requirements and exceptions: 10 or 12 years old, or a different age? 12, 12 is the consenting age for MH counseling.	Because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance. Subdivision (d)(1) has therefore been removed from the proposed rules. Comments related to administrative functions will however be forwarded to CDSS and DHCS as they implement

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	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
				policy guidance and regulations to implement AB 1299.
			• Should the rule include the requirements of the placing agency's responsibilities during the presumptive transfer individualized exception determination as laid out in section 14717.1 and ACL 17-77?	
			Yes	See comment above. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g). However, the placing agency's responsibilities found in section 14717.1(d) will be required in the rule.
			And should the rule require the court to review these efforts to ensure compliance?	
			Yes	See comment above.
			• Is there any concern with subdivision (b)(2) reflecting a timeline of seven calendar days as opposed to seven court days? Calendar days was used to mirror the requirements in ACL 17-77. Court days is used throughout the rest of both rules.	
			No	See comment above. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g).

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	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
9.	Office of County Counsel County of Santa Clara By James R. Williams & Michaela L. Lewis San Jose, CA		2. What is the appropriate age for a minor to be notified of the presumptive transfer requirements and exceptions: 10 or 12 years old, or a different age? A minor should be provided notice at the age of 12 years, because at this age, the minor is able consent to certain types of medical treatment, including most mental health services. 6. Is there any concern with subdivision (b)(2) reflecting a timeline of seven calendar days as opposed to seven court days? Calendar days was used to mirror the requirements in ACL 17-77. Court days is used throughout the rest of both rules. As stated above, the ACL and the rules should be consistent to avoid confusion in practice and implementation of this new procedure. Inconsistencies - such as a single use of calendar days - could result in a party unintentionally missing a deadline despite best efforts to comply with the requirements.	Subdivision (d)(1) has been removed from the rules for the reasons stated above. Subdivision (b)(2) has been removed for the reasons stated above related to the evolving policy guidance and pending regulations.
10.	Orange County Bar Association Nikki P. Miliband, President Newport Beach, CA	AM	**Comments:** Recommend changing the age of a minor required to be notified from age 10 to age 12 in Rule 5.647 (c)(2)(E) to conform with age 12 in (d)(1)(A) and because, in general, minors are given the opportunity to be consulted in other dependency matter issues, such as birth	Subdivision (d)(1) has been removed from the rule for reasons state below.

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			control decisions, after reaching age 12. The same change is recommended in Rule 5.648 in the same subsections. • What is the appropriate age for a minor to be notified of the presumptive transfer requirements and exceptions: 10 or 12 years old, or a different age? • Should the rule include the requirements of the placing agency's responsibilities during the presumptive transfer individualized exception determination as laid out in section 14717.1 and ACL 17-77? And should the rule require the court to review these efforts to ensure compliance? Comment: The Rules are acceptable as written.	Because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance. Subdivision (d)(1) has therefore been removed from the proposed rules. Comments related to administrative functions will however be forwarded to CDSS and DHCS as they implement policy guidance and regulations to implement AB 1299. See comment above. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g).

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Juvenile Law: Presumptive Transfer of Specialty Mental Health Services (Adopt Cal. Rules of Court, rules 5.647 and 5.648; adopt forms JV-214, JV-214(A), JV-214-INFO, and JV-215; renumber current form JV-215 as JV-212)

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	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			• Is there any concern with subdivision (b)(2) reflecting a timeline of seven *calendar* days as opposed to seven *court* days? Calendar days was used to mirror the requirements in ACL 17-77. Court days is used throughout the rest of both rules. Comment: No, but we would not object to seven court days.	Subdivision (b)(2) has been removed from the rules for the reasons stated above. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g).
11.	Sacramento County Department of Health and Human Services Sacramento County Office of the County Counsel By Robyn Truitt Drivon County Counsel & Traci Lee Assistant County Counsel Sacramento, CA	NI	By and through counsel, Sacramento County Department of Health and Human Services (DHHS) provides the comments below pertaining to Presumptive Transfer of Specialty Mental Health Services (SMHS) proposed Rules of Court and Judicial Counsel (JV) forms in response to the Invitation to Comment (IC) W18-07. Sacramento County Child Protective Services, Behavioral Health and Probation departments have been diligently working to develop and implement policies and procedures to ensure compliance with the legislation. Through this work it has become evident that the legislation effectuating the Presumptive Transfer of SMHS is complicated involving systems with differing terminology and practices that will need to coordinate closely at both a State and County level to ensure the goals of the legislation are met.	

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Juvenile Law: Presumptive Transfer of Specialty Mental Health Services (Adopt Cal. Rules of Court, rules 5.647 and 5.648; adopt forms JV-214, JV-214(A), JV-214-INFO, and JV-215; renumber current form JV-215 as JV-212)

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	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			Comment 1: One key element is the definition of the placing agency's determination and whether it is the "initial determination" or "final determination". Clear definitions of both terms need to be developed and incorporated in the rules.	Because the committee has elected to remove requirements that relate to the administrative process of a waiver to presumptive transfer as discussed above, the committee does not believe that these definitions need to be included in the rule. Initial determinations and final determinations related to presumptive transfer will not be addressed by the rule because they relate to policy guidance and regulations that are responsibility of CDSS and DHCS to develop and implement.
			Comment 4: Proposed Rule of Court 5.647(d)(3)(D) – should reference parents/guardians instead of "biological parents" given the specific legal significance of "biological" parent in the juvenile court context (i.e. you could have presumed parent who is not in fact a biological parent.)	Subdivision (d)(3) has been removed from the rules for the reasons stated above. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g) because policy guidance are evolving and regulations are pending. The comment however will be forwarded to CDSS and DHCS as they implement policy guidance and regulations to implement AB 1299. Subdivision (d)(3) was taken from ACL 17-77.
			Comment 8: What is the appropriate age for a minor to be notified of presumptive transfer? Although Health and Safety section 124260 allows a minor who is 12 years of age or older to consent to outpatient mental health treatment	See the response above related to the removal of administrative requirements from the rule.

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			or counseling services, for the purposes of noticing regarding presumptive transfer the age of the youth should include minors 10 years of age or older to mirror WIC section 361.2(h). **Comment 10:** Should the rule include the requirements of the placing agency's responsibilities during the presumptive transfer individualized exception determination as laid out in section 14717.1 and ACL 17-77? And should the rule require the court to review these efforts to ensure compliance? No. These responsibilities are adequately laid out in the statute and ACL and it is not required that the court make findings as to these responsibilities in making its ruling on the question of presumptive transfer. It would not add any clarity to the rule. **Comment 13:** Is there concern with subdivision (b)(2) reflecting a timeline of seven calendar days as opposed to seven court days? No, calendar days should be used throughout for consistency. The ACL should be changed to coincide with calendar days.	See the response above related to the removal of administrative requirements from the rule. The committee agrees with the comment as it relates to the responsibilities under ACL 17-77. However, the committee has elected to require in subdivision (d) that the report address requirements found in section 14717.1 related to the presumptive transfer process. This is to ensure that the placing agency has meet these responsibilities and ensures a more meaningful review. Subdivision (b)(2) has been removed from the rules for the reasons stated above. See the response above related to the removal of administrative requirements from the rule.
12.	San Bernardino County Program Development Division	NI	**Comment Request:**	

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	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
	By Robert Silva Supervising Program Specialist Program Development Division County of San Bernardino San Bernardino, CA		Is there any concern with subdivision (b)(2) reflecting a timeline of seven calendar days as opposed to seven court days? **Notes:** Calendar days were used to mirror the requirements in ACL 17-77. Court days is used throughout the rest of both rules. **County Comment:** N/A **Comment Request:** What is the appropriate age for a minor to be notified of the presumptive transfer requirements and exceptions: 10 or 12 years old, or a different age? **Notes:** A minor can consent to MH treatment at 12 and must be noticed of their right to attend court at 10. Any child has the right to present at any hearing. **County Comment:** Since a child age 10 and older are noticed for out-of-county placement changes, the child should be noticed of presumptive transfer requirements at the same time.	No response required. Because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance. The rule therefore will not review the placing agency's responsibilities to notice the child of the

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
				presumptive transfer requirements. Comments related to administrative functions will however be forwarded to CDSS and DHCS as they implement policy guidance and regulations to implement AB 1299.
13.	Santa Clara County Department of Family and Children Services By Francesca LeRue, Director San Jose, CA	AM	3. A minor can consent to the mental health treatment at the age of 12 because this is a hearing about specialty mental health treatment; therefore, 12 is the appropriate age to be notified of the presumptive transfer requirements and exceptions. Current draft JV214 states 10 years of age. 4. Should the rule reflect any new timelines for requesting a hearing that are introduced by subsequent ACLs or ACINs? • Yes, we support and recommend consistency between the administration rules and rules of court. 8. As to the language of the proposed Cal. Rule of Court 5.647 & 5.648:	The committee has elected to remove the subdivision (d)(1) which addresses notice to the child of presumptive transfer requirements because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance. The committee appreciates this comment, but the it addresses a portion of the rule that will be removed for reason mentioned above. The comment however will be forwarded to representatives at the CDSS and DHCS. who are creating policy guidance and regulations implementing AB 1299. See comment above. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g).

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	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			• **Inaccurate cite in subdivision (b)(2)?** The latter part of the sentence provides that a request for waiver must be made to the placing agency "…within two court days of the agency providing notice in subdivision (d)(1)(C)." However, (d)(1)(C) requires notice *only* to "the person or agency responsible for making mental health care decisions on behalf of the child or nonminor." It appears that the cite should more correctly read as "subdivision (d)(1)," which more broadly includes the child/nonminor and their attorney, *as well as* the person responsible for making mental health care decisions on behalf of the child or nonminor.	Subdivision (b)(2) has been removed from the rules for the reasons stated above related to evolving policy guidance and pending regulations. The commentator is however correct that the reference in (b)(2) to (d)(1)(C) was incorrect. There was a last-minute modification to the rule's numbering which resulted in the oversight. The correct reference should be to (d)(1).
14.	Solano County Counsel's Office By Clarisa P. Sudarma Deputy County Counsel Fairfield, CA	NI	Specific Comments: - Extending the parties' ability to request a hearing within 7 days from the time they are notices of CWS's determination seems appropriate. - 12 years old seems an appropriate age for the minor to be notified of the presumptive transfer requirements and exceptions as it is when they start receiving copies of reports.	Subdivision (b)(4) has been removed from the rules for the reasons stated above related to the removal of administrative requirements from the rule. Subdivision (d)(1) has been removed from the rules for the reasons stated above related to the removal of administrative requirements from the rule.

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			- No concern regarding the 7 calendar day requirement as long as it remains explicitly different than the rest of rules which refer to court days	Subdivision (b)(2) has been removed from the rules for the reasons stated above related to the removal of administrative requirements from the rule.
15.	Kim Suderman, LCSW California County Behavioral Health Directors Association Sacramento, CA	NI	**Page 5:** A minor can consent to mental health treatment at the age of 12. At the age of 10, a child is to be provided notice of their right to attend court. A child of any age who is the subject of a juvenile court hearing is entitled to be present at a hearing. The committee is seeking input on whether age 10 or age 12, or some other age, is most appropriate. *Because AB 1299 is about mental health services, and the age of consent for mental health treatment is age 12, it makes sense to start at age 12.* **Page 5 & 6:** Bottom of the page 5, top of page 6 … Finally, to ensure that the administrative process of presumptive transfer does not take place prior to the court ruling… This will ensure that the placing agency will be aware of the request for a hearing and should not proceed with presumptive transfer until… *The Placing Agency should notice the MHP of jurisdiction that a JV-214 has been*	Subdivision (d)(1) has been removed from the rules for the reasons stated above. Subdivision (d)(1) addresses notice of the initial presumptive transfer determination, which the rule will no longer require to be reviewed by the court. The committee agrees that the placing agency should provide this notification, but believes it is

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			submitted. Presumptive Transfer responsibility for the MHP of Residence begins when the Placing Agency notices them of the out of county placement into their county, do notification timing is critical. **Page 8—1st paragraph:** For these children, the SMHS jurisdiction is to transfer either if the foster child requests the transfer… *Presumptive transfer is to occur for any youth placed after July 1, 2017. Where in AB 1299 does it say that "SMHS is to transfer if the foster child requests the transfer"?*	outside the scope of the proposed rules. This would need to be addressed in pending regulations. The committee has elected to not have the proposed rules address administrative functions that are the subject of evolving policy guidance and pending regulations. Section 14717.1(c)(2) requires that the presumptive transfer process be initiated if a foster youth resides in a county other than the county of original jurisdiction after June 30, 2017, is not receiving specialty mental health services consistent with his or her mental health needs, and requests transfer of responsibility.
16.	Superior Court of Riverside County By Susan D. Ryan Chief Deputy of Legal Services	A	2. What is the appropriate age for a minor to be notified of the presumptive transfer requirements and exceptions: 10 or 12 years old, or a different age? It seems that since 12 is the age when a minor can consent to mental health treatment, then 12 should also be the age when the minor receives information regarding the presumptive transfer requirements and exceptions. This would provide the minor with information on how to consent to or challenge a decision that has been made regarding mental health. A minor at 10	Subdivision (d)(1) has been removed from the rules for the reasons stated above.

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			years of age should receive notice of a court hearing if one is set. 4. Should the rule include the requirements of the placing agency's responsibilities during the presumptive transfer individualized exception determination as laid out in section 14717.1 and ACL 17-77? And should the rule require the court to review these efforts to ensure compliance? It would provide more clarity if these requirements were included in the rule, however a reference to WIC 14717.1(b)(2)(A)) and that the Mental Health Provider (MHP) in the county of original jurisdiction can contract and provide services within 30 days might also be sufficient. For a complete determination at the hearing it would seem the court should at least make findings on these issues. Perhaps listing them on the JV-215 would be the easiest way to accomplish this. 8. Is there any concern with subdivision (b)(2) reflecting a timeline of seven *calendar* days as opposed to seven *court* days? Calendar days was used to mirror the requirements in ACL 17-77. Court days is used throughout the rest of both rules. No concerns.	As mentioned above, the committee has elected to remove items from the rule that relate to administrative process of presumptive transfer. The rules however still require that the placing agency address whether the Mental Health Provider (MHP) in the county of original jurisdiction can contract and provide services within 30 days. The requirements are also reflected in form JV-215. No response required.

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	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
17.	Superior Court of San Diego By Mike Roddy, Executive Officer San Diego, CA		2. What is the appropriate age for a minor to be notified of the presumptive transfer requirements and exceptions: 10 or 12 years old, or a different age? 10. Per ACL 17-77, notice should be provided as set forth in WIC § 361.2(h), which requires notice to the child if **10** or older. 8. Is there any concern with subdivision (b)(2) reflecting a timeline of seven calendar days as opposed to seven court days? Calendar days was used to mirror the requirements in ACL 17-77. Court days is used throughout the rest of both rules. The concern with subdivision (b)(2) is not that it uses calendar days as opposed to court days. Rather, it is problematic in other respects:	The committee has elected to remove subdivision (d)(1) which addresses notice to the child of presumptive transfer requirements because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change, the committee has decided to remove elements from the rule that directly relate to this policy guidance. The committee appreciates this comment, but the it addresses a portion of the rule that will be removed for reason mentioned above. The comment however be forwarded to representatives at the CDSS and DHCS. who are creating policy guidance and regulations implementing AB 1299. Subdivision (b)(2) has been removed from the rules for the reasons stated above. The committee has elected to remove items in the rule related to the policy guidance required by section

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			1. The timeline of "seven calendar days of the determination that the *child or nonminor will be in a placement* outside the county of original jurisdiction" is similar but slightly different from the timeline specified in ACL 17-77: "within 7-calendar days of the placing agency's determination of *where the foster child will be placed* out of county." (ACL 17-77, p. 8.) It is conceivable that a placing agency will decide an out-of-county placement is appropriate some time (days or weeks?) before it actually decides the specific location of that placement. If the committee intended to mirror the requirements in ACL 17-77, it should read: "seven calendar days of the determination ~~that~~ of where the child or nonminor will be ~~in a placement~~ placed outside the county of original jurisdiction."	14717.1(b)(1-2) and (g) because policy guidance are evolving and regulations are pending.
			2. Shouldn't the timeline start when the agency *has given notice* of its decision to place out-of-county rather than when the agency *has made its decision*? Arguably, the timeline in ACL 17-77 should read: "The waiver request must be made to the placing agency within 7-calendar days of the date the placing agency~~'s determination~~ served written notice of where the foster child will be placed out of county." (See WIC § 361.2(h) ["The child or parent or guardian may object to the [out-of-county]	See comment above. The committee has removed subdivision (b)(2) from the proposed rules.

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			placement not later than seven days **after receipt of the notice** …"].)	
			3. Where does the alternative timeline ("within two court days of the agency providing notice in subdivision (d)(1)(C)") come from? This refers to notice "of the presumptive transfer requirements," the "exceptions to presumptive transfer, the option to request a waiver of presumptive transfer …, and how to make such a request…given to the "person or agency responsible for making mental health care decisions…."	See comment above. The committee has removed subdivision (b)(2) from the proposed rules. For reference, the two-day timeline was added by the committee to address those situations where the placing agency does not adhere to the notice requirement found in former subdivision (d)(1).
			a. Why is this timeline limited to notice given to the "person or agency responsible for making mental health care decisions…"? Shouldn't it be when notice is given to *all who are entitled to notice*, i.e., "within two court days of the agency providing notice in subdivision (d)(1)~~(C)~~"? (Note: Under WIC § 361.2(h), notice of an out-of-county placement must be served "at least 14 days prior to the placement.")	See comments above. The subdivision has been removed from the proposed rules.
			b. Is **two court days** after receiving notice enough time for requesting a waiver? Under WIC § 361.2(h), an objection to out-of-county placement may be made up to **seven days** after receipt of the notice.	See comment above.

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			4. Regardless of how these issues are resolved, if subdivision (b)(2) offers two alternative timelines, should it specify an outer limit, e.g., "within seven calendar days ... or within two court days ..., whichever occurs later [or whichever occurs first]." Subd. (b)(2): *For consistency and clarity --* A request for waiver must be made to the placing agency within seven calendar days of the ~~determination~~ decision that the child or nonminor will be ~~in a placement~~ placed outside the county of original jurisdiction or within two court days of the agency providing the notice described in subdivision (d)(1)~~(C)~~,[2] whichever occurs later. [1] *It is not clear why subparagraph "(C)" is specified, as that narrows the condition down to notice provided to the "person or agency responsible for making mental health care decisions on behalf of the child or nonminor." Shouldn't the trigger be notice to all parties who are entitled to notice?* *Preferred revisions (see responses to question 8 above):* A request for waiver must be made to the placing agency within seven calendar days of the ~~determination~~ date the placing agency	See comment above. For the reasons stated above, subdivision (b)(2) is being removed from the proposed rules.

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			served written notice of where ~~that~~ the child or nonminor will be ~~in a placement~~ placed outside the county of original jurisdiction or within two court days of the agency providing the notice described in subdivision (d)(1)~~(C)~~, whichever occurs later. Subd. (d)(1)(A): *For consistency with WIC § 361.2(h) and for clarity --* The child, if ~~aged 12~~ 10 years ~~old~~ of age or older, or nonminor;	For reasons stated above, subdivision (d)(1) has been removed from the rule.
			Subd. (d)(1)(B): *To correct grammar --* The attorney ~~of~~ for the child or nonminor; and	See comment above
			Subd. (d)(3): *For consistency --* That the placing agency informed the following of its initial presumptive transfer ~~determination~~ decision, which includes a ~~determination~~ decision by the placing agency that an exception to presumptive transfer applies, within three days of that ~~determination~~ decision:	For the reasons stated above, subdivision (d)(3) has been removed from the rule. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g) because policy guidance are evolving and regulations are pending.
			Subd. (d)(3)(B): *For consistency --* The Child and Family Team coordinator if one exists, or the placing agency's case-carrying social worker or ~~deputy~~ probation officer,	See comment above.

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			Subd. (d)(3)(C): *To correct grammar* -- The attorney ~~of~~ for the child or nonminor,	See comment above.
			Subd. (d)(3)(D): *To correct grammar* -- The biological parents when appropriate (if they are not already ~~a~~ members of the Child and Family Team).	See comment above.
			Subd. (d)(5): *For consistency, clarity, and brevity* -- That notice of the placing agency's ~~determination~~ decision of whether to waive presumptive transfer was provided to the ~~individual~~ person or agency who requested waiver of presumptive transfer, along with all parties to the case, within three court days of the placing agency's decision on ~~the application of waiver~~ whether to waive to presumptive transfer.	For the reasons stated above, subdivision (b)(5) has been removed from the rule. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g) because policy guidance are evolving and regulations are pending.
			CRC 5.648 *All comments for CRC 5.647,* ante*, also apply to CRC 5.648 to the extent those provisions are repeated in the latter. As a result, the following comments refer only to the provisions highlighted in gray on the proposal.*	Rule 5.648 has been removed from the proposal because after the removal from the rules of items related to policy guidance, rule 5.648 became unnecessary as it was identical to rule 5.647 except in the language of its applicability.

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			Subd. (a): *For clarity and to correct grammar --* for any child or nonminor ~~that~~ who resides outside the~~ir~~ county of original jurisdiction as of December 31, 2017. … This rule will sunset on January 1, 2020, and ~~only~~ applies only to those children or nonminors ~~that~~ who reside in a placement outside the~~ir~~ county of original jurisdiction as of December 31, 2017. Subd. (d)(1): *For clarity and brevity --* That notice was provided prior to the determination of presumptive transfer at least 10 days ~~prior to~~ before the child's or nonminor's next section 366 status review hearing that occurs after December 31, 2017, or as soon as possible thereafter, of the presumptive transfer requirements under section 14717.1. *Note re text highlighted in green: What "determination"? Per WIC § 14717.1(c)(2), "A foster child who resided in a county other than the county of original jurisdiction after June 30, 2017, and who continues to reside outside the county of original jurisdiction after December 31, 2017,* ***shall have jurisdiction transferred*** *no later than the child's first regularly scheduled status review hearing conducted pursuant to Section 366 in the 2018 calendar year unless an exception described under subdivision (d)*	

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			applies." This language suggests the transfer of jurisdiction occurs by operation of law, not as a result of a determination. *-- Is "determination" meant to refer to a determination by the placing agency that an exception under subd. (d) does not apply?* *-- Would it not be clearer to simply delete "prior to the determination of presumptive transfer"? If this change is made, subd. (d)(1) would still be consistent with (d)(3). It would then read,* "That notice was provided at least 10 days ~~prior to~~ before the child's or nonminor's next section 366 status review hearing that occurs after December 31, 2017, or as soon as possible thereafter, of the presumptive transfer requirements under section 14717.1." Subd. (d)(3): *For consistency and brevity --* That at least 10 days ~~prior to~~ before the child's or nonminor's next status review hearing that occurs after December 31, 2017, the placing agency informed the following of its initial presumptive transfer ~~determination~~ decision, which includes a ~~determination~~ decision by the placing agency that an exception to presumptive	

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			transfer applies, within three days of that ~~determination~~ decision: *Note: It is somewhat confusing to have two different deadlines within the same sentence – "at least 10 days prior to the … next status review hearing" and "within three days of that decision." Perhaps it would be clearer as follows:* That the placing agency informed the following of its initial presumptive transfer decision, which includes a decision by the placing agency that an exception to presumptive transfer applies, within three days of that decision and at least 10 days before the child's or nonminor's next status review hearing that occurs after December 31, 2017: Subd. (d)(7): *For brevity and to correct grammar --* That for a child or nonminor who resides in a county other than the county of original jurisdiction after June 30, 2017, ~~that~~ and who is not receiving specialty mental health services consistent with his or her mental health needs as specified in the child's or nonminor's client plan, the placing agency ensured: (A) That the child or nonminor has ~~been provided~~ received a mental health screening	

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			~~prior to~~ before completing the steps of presumptive transfer, unless a waiver is requested; and (B) For a child or nonminor ~~that~~ who has been screened and assessed as needing specialty mental health services but is not receiving them, that presumptive transfer occurs consistent with this rule. Advisory Committee Comment: *For clarity and brevity* -- This rule describes the process for presumptive transfer of responsibility for specialty mental health services for children or nonminors who, as of December 31, 2017, are residing in a California county ~~as of December 31, 2017~~, that is not the county of original jurisdiction. The rule will sunset on January 1, 2020, because it is not considered likely that the rule will still be needed after that point. A presumptive transfer determination for children or nonminors who reside out-of-county as of December 31, 2017, ~~is required to~~ must occur ~~prior to~~ before the first scheduled section 366 hearing in the year 2018. For more information, see the advisory committee comment ~~of~~ on rule 5.647.	
18.	Lynn Thull, Ph.D.,	NI	2. There are references to decisions of youth, some listing the age as 12, other	References to the youth's age in subdivision (d)(1) which addresses notice to the child of

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
	Mental Health Policy and Practice Improvement Consultant, California Alliance of Child and Family Services Sacramento, CA		places listing the age of 10. This needs to be consistent throughout. From Attachment 1 Rule 5.647, (d)(3)(B) page 14: (B) The Child and Family Team coordinator if one exists, or the placing 39 agency's case-carrying social worker or deputy probation officer, **Comment:** This should be "and" not "or" From Attachment 1 Rule 5.648, (d)(3)(B) page 20:	presumptive transfer requirements has been removed because policy guidance on the implementation of AB 1299, required by section 14717.1(b)(1-2) and (g), is incomplete and subject to change. The committee has decided to remove elements from the rule that directly relate to this policy guidance. The comment however be forwarded to representatives at the CDSS and DHCS. who are creating policy guidance and regulations implementing AB 1299. References to the child's age are only referenced once in the rule, at subdivision (c)(2)(E). Subdivision (d)(3) has been removed from the rules for the reasons stated above. The committee has elected to remove items in the rule related to the policy guidance required by section 14717.1(b)(1-2) and (g) because policy guidance are evolving and regulations are pending.

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			(B) the Child and Family Team coordinator if one exists, or the placing agency's case-carrying social worker or deputy probation officer, **Comment:** This should be "and" and not "or" From Attachment 1 Rule 5.648, (d)(7)(B) page 20: (B) For a child or nonminor that has been screened and assessed as needing specialty mental health services but is not receiving them, that presumptive transfer occurs consistent with this rule. **Comment:** Neither (A) nor (B) are part of the statute. There is no requirement for a child/youth to be screened or assessed prior to transfer. Of greatest concern is (B) as it will delay access to care.	For the reasons stated above, subdivision (d)(3) has been removed from the proposal. These subdivisions were taken from ACL 17-77 and will be removed for the reasons stated above.
19.	Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC) Sacramento, CA		**2. What is the appropriate age for a minor to be notified of the presumptive transfer requirements and exceptions: 10 or 12 years old, or a different age?** The age should be 12, not 10. Rationale: These children are already being given mental health services and a 10-year-old will receive them regardless of their consent, since consent for services begins at age 12. Notice of a right to	The committee has removed subdivision (d)(1) from the proposed rules for the reasons stated above.

	Administrative Responsibilities Removed from the Rule			
	Commentator	**Position**	**Comment**	**Committee Response**
			attend court is far less complicated than the transfer or continuance of mental health services in a particular jurisdiction. To be consistent with the consent rule for minors, 12 should be the age where notice is required. **4. Should the rule include the requirements of the placing agency's responsibilities during the presumptive transfer individualized exception determination as laid out in section 14717.1 and ACL 17-77? And should the rule require the court to review these efforts to ensure compliance?** The rule should include requirements for the agency and court review to make sure requirements are met. **8. Is there any concern with subdivision (c)(2) reflecting a timeline of seven calendar days as opposed to seven court days? Calendar days was used to mirror the requirements in ACL 17-77. Court days is used throughout the rest of both rules.** Subdivision (b)(2) and all other timelines should be changed to court days, to avoid confusion.	The committee has elected to remove review of administrative requirements from the rule for the reasons stated above but responsibilities under section 14717.1(d) will remain in the rule. The committee has elected to remove review of administrative requirements including subdivision (b)(2) from the rule for the reasons stated above.

Item number: 10

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: May 1, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Juvenile Delinquency: Information for Parents (revise forms JV-600 and JV-625)

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

Staff contact (name, phone and e-mail): Corby Sturges, 415-865-4507, corby.sturges@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 24, 2017
Project description from annual agenda: 2. Implementation of Legislative Changes from the 2017–2018 Legislative Session
As directed by the Judicial Council, review legislation identified by Governmental Affairs that may have an impact on family and juvenile law issues within the advisory committee's purview. The committee will review the legislation below, and any other identified legislation, and propose rules and forms as may be appropriate for the council's consideration.

If requesting July 1 or out of cycle, explain:

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

JUDICIAL COUNCIL OF CALIFORNIA

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

REPORT TO THE JUDICIAL COUNCIL

For business meeting on May 24, 2018:

Title
Juvenile Delinquency: Information for Parents

Rules, Forms, Standards, or Statutes Affected
Revise forms JV-600 and JV-625

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

Judicial Council Staff
Mr. Corby Sturges, Attorney
Center for Families, Children & the Courts

Agenda Item Type
Action Required

Effective Date
September 1, 2018

Date of Report
April 27, 2018

Contact
Corby Sturges, 415-865-4507
corby.sturges@jud.ca.gov

Executive Summary

The Family and Juvenile Law Advisory Committee recommends revising two Judicial Council forms to update advisements to parents whose children are the subject of juvenile court wardship proceedings to provide accurate information about their financial responsibility for costs of services and support provided to their child by the court and county.

Recommendation

The advisory committee recommends that the Judicial Council, effective September 1, 2018, revise two optional Judicial Council forms to update statutorily required legal advisements, as follows:

- Revise *Juvenile Wardship Petition* (form JV-600) to update the advisement required by Welfare and Institutions Code section 656(j)[1] to reflect the elimination of parents' liability for fees and costs of services provided by the court or county to their children who are subject to juvenile wardship proceedings by SB 190 (Stats. 2017, ch. 678, § 11).

- Revise *Notice of Hearing—Juvenile Delinquency Proceeding* (form JV-625) to update the advisements required by section 659(e), (f) & (g) to reflect the elimination of parents' liability for fees and costs of services provided by the court or county to their children who are subject to juvenile wardship proceedings by SB 190 (Stats. 2017, ch. 678, § 12) and to make technical changes.

The revised forms are attached at pages 4–7.

Relevant Previous Council Action

The Judicial Council adopted form JV-600 for mandatory use and approved form JV-625 for optional use, effective January 1, 1993. Form JV-600 was converted to an optional form, effective January 1, 2012. Both forms have been revised multiple times since the initial effective date. Form JV-600 was last revised effective May 22, 2017; form JV-625 was last revised effective January 1, 2012.

Analysis/Rationale

Effective January 1, 2018, Senate Bill 190 (Mitchell; Stats. 2017, ch. 678) eliminated almost all parental liability for fees or costs of services provided to the parents' children in juvenile justice (delinquency) proceedings. Parents remain liable for victim restitution, as well as for any fines or penalties assessed by the court.

Policy implications

This proposal revises advisements on Judicial Council forms to reflect statutory amendments that limit parental responsibility for reimbursement of court and county costs of providing services and support to a child who is the subject of juvenile justice proceedings. The committee has not identified any further policy implications.

Comments

This proposal circulated for comment as part of the winter 2018 invitation-to-comment cycle, from December 15, 2017, to February 9, 2018, to the standard mailing list for family and juvenile law proposals.[2] Included on the list were appellate presiding justices, appellate court administrators, trial court presiding judges, trial court executive officers, judges, court administrators and clerks, attorneys, social workers, probation officers, and other juvenile law

[1] Unless otherwise specified, all further statutory references are to the Welfare and Institutions Code.

[2] As circulated for comment, the proposal included revisions to *Juvenile Court: Information for Parents* (form JV-060). The committee will address those revisions in a later, separate report. All comments received on form JV-060 will be addressed in that report.

professionals. Four organizations and the Joint Rules Subcommittee of the Trial Court Presiding Judges and Court Executives Advisory Committees provided comment. All agreed with the proposal; of those, three suggested some modifications. The committee incorporated most of the suggestions into its recommendation and made additional technical and clarifying changes consistent with those suggestions. A chart with the full text of the comments received and the committee's responses is attached at pages 8–11.

Alternatives considered

In addition to the recommended action, the committee proposed and considered revising form JV-060, *Juvenile Court: Information for Parents.* The revisions proved more extensive than anticipated; the committee has deferred this recommendation to a later date. The advisements to parents on forms JV-600 and JV-625 are required by statute; revisions were required to conform to statutory amendment.

Fiscal and Operational Impacts

The committee does not anticipate that the revisions will requires the courts or their justice partners to make significant operational changes. Printing and case management system programming costs may be incurred by courts and prosecuting attorneys' offices that use optional forms JV-600 and JV-625 to perform their statutory duties, but revisions to conform to the statutory amendments will be required regardless of the format used for petitions and notices. The committee does not anticipate that the revisions will generate cost savings.

Attachments and Links

1. Forms JV-600 and JV-625, at pages 4–7
2. Chart of comments, at pages 8–11
3. Link A: Senate Bill 190 (Stats. 2017, ch. 678), *http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB190*

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

1. Petitioner on information and belief alleges the following:

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

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

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

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

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

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

j. Other *(name, address, and relationship to child):*
☐ No known parent or guardian resides within this state. This adult relative lives in this county or is closest to this court.

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

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

(See important notices on page 2.)

CHILD'S NAME:	CASE NUMBER:

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

3. ☐ Petitioner requests a hearing to determine whether the child is a fit and proper subject under juvenile court law under Welfare and Institutions Code section ☐ 707(a)(1) ☐ 707(a)(2) ☐ 707(c).

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

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PETITIONER)

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

☐ Number of pages attached: _____

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

You and your child may be required to pay any *restitution* owed to the victim and any fines or penalties ordered by the court. In addition, if you or family members other than your child receive services or legal assistance paid for by the court or county, you may be required to pay back the cost of those services unless the court or county decides that you can't afford to pay.

RECORD SEALING

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

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY* **DRAFT** **Not Approved** **by the** **Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
NOTICE OF HEARING—JUVENILE DELINQUENCY PROCEEDING **Welfare and Institutions Code, §§ ☐ 601 ☐ 602 ☐ 725 ☐ 777(a)**	CASE NUMBER:

NOTICE TO *(name and address):*

- **A hearing has been set for the date and time below. The child and the parent or legal guardian or noticed adult relative are entitled to be represented by an attorney.**
- **The court will appoint an attorney for the child if the child cannot afford an attorney.**

See important notice on page 2.

1. A hearing will be held

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

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

2. The hearing is for the purpose of
   a. ☐ detention hearing.
   b. ☐ formal reading of petition, advisement of rights, and plea.
   c. ☐ jurisdiction hearing.
   d. ☐ disposition hearing.
   e. ☐ review.
   f. ☐ permanency hearing.
   g. ☐ other *(specify):*

3. **TO THE CHILD:**
   You have the right to be at the hearing and to present evidence. You have the right to be represented by an attorney. The court will appoint an attorney for you if you cannot afford to pay for one. An attorney can be appointed to speak with you before the court date.
   ☐ You are ordered to be present at the hearing.

4. **TO THE PARENT, LEGAL GUARDIAN, OR ADULT RELATIVE:**
   You have the right to be present at the hearing. You have the right to have an attorney present to represent you at the hearing.

Date:

(TYPE OR PRINT NAME) (SIGNATURE)

CHILD'S NAME:	CASE NUMBER:

— TO PARENT OR LEGAL GUARDIAN —

1. If the court orders your child to pay *restitution* to the victim of the alleged offense or to pay any *fines* or *penalty assessments,* you can be required to pay the full amount or, if you cannot afford the full amount, as much of that amount as the court decides you can afford to pay.
2. You will not be required to pay back the cost of services, support, or legal assistance provided to your child by the court or county in this case.
3. You may be required to pay back the cost of services, including counseling, or legal assistance provided to you or family members other than your child by the court or county in this case.

Request for Accommodations

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

W18-05

Juvenile Law: Information for Parents (revise forms JV-060†, JV-600, and JV-625)

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

	Commentator	Position	Comment	Committee Response
1.	Orange County Bar Association by Nikki P. Miliband, President	AM	1. The proposed change to JV-600 (Juvenile Wardship Petition) correctly informs parents about their limited financial liability under Welfare and Institutions Code section 656. 2. The suggested change to JV-625 (Notice of Hearing-Juvenile Delinquency Proceedings) provides notice to parents regarding juvenile hearings, as is required by Welfare and Institutions Code section 659.	No response required. No response required.
2.	Santa Clara County Department of Family and Children's Services by Francesca LaRue, Director	A	This draft proposal reflects laws that already went in to effect (1/1/18) and are rooted in Juvenile Justice Court process, not Dependency.	No response required.
3.	Superior Court of Riverside County	A	1. Does the proposal appropriately address the stated purpose? ***Yes.*** 2. Should the revisions to form JV-060 include any additional information for parents of a child in a juvenile wardship proceeding? ***No.*** 3. Would the proposal provide cost savings? ***No.*** 4. What would the implementation requirements be for courts? ***No additional implementation requirements for the court.*** 5. Would 3 months from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation? ***Yes.***	The committee appreciates the answers to these specific questions. No response required. No response required. No response required. No response required. No response required.

	Commentator	Position	Comment	Committee Response
			6. How well would this proposal work in courts of different sizes? ***No difference.***	No response required.
4.	Superior Court of San Diego County by Michael M. Roddy, Executive Officer	AM	• Does the proposal appropriately address the stated purpose? ***Yes.***	The committee appreciates the answers to these specific questions. No response required.
			• Should the revisions to form JV-060 include any additional information for parents of a child in a wardship proceeding? If so, please describe. ***No. The amount of information is sufficient to meet the purpose of the form.***	No response required.
			• Would the proposal provide cost savings? If so, please quantify. ***Unknown.***	No response required.
			• What would the courts need to do to implement the proposed changes? ***Replace old forms with revised forms. Revise docket codes, local rules, and local forms as needed to reflect recent legislation (SB 190, SB 395, AB 529, and SB 312).***	No response required.
			• Would three months from approval of this proposal until its effective date provide sufficient time for implementation? ***Yes.***	No response required.
			• How well would this proposal work in courts of different sizes? ***It probably will work well. If resources permit, versions in languages other than English and Spanish should be made available.***	No response required.

	Commentator	Position	Comment	Committee Response
			FORM JV-600 Page 1, right footer: Change citation to WIC § 601 et seq. (There is no § 600 in the WIC.)	The committee agrees and has incorporated the suggested change into its recommendation.
			The form contains the notice required by WIC § 656(j), but it does not contain the notices required by § 656(h) and (i). Is it presumed that those notices will appear on attachments to the petition?	Yes.
			§ 656(h): In a proceeding alleging that the minor comes within Section 601, notice to the parent, guardian, or other person having control or charge of the minor that failure to comply with the compulsory school attendance laws is an infraction, which may be charged and prosecuted before the juvenile court judge sitting as a superior court judge. In those cases, the petition shall also include notice that the parent, guardian, or other person having control or charge of the minor has the right to a hearing on the infraction before a judge different than the judge who has heard or is to hear the proceeding pursuant to Section 601. The notice shall explain the provisions of Section 170.6 of the Code of Civil Procedure.	The notices required by section 656(h) are included in form JV-611, *Child Habitually Truant.* This form should be attached to form JV-600 when it applies.
			§ 656(i): If a proceeding is pending against a minor child for a violation of Section 594.2, 640.5, 640.6, or 640.7 of the Penal Code, a notice to the parent or legal guardian of the minor that if the minor is found to have violated either or both of these provisions that (1) any	The notice required by section 656(i) is included in form JV-620, *Violation of Law by Child.* This mandatory form must be attached to form JV-600 when it applies.

	Commentator	Position	Comment	Committee Response
			community service that may be required of the minor may be performed in the presence, and under the direct supervision, of the parent or legal guardian pursuant to either or both of these provisions, and (2) if the minor is personally unable to pay any fine levied for the violation of either or both of these provisions, that the parent or legal guardian of the minor shall be liable for payment of the fine pursuant to those sections.	
5.	Trial Court Presiding Judges Advisory Committee and Court Executives Advisory Committee Joint Rules Subcommittee (JRS)	AM	The JRS notes that the proposed revisions will create a minor impact on existing automated systems (e.g., case management system, accounting system, technology infrastructure or security equipment, Jury Plus/ACS, etc.).	No response required.

Item number: 08

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: May 1, 2018

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Rules and Forms: Miscellaneous Technical Changes

Committee or other entity submitting the proposal:
Judicial Council staff

Staff contact (name, phone and e-mail): Susan McMullan, 415-865-7990, susan.mcmullan@jud.ca.gov

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

If requesting July 1 or out of cycle, explain:
These proposals were not circulated for public comment because they are noncontroversial, involve technical revisions, and are therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

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

JUDICIAL COUNCIL OF CALIFORNIA

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

REPORT TO THE JUDICIAL COUNCIL

For business meeting on: May 24, 2018

Title
Rules and Forms: Miscellaneous Technical Changes

Rules, Forms, Standards, or Statutes Affected
Revise forms CR-112/JV-792, JV-216, JV-750, MC-012, TH-100, TH-110, TH-120, TH-130, TH-140, TH-190, TH-200, and TH-210

Recommended by
Judicial Council staff
Susan R. McMullan, Attorney
Legal Services

Agenda Item Type
Action Required

Effective Date
September 1, 2018

Date of Report
April 27, 2018

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Executive Summary

Various members of the judicial branch, members of the public, and Judicial Council staff have identified errors in the California Rules of Court and Judicial Council forms resulting from typographical errors and changes resulting from legislation and previous rule amendments and form revisions. Judicial Council staff recommend making the necessary corrections to avoid causing confusion for court users, clerks, and judicial officers.

Recommendation

Judicial Council staff recommend that the council, effective September 1, 2018:

1. Revise form CR-112/JV 792, *Instructions: Order for Victim Restitution*, to insert the image of the new version of form CR-110/JV-790 on the first page.

2. Revise optional form JV-216, *Order Delegating Judicial Authority Over Psychotropic Medication*, as it inadvertently contains the signature block, "Type or print name of person completing this form," but should contain the standard signature block for judicial officers.

The form must be signed by a judicial officer. Under Welfare and Institutions Code sections 369.5 and 739.5, only the juvenile court can issue an order delegating the authority to make decisions about psychotropic medications for children removed from the custody of a parent.

3. Revise form JV-750, *Determination of Eligibility: Deferred Entry of Judgment—Juvenile*. Welfare and Institutions Code section 790(a)(7) was added to the criteria for Deferred Entry of Judgment (Sen. Bill 838 [Beall]; Stats. 2014, ch. 919), but inadvertently was not added to form JV-750. Staff recommend adding "or 790(a)(7)" at the end of item 1.c after "section 707(b)" and before the period.

4. Revise form MC-012, *Memorandum of Costs After Judgment, Acknowledgement of Credit, and Declaration of Accrued Interest*, to correct the Code of Civil Procedure reference in item 2.b.

5. Revise all code references in the Transitional Housing forms to reflect the recasting of the relevant statutory provisions from Health and Safety Code, section 50580 et seq. to Civil Code section 1954.10 et seq. The forms to be revised are *Petition for Order Prohibiting Abuse or Program Misconduct* (form TH-100); *Order to Show Cause and Temporary Restraining Order* (form TH-110); *Participant's Response* (form TH-120); *Order After Hearing* (form TH-130); *Proof of Personal Service* (form TH-140); *Restatement of Transitional Housing Misconduct Act* (form TH-190); *Instructions for Program Operators* (form TH-200); and *Instructions for Participants* (form TH-210).

Copies of the revised forms are attached at pages 4–36.

Previous Council Action

Although the Judicial Council has acted on these rules and forms, this proposal recommends only minor corrections unrelated to any prior action.

Rationale for Recommendation

The changes to these rules, forms, and the bail and penalty schedules are technical in nature and necessary to correct inadvertent omissions and incorrect references.

Comments, Alternatives Considered, and Policy Implications

These proposals were not circulated for public comment because they are noncontroversial, involve technical revisions, and are therefore within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

Implementation Requirements, Costs, and Operational Impacts

Operational impacts are expected to be minor. The proposed revisions may result in reproduction costs if courts provide hard copies of any of the forms recommended for revision. Because the proposed changes are technical corrections, case management systems are unlikely to need updating to implement them.

Attachments and Links

1. Forms CR-112/JV-792, JV-216, JV-750, MC-012, TH-100, TH-110, TH-120, TH-130, TH-140, TH-190, TH-200, and TH-210, at pages 4–36
2. Senate Bill 838

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. Defendant:	
PLEA FORM, WITH EXPLANATIONS AND WAIVER OF RIGHTS—FELONY	CASE NUMBER:

INSTRUCTIONS: (1) Fill out this form only if you want to plead guilty or no contest.
(2) Read this form carefully. For each item, if you understand and agree with what you read, put your initials in the box to the right of the item. For any item that does not apply to you or that you do not understand, leave the box blank.
(3) On page 6, sign and date the form under "DEFENDANT'S STATEMENT."
(4) Keep in mind that the court cannot give legal advice. If you have any questions about anything in this form, ask your attorney.

1. **CHARGES AND MAXIMUM TERM.** I want to plead guilty or no contest ("nolo contendere") to the charges and allegations listed below. I understand that the minimum and maximum penalties for the charges to which I am pleading guilty or no contest are listed below. INITIALS ☐

COUNT	CHARGES (SECTION & DESCRIPTION)	YEARS / MONTHS MINIMUM	YEARS / MONTHS MAXIMUM	PRIOR CONVICTIONS, ENHANCEMENTS, & SPECIAL ALLEGATIONS (SECTION & DESCRIPTION)	YEARS / MONTHS MINIMUM	YEARS / MONTHS MAXIMUM	TOTAL MAXIMUM TIME
					AGGREGATE MAXIMUM TIME OF IMPRISONMENT		

2. **PLEA AGREEMENT.** I understand that I must tell the court on this form about any promises anyone has made to me about the sentence I will receive or the sentence recommendations that will be made to the court. My attorney, the court, or the prosecutor has explained to me that if I plead guilty or no contest to the charges and admit the allegations listed above, the court will sentence me as follows:

a. Check one: ☐ **State Prison** (or the Division of Juvenile Justice) ☐ **County Jail** for INITIALS ☐
(1) ☐ years and months or
(2) ☐ Not less than years and months and/or not more than years and months.
(3) ☐ Other *(specify):*

b. **Probation** for years under conditions to be set by the court, including: ☐
☐ days in the **county jail** or
☐ up to days in the **county jail.**

I understand that a violation of any of the conditions of probation, including failure to complete a drug education or treatment program, if ordered by the court, may cause the court to send me to **county jail or state prison** for up to the **"Aggregate Maximum Time of Imprisonment"** specified in item 1, which may include a period of mandatory supervision under Penal Code section 1170(h)(5)(B) if the court sends me to county jail.

Form Approved for Optional Use
Judicial Council of California
CR-101 [Rev. January 1, 2018]

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

INITIALS

2. c. **Split Sentence (1170(h)(5)(B)):** years and days in the county jail and years and days on mandatory supervision under conditions set by the court. I understand that if I violate any of the terms or conditions of mandatory supervision, I may be remanded into custody for the entire unserved portion of the sentence. ☐

d. **Narcotics Addiction Confinement** ☐
I understand that if the court finds that I am addicted to narcotics or in immediate danger of becoming a narcotics addict, the court may send me to a narcotics detention, treatment, and rehabilitation facility for up to the amount of time I would otherwise have served in prison.

e. **Open Plea**

1. ☐ I understand the maximum and minimum sentences for the charges and allegations stated on page 1. No one has made any other promises to me about what sentence the court may order. ☐
2. ☐ I understand that I am not eligible for probation.
3. ☐ I understand that I will not be granted probation unless the court finds at the time of sentencing that this is an unusual case where the interests of justice would be best served by granting probation.

f. **Restitution, Statutory Fees, and Assessments** ☐
I understand that the court will order me to pay the following amounts (if an amount is not yet known, "TBD" for "to be determined" is entered next to the $); I must prepare financial disclosure statements to assist the court in determining my ability to pay; and refusal or failure to prepare the required financial disclosure statements may be used against me at sentencing:

1. ☐ $ **to the Victim Restitution Fund**
2. ☐ $ **restitution to actual victims**
3. ☐ $ **restitution to the State of California, Victims of Crime Fund**
4. ☐ $ **court operations assessment**
5. ☐ $ **court facilities assessment**
6. ☐ $ **base fine plus any applicable penalties, assessments, and surcharges**
7. ☐ $ **other** *(specify):*
8. ☐ $ **other** *(specify):*
9. ☐ An (additional) amount to be determined by the court at sentencing or such other hearing as the court may set.

g. **Parole Revocation or Probation Revocation Fine** ☐
I understand that if I am sentenced to **state prison**, the court **will** impose a parole revocation fine, which will be collected only if my parole is later revoked. I also understand that if I am granted probation, the court **will** impose a probation revocation fine, which will be collected only if my probation is later revoked.

h. **Dismissal of Other Counts** ☐
I understand that as part of the plea agreement bargain, the following counts will be dismissed after sentencing:

I understand and agree that the sentencing judge may consider facts underlying dismissed counts to determine restitution and to sentence me on the counts to which I am entering a plea. ☐

i. **Other Terms (*specify):*** ☐

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

3. **CONSEQUENCES OF MY PLEA** INITIALS

a. **No Contest ("Nolo Contendere") Plea** ☐
I understand that a no contest plea is the same as pleading guilty and that if I plead no contest, I will be convicted and my no contest plea could be used against me in a civil case.

b. **Parole and Postrelease Community Supervision** ☐
I understand that if I am sentenced to **state prison** or a **narcotics treatment facility**
(1) I will be placed on parole or postrelease community supervision for up to years after my release.
(2) If I abscond or the court tolls my supervision, the total time of parole or postrelease community supervision can be extended.
(3) If I violate any of the terms or conditions of my parole, I can be sentenced to county jail for up to 180 days for each violation, or returned to state prison for up to one year, up to a maximum of years. If I violate any of the terms or conditions of postrelease community supervision, I can be sentenced to county jail for up to 180 days for each violation, for up to a maximum of 3 years.

c. **Effect of Conviction on Other Cases** ☐
I understand that a conviction in this case may constitute a violation of any other current grant of parole, mandatory supervision, postrelease community supervision, or probation in any other case and that I may receive additional punishment as a result of that violation.

d. **Registration** ☐
I understand that I will be required to register with the local police agency or sheriff's department in the city or county in which I reside as

(1) ☐ an arson offender
(2) ☐ a gang member
(3) ☐ a narcotics offender
(4) ☐ a sex offender **(this registration is a lifelong requirement)**
(5) ☐ other (*specify*):

and that if I fail to register or to keep my registration current for any reason, new felony criminal charges may be filed against me.

e. **Prints and DNA Samples** ☐
I understand that I must provide biological samples and prints for identification purposes—including buccal (mouth) swab samples, right thumb prints, palm prints of each hand, and blood specimens or other biological samples required by law—and that failure to do so constitutes a new criminal offense.

f. **Serious or Violent Felony** ☐
(1) ☐ I understand that by pleading guilty or no contest to a serious or violent felony ("strike"), the penalty for any future felony conviction will be increased as a result of my convicion in this case, depending on the number of strikes I have, up to a mandatory prison sentence of double the term otherwise provided or a term of at least 25 years to life.
(2) ☐ I understand that if I am convicted of a violent felony, jail or prison conduct/work-time credit I may accrue will not exceed 15%.
(3) ☐ I understand that if I am admitting a prior strike conviction, prison work-time credit that I may accrue will not exceed 20% of the total term of imprisonment.
(4) ☐ I understand that if I am convicted of murder or a third felony conviction of certain offenses, I am ineligible to receive work-time credits. Count is such an offense.

g. **Prior Prison Term or County Jail Sentence Under Penal Code Section 1170(h)(5)** ☐
I understand that if I am sentenced to prison or county jail under Penal Code section 1170(h)(5), the penalty for any future felony conviction may be increased as a result of my incarceration in this case.

h. **Driver's License and Vehicle Forfeiture** ☐
I understand that my privilege to drive a motor vehicle may be revoked or suspended by the court or the California Department of Motor Vehicles, and my vehicle may be ordered forfeited if it was involved in the offense.

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3. i. **Immigration Consequences**
I understand that if I am not a citizen of the United States, my plea of guilty or no contest may or, with certain offenses, **will** result in my deportation, exclusion from reentry to the United States, and denial of naturalization and amnesty, and that the appropriate consulate may be informed of my conviction. The offenses that **will** result in such immigration action include, but are not limited to, an aggravated felony, conspiracy, a controlled substance offense, a firearm offense, and, under certain circumstances, a moral turpitude offense. ☐

j. **Firearms**
I understand that federal and state laws prohibit a convicted felon from possessing firearms or ammunition for life. ☐

k. **Other Consequences** (*specify*): ☐

4. **RIGHT TO AN ATTORNEY**
I understand that I have the right to an attorney of my choice to represent me throughout the proceedings. If I cannot afford to hire an attorney, the court will appoint one to represent me. ☐

I hereby give up my right to be represented by an attorney. ☐

5. **OTHER CONSTITUTIONAL RIGHTS**
I understand that I am entitled to each of the following rights as to the charges listed in item 1 (on page 1):

a. **Right to a Jury Trial**
I understand that I have a right to a speedy and public jury trial. At the trial, I would be presumed to be innocent, and I could not be convicted unless, after hearing all of the evidence, 12 impartial jurors chosen from the community were unanimously convinced beyond a reasonable doubt that I am guilty. I have a right, through my counsel, to participate in jury selection. ☐

b. **Right to a Court Trial**
I understand that, as an alternative to a jury trial, if the prosecutor agrees, I may give up a jury trial and have a court trial in which the judge alone, without a jury, hears the evidence. I still could not be convicted unless, after hearing all of the evidence, the judge was convinced beyond a reasonable doubt that I am guilty. ☐

c. **Right to Confront and Cross-Examine Witnesses**
I understand that I have the right to confront and cross-examine all witnesses testifying against me. This means that the prosecution must produce the witnesses in court, they must testify under oath in my presence, and my attorney may question them. ☐

d. **Right to Remain Silent and Not to Incriminate Myself**
I understand that I have the right to remain silent, and my silence cannot be considered as evidence against me. I understand that I also have the right not to incriminate myself, and I cannot be forced to testify. ☐

e. **Right to Produce Evidence and to Present a Defense**
I understand that I have a right to present evidence and to have the court issue subpoenas to bring to court all witnesses and evidence favorable to me, at no cost to me. I also have the right to testify on my own behalf. ☐

6. **BEFORE THE PLEA**

a. **Discussion With My Attorney** ☐

Before entering this plea, I have had a full opportunity to discuss the following with my attorney:

(1) The facts of my case;
(2) The elements of the charged offenses, prior convictions, enhancements, and special allegations;
(3) Any defenses that I may have;
(4) My constitutional and statutory rights and waiver of those rights;
(5) The consequences of this plea, including the immigration consequences; and
(6) Anything else I think is important to my case.

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

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6. b. **Questions**
I have no further questions of the court or of my attorney with regard to my plea and admissions in this case, any of the rights, or anything else on this form. ☐

c. **Stipulation to Commissioner**
I understand that I have the right to have a judge take my plea and sentence me. I give up this right and agree to have a commmissioner, sitting as a temporary judge, take my plea and sentence me. ☐

d. **Medications or Controlled Substances**
I am not taking any medication that affects my ability to understand this form and the consequences of my plea, have not recently consumed any alcohol or drugs, and am not suffering from any medical condition, except for the following: ☐

e. **Court Approval of Plea Agreement**
I understand that the plea agreement in item 2 (on pages 1 and 2) is based on the facts before the court. I understand that if the court approves this plea agreement the approval of the court is not binding, and that the court may withdraw its approval of the plea agreement upon further consideration of the matter. I understand that if the court withdraws its approval of this plea agreement I will be allowed to withdraw my plea. (Pen. Code, § 1192.5.) ☐

7. **STATUTORY RIGHT TO A PRELIMINARY HEARING**
I understand that before I have a trial, the law gives me the right to a speedy preliminary hearing at which the prosecution would produce evidence and the court must find reasonable cause to believe I committed the crimes with which I have been charged. I understand that I have all of the above constitutional rights at the preliminary hearing, except for the right to a jury trial. ☐

I give up my right to a preliminary hearing and the constitutional rights listed in item 5 (on page 4).

8. **WAIVER OF CONSTITUTIONAL RIGHTS**
I give up, for each of the charges and allegations listed in item 1 (on page 1), my right to a jury trial, my right to a court trial, my right to confront and cross-examine witnesses, my right to remain silent and not to incriminate myself, and my right to produce evidence and to present a defense, including my right to testify on my own behalf. I understand that I am, in fact, incriminating myself with my plea. ☐

9. **THE PLEA**
I freely and voluntarily plead ☐ GUILTY ☐ NO CONTEST to the charges listed in item 1 (on page 1) and admit the allegations listed in item 1 (on page 1), understanding that this plea and admission will lead to the penalties listed in item 2 (on pages 1 and 2). ☐

a. I offer my plea of guilty or no contest freely and voluntarily and with full understanding of everything in this form. No one has made any threats; used any force against me, my family, or my loved ones; or made any promises to me, except as listed in this form, in order to convince me to plead guilty or no contest. ☐

b. **I understand that the court is required to find a factual basis for my plea to make sure that I am entering a plea to the proper offenses under the facts of the case.**

I offer to the court the following as the basis for my plea of guilty or no contest and any admissions:

(1) **I understand that the court may consider the following as proof of the factual basis for my plea:** ☐

(a) ☐ Preliminary hearing transcript
(b) ☐ Police report
(c) ☐ Probation report
(d) ☐ Welfare investigator's declaration
(e) ☐ Court documents regarding any alleged prior offenses
(f) ☐ Other *(specify):*
(g) ☐ (Specify facts):

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9. b. (2) **I am pleading guilty or no contest to take advantage of a plea agreement (my attorney will stipulate to a factual basis for the plea).** (*People v. West* (1970) 3 Cal.3d 595.) ☐

10. **AFTER THE PLEA**

a. **Surrender**
I understand that the court is allowing me to surrender at a later date to begin serving time in custody. ☐

I agree that if I fail to appear on the date set for surrender or sentencing without a legal excuse, my plea will become an "open plea" to the court, I will not be allowed to withdraw my plea, and I may be sentenced up to the maximum allowed by law. ☐

b. **Sentencing Court**
I understand that I have the right to be sentenced by the same judge or commissioner who takes my plea. I give up that right and agree that any judge or commissioner may sentence me. ☐

c. **Sentencing Date**
I understand that I have the right to be sentenced within 20 court days. I give up that right and agree to be sentenced at a later date. ☐

11. **MANDATORY WARNING** ☐
I understand that if I am charged with violating Vehicle Code section 23103, as specified in Vehicle Code section 23103.5, or Vehicle Code sections 23152 or 23153, the following warning applies:

You are hereby advised that being under the influence of alcohol or drugs, or both, impairs your ability to safely operate a motor vehicle. Therefore, it is extremely dangerous to human life to drive while under the influence of alcohol or drugs, or both. If you continue to drive while under the influence of alcohol or drugs, or both, and as a result of that driving someone is killed, you can be charged with murder.

DEFENDANT'S STATEMENT

I have read or have had read to me this form and have initialed each of the items that applies to my case. If I have an attorney, I have discussed each item with my attorney. By putting my initials next to the items in this form, I am indicating that I understand and agree with what is stated in each item that I have initialed. The nature of the charges, possible defenses, and effects of any prior convictions, enhancements, and special allegations have been explained to me. I understand each of the rights outlined above, and I give up each of them to enter my plea.

DEFENDANT'S SIGNATURE _____ DATE _____

ATTORNEY'S STATEMENT

I am the attorney of record for the defendant. I have reviewed this form with my client. I have explained each of the items in the form, including the defendant's constitutional and statutory rights, to the defendant and have answered all of his or her questions with regard to those rights, the other items in this form, and the plea agreement. I have also discussed the facts of the case with the defendant and have explained the nature and elements of each charge; any possible defenses to the charges; the effect of any prior convictions, enhancements, and special allegations; and the consequences of the plea.

I concur in the plea and admissions and join in the waiver of the defendant's constitutional and statutory rights, and I hereby stipulate that there is a factual basis for the plea and refer the court to the ☐ police report ☐ preliminary hearing transcript ☐ probation report ☐ other (*specify*): (*People v. West* (1970) 3 Cal.3d 595.)

ATTORNEY'S SIGNATURE _____ DATE _____

PEOPLE OF THE STATE OF CALIFORNIA v. Defendant(s):	CASE NUMBER:

INTERPRETER'S STATEMENT

I, having been duly sworn or having a written oath on file, certify that I truly translated this form to the defendant in the language noted below. The defendant stated that he or she understood the contents of the form and then initialed and signed the form.

Language: ☐ Spanish ☐ Other (*specify*):

INTERPRETER'S SIGNATURE _____ DATE _____

INTERPRETER'S NAME (TYPE OR PRINT) _____

DISTRICT ATTORNEY'S STATEMENT

I have read this form and understand the terms of the plea agreement.

I ☐ agree ☐ do not agree with the terms of the plea agreement and the indicated sentence.

ATTORNEY'S SIGNATURE _____ DATE _____

COURT'S FINDINGS AND ORDER

The court, having reviewed this form (and any addenda), and having orally examined the defendant, finds as follows:

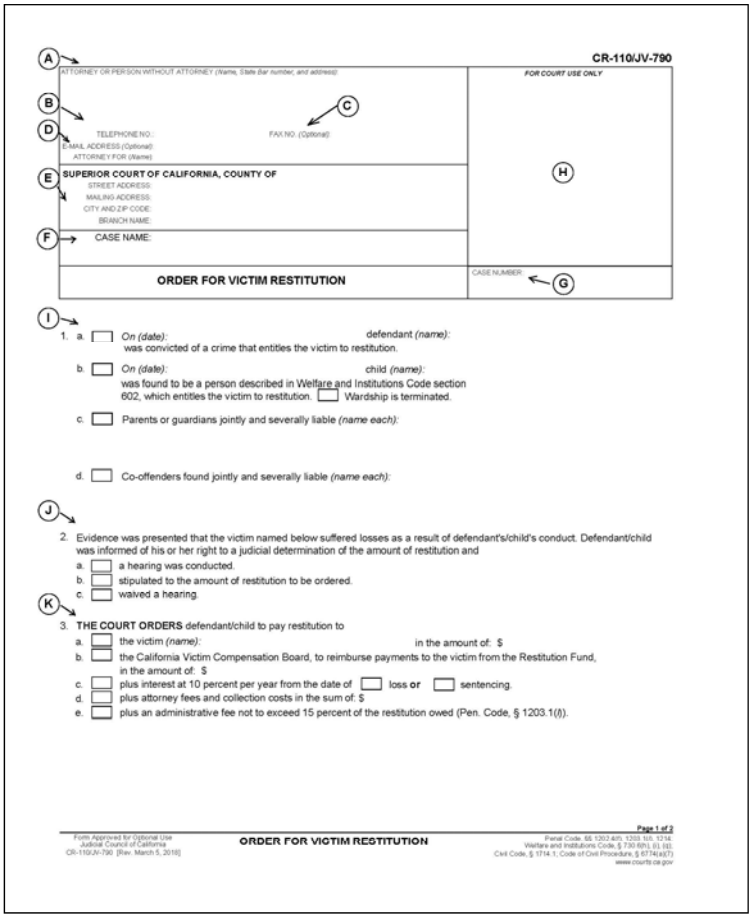
1. The defendant has read or has had read to him or her and understands each of the initialed items in this form.
2. The defendant understands the nature of the crimes and allegations listed in item 1 (on page 1) and the consequences of the plea and any admissions.
3. The defendant expressly, knowingly, understandingly, and intelligently waives his or her constitutional and statutory rights.
4. The defendant's plea, admissions, and waiver of rights are made freely and voluntarily.
5. A factual basis exists for the plea and admissions, or the defendant is pleading pursuant to a plea bargain under *People v. West.*

The court accepts the defendant's plea, admissions, and waiver of rights, and the defendant is hereby convicted based thereon.

It is ordered that this document be filed with the court's records of this case and that the defendant's plea, admissions, and waiver of rights be accepted and entered in the minutes of this court.

JUDGE'S SIGNATURE _____ DATE _____

INSTRUCTIONS: ORDER FOR VICTIM RESTITUTION


CR-110/JV-790

ATTORNEY OR PERSON WITHOUT ATTORNEY (Name, State Bar number, and address):

FOR COURT USE ONLY

TELEPHONE NO.: FAX NO. (Optional):

E-MAIL ADDRESS (Optional):

ATTORNEY FOR (Name):

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

STREET ADDRESS:

MAILING ADDRESS:

CITY AND ZIP CODE:

BRANCH NAME:

CASE NAME:

ORDER FOR VICTIM RESTITUTION

CASE NUMBER:

1. a. ☐ On (date): defendant (name): was convicted of a crime that entities the victim to restitution.

b. ☐ On (date): child (name): was found to be a person described in Welfare and Institutions Code section 602, which entities the victim to restitution. ☐ Wardship is terminated.

c. ☐ Parents or guardians jointly and severally liable (name each):

d. ☐ Co-offenders found jointly and severally liable (name each):

2. Evidence was presented that the victim named below suffered losses as a result of defendant's/child's conduct. Defendant/child was informed of his or her right to a judicial determination of the amount of restitution and

a. ☐ a hearing was conducted.

b. ☐ stipulated to the amount of restitution to be ordered.

c. ☐ waived a hearing.

3. THE COURT ORDERS defendant/child to pay restitution to

a. ☐ the victim (name): in the amount of: $

b. ☐ the California Victim Compensation Board, to reimburse payments to the victim from the Restitution Fund, in the amount of: $

c. ☐ plus interest at 10 percent per year from the date of ☐ loss or ☐ sentencing.

d. ☐ plus attorney fees and collection costs in the sum of: $

e. ☐ plus an administrative fee not to exceed 15 percent of the restitution owed (Pen. Code, § 1203.1(l)).

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Form Approved for Optional Use Judicial Council of California CR-110/JV-790 [Rev. March 5, 2018]

ORDER FOR VICTIM RESTITUTION

Penal Code, §§ 1202.4(f), 1203.1(l), 1214; Welfare and Institutions Code, § 730.6(h), (i), (q); Civil Code, § 1714.1; Code of Civil Procedure, § 674(a)(7)

www.courts.ca.gov

A. Attorney or Person Without Attorney

Write the name of your attorney. If you are representing yourself, your name goes here.

B. Telephone Number

Your telephone number goes here. You may also give a number where the court can leave a message for you.

C. Fax Number

You may write in your fax number here or you may leave this line blank.

D. E-mail Address

You may write in your e-mail address here or you may leave this line blank.

E. Name and Address of Court

Ask the clerk of your court for this information, including the court's address.

F. Case Name

Use the assigned case name. Example: *In re John D.* or *People of the State of California v. Doe.*

G. Case Number

Write the assigned case number in this space. You need to write this number at the top of every page of this form.

H. For Court Use Only

Leave blank. After this form is filed, the clerk will stamp this box on the copies so everyone knows they are copies of an official court document.

I. Order for Restitution

a. If the person was convicted in criminal court, write in the date of the defendant's conviction and the defendant's name.

b. In cases where a child has been found to be a person described in Welfare and Institutions Code section 602, check item b and fill in the date of the hearing and the child's name.

c. If the parents or guardians are jointly and severally liable, write the names in the space provided.

d. If co-offenders were found jointly and severally liable, write the names in the space provided.

This section must be completed by either you or the court. A separate order and abstract of judgment should be completed for each defendant or child ward found guilty of an offense.

J. Judicial Determination of Restitution

The defendant or child has a right to a restitution hearing. The hearing can be waived if the defendant or child agrees to give up his or her right to have a hearing. The amount of restitution may also be stipulated if the amount of restitution to be ordered is agreed to by all parties and the judge makes an order for the amount based on an agreement by all parties. It is very important to check the appropriate boxes to indicate whether the defendant or child has had a hearing or has waived the hearing. If you do not have all of the relevant information to complete this section, then the court should complete it for you.

K. Restitution Ordered to Pay

a. If the court ordered the offender to pay you, write your name as the victim and the amount of restitution ordered by the court. Make sure the amount of restitution is not left blank or "to be determined." A dollar amount must be listed for the order to be enforceable.

b. Check this box if the court ordered the California Victim Compensation Board to receive reimbursement for funds previously paid to you or your service provider by the Restitution Fund. Make sure the amount of reimbursement is not left blank or "to be determined." A dollar amount must be listed for the order to be enforceable.

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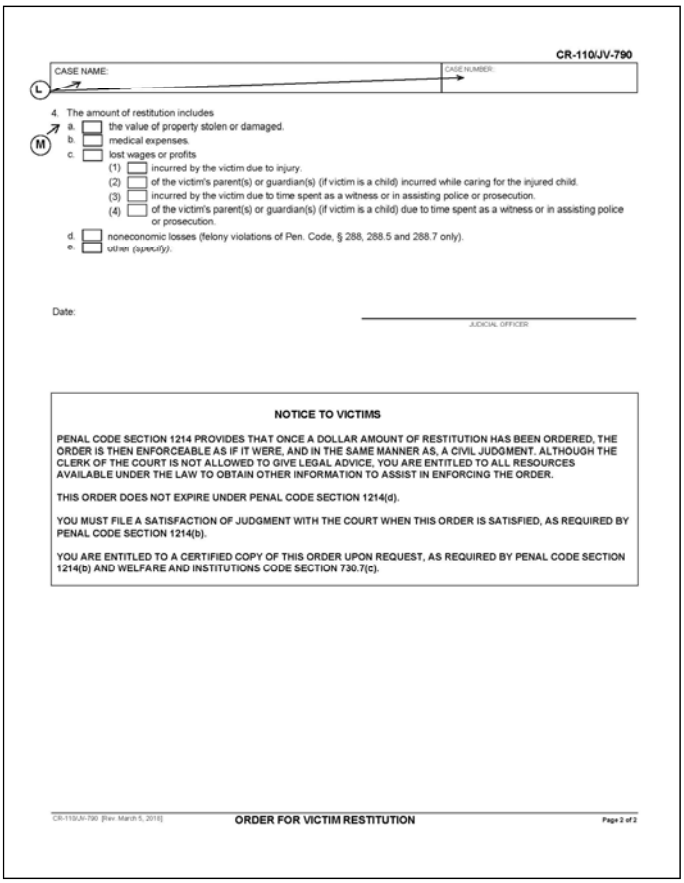
L. Case Name and Number

Use the case name and case number that you wrote on the front of the form.

M. Amount of Restitution

Check the applicable boxes a through e that specify why the restitution was ordered. Example: If the court ordered that you collect medical expenses and lost wages, check boxes 4b and 4c. If the amount of restitution includes something that is not listed, check box 4e and briefly specify what additional costs are covered.



CR-110/JV-790

CASE NAME: CASE NUMBER:

4. The amount of restitution includes
   a. ☐ the value of property stolen or damaged.
   b. ☐ medical expenses.
   c. ☐ lost wages or profits
      (1) ☐ incurred by the victim due to injury.
      (2) ☐ of the victim's parent(s) or guardian(s) (if victim is a child) incurred while caring for the injured child.
      (3) ☐ incurred by the victim due to time spent as a witness or in assisting police or prosecution.
      (4) ☐ of the victim's parent(s) or guardian(s) (if victim is a child) due to time spent as a witness or in assisting police or prosecution.
   d. ☐ noneconomic losses (felony violations of Pen. Code, § 288, 288.5 and 288.7 only).
   e. ☐ other (*specify*):

Date: JUDICIAL OFFICER

NOTICE TO VICTIMS

PENAL CODE SECTION 1214 PROVIDES THAT ONCE A DOLLAR AMOUNT OF RESTITUTION HAS BEEN ORDERED, THE ORDER IS THEN ENFORCEABLE AS IF IT WERE, AND IN THE SAME MANNER AS, A CIVIL JUDGMENT. ALTHOUGH THE CLERK OF THE COURT IS NOT ALLOWED TO GIVE LEGAL ADVICE, YOU ARE ENTITLED TO ALL RESOURCES AVAILABLE UNDER THE LAW TO OBTAIN OTHER INFORMATION TO ASSIST IN ENFORCING THE ORDER.

THIS ORDER DOES NOT EXPIRE UNDER PENAL CODE SECTION 1214(d).

YOU MUST FILE A SATISFACTION OF JUDGMENT WITH THE COURT WHEN THIS ORDER IS SATISFIED, AS REQUIRED BY PENAL CODE SECTION 1214(b).

YOU ARE ENTITLED TO A CERTIFIED COPY OF THIS ORDER UPON REQUEST, AS REQUIRED BY PENAL CODE SECTION 1214(b) AND WELFARE AND INSTITUTIONS CODE SECTION 730.7(c).

CR-110/JV-790 [Rev. March 5, 2018] **ORDER FOR VICTIM RESTITUTION** Page 2 of 2

Order for Victim Restitution (form CR-110/JV-790) is the court order or judgment directing the offender to repay you for any losses that you suffered because of the offense. Once this judgment is entered in the court records, you may use it to collect the money you are owed from the offender. If the court does not give you a certified copy of the order, ask the clerk for one and check to make sure the judgment is entered. If the offender does not pay you, you have several options, including getting the offender to pay you voluntarily, getting more information about the offender, and collecting from the offender's property. If you choose to try to collect from the value of real estate owned by the offender, you will need to record an abstract of the judgment with the county recorder in the county where the property is located. For more information about this process, see *Abstract of Judgment—Restitution* (form CR-111/JV-791) and *Instructions: Abstract of Judgment—Restitution* (form CR-113/JV-793). For more information about this and other options for collecting your restitution judgment, see the California Courts Online Self-Help Center at *www.courts.ca.gov/1014.htm*.

JV-216 Order Delegating Judicial Authority Over Psychotropic Medication

Clerk stamps date here when form is filed.

(1) Parent or legal guardian *(name):* _____

(2) The court finds as follows:

a. The parent or legal guardian poses no danger to the child.

b. The parent or legal guardian has the capacity to authorize psychotropic medications.

(3) The parent or legal guardian in (1) is authorized to approve or deny the administration of psychotropic medication for the child, unless such authority is modified by a subsequently issued order.

Fill in court name and street address:

Superior Court of California, County of

Fill in child's name and date of birth:

Child's Name:
Date of Birth:

Court fills in case number when form is filed.

Case Number:

Date:

_____
(SIGNATURE OFJUDICIAL OFFICER)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	*FOR COURT USE ONLY*
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
DETERMINATION OF ELIGIBILITY **Deferred Entry of Judgment—Juvenile**	CASE NUMBER:

1. The undersigned, *(name):* , Deputy District Attorney, has reviewed the records, police reports, and other materials submitted regarding the above-referenced youth and has determined the following *(check all applicable boxes):*
   a. ☐ The youth will be 14 years or older at the time of the hearing on the deferred entry of judgment.
   b. ☐ The youth is alleged to have committed at least one felony offense.
   c. ☐ There is no allegation that the youth committed an offense described in Welfare and Institutions Code section 707(b) or 790(a)(7).
   d. ☐ The youth has not previously been declared a ward of the court based on a finding that the minor committed a felony.
   e. ☐ The youth has never been committed to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice.
   f. The youth's records indicate the following:
      (1) ☐ The youth has never been on formal or informal probation.
      (2) ☐ The youth is presently on ☐ formal ☐ informal probation.
      (3) ☐ The youth successfully completed a previous ☐ formal ☐ informal probation program.
      (4) ☐ The youth's probation has never been revoked.
   g. ☐ The youth is eligible for probation under Penal Code section 1203.06.

2. a. ☐ The youth is eligible
   b. ☐ The youth is ineligible

3. ☐ ***Citation and Written Notification for Deferred Entry of Judgment—Juvenile*** *(form JV-751),* is attached.

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF DEPUTY DISTRICT ATTORNEY)

Form Adopted for Mandatory Use
Judicial Council of California
JV-750 [Rev. September 1, 2018]

Welfare and Institutions Code, §§ 790, 791
www.courts.ca.gov

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** **04-27-18** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Plaintiff: Defendant:	
MEMORANDUM OF COSTS AFTER JUDGMENT, ACKNOWLEDGMENT OF CREDIT, AND DECLARATION OF ACCRUED INTEREST	CASE NUMBER:

1. ☐ **Postjudgment costs**
   a. I claim the following costs after judgment incurred within the last two years *(indicate if there are multiple items in any category):*

	Dates Incurred	Amount
(1) Preparing and issuing abstract of judgment		$
(2) Recording and indexing abstract of judgment		$
(3) Filing notice of judgment lien on personal property		$
(4) Issuing writ of execution, to extent not satisfied by Code Civ. Proc., § 685.050 *(specify county):*		$
(5) Levying officers fees, to extent not satisfied by Code Civ. Proc., § 685.050 or wage garnishment		$
(6) Approved fee on application for order for appearance of judgment debtor, or other approved costs under Code Civ. Proc., § 708.110 et seq.		$
(7) Attorney fees, if allowed by Code Civ. Proc., § 685.040		$
(8) Other: _____ *(Statute authorizing cost):* _____		$
(9) Total of claimed costs for current memorandum of costs *(add items (1)–(8))*		$
b. All previously allowed postjudgment costs		$
c. **Total** of all postjudgment costs *(add items a and b)*		$

2. ☐ **Credits to interest and principal**
   a. I acknowledge total payments to date in the amount of: $_____ (including returns on levy process and direct payments). The payments received are applied first to the amount of accrued interest, and then to the judgment principal (including postjudgment costs allowed) as follows: credit to accrued interest: $_____ ; credit to judgment principal $_____ .
   b. **Principal remaining due:** The amount of judgment principal remaining due is $_____. *(See Code Civ. Proc., § 680.300)*
3. ☐ **Accrued interest remaining due:** I declare interest accruing (at the legal rate) from the date of entry or renewal and on balances from the date of any partial satisfactions (or other credits reducing the principal) remaining due in the amount of $_____ .
4. I am the: ☐ judgment creditor ☐ agent for the judgment creditor ☐ attorney for the judgment creditor.
   I have knowledge of the facts concerning the costs claimed above. To the best of my knowledge and belief, the costs claimed are correct, reasonable, and necessary, and have not been satisfied.

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

_____ ▶ _____
(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

NOTICE TO THE JUDGMENT DEBTOR

If this memorandum of costs is filed at the same time as an application for a writ of execution, any statutory costs, not exceeding $100 in aggregate and not already allowed by the court, may be included in the writ of execution. The fees sought under this memorandum may be disallowed by the court upon a motion to tax filed by the debtor, notwithstanding the fees having been included in the writ of execution. (Code Civ. Proc., § 685.070(e).) A motion to tax costs claimed in this memorandum must be filed within 10 days after service of the memorandum. (Code Civ. Proc., § 685.070(c).)

Form Adopted for Mandatory Use
Judicial Council of California
MC-012 [Rev. September 1, 2018]

MEMORANDUM OF COSTS AFTER JUDGMENT, ACKNOWLEDGMENT OF CREDIT, AND DECLARATION OF ACCRUED INTEREST

Code of Civil Procedure,
§§ 685.040, 685.070, 695.220
www.courts.ca.gov

Short Title:	CASE NUMBER:

PROOF OF SERVICE

☐ **Mail** ☐ **Personal Service**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My residence or business address is:

3. ☐ I mailed or personally delivered a copy of the *Memorandum of Costs After Judgment, Acknowledgment of Credit, and Declaration of Accrued Interest* as follows *(complete either a or b):*

   a. ☐ **Mail.** I am a resident of or employed in the county where the mail occurred.
      (1) I enclosed a copy in an envelope AND
         (a) ☐ **deposited** the sealed envelope with the United States Postal Service with the postage fully prepaid.
         (b) ☐ **placed** the envelope for collection and mailing on the date and at the place shown in items below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

      (2) The envelope was addressed and mailed as follows:

         (a) Name of person served:
         (b) Address on envelope:
         (c) Date of mailing:
         (d) Place of mailing *(city and state)*:

   b. ☐ **Personal delivery.** I personally delivered a copy as follows.
      (1) Name of person served:
      (2) Address where delivered:
      (3) Date delivered:
      (4) Time delivered:

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

Date: _____

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

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** **04-09-2018** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PROGRAM OPERATOR: PARTICIPANT:	
PETITION FOR ORDER PROHIBITING ABUSE OR PROGRAM MISCONDUCT ☐ **Application for Temporary Restraining Order** ☐ **Modification of Previous Order *(date):***	CASE NUMBER:

(THIS IS NOT AN ORDER)

- *Read the Instructions for Program Operators before completing this form.*
- *You must have a copy served on the participant at least two days before the hearing.*

1. **Jurisdiction.** This suit is filed in this county because participant resides in this county.
2. **Program operator** *(name)*:
   operates a "transitional housing program" as defined in Health and Safety Code section 50582(g).
   a. ☐ Governmental agency *(specify):* ☐ Manager or operator
   b. ☐ Private nonprofit corporation receiving program funds from a governmental agency ☐ Manager or operator
   The funding agency is *(specify)*:
3. **Program site** *(specify street address, city, ZIP Code)*:
   a. ☐ Dwelling unit of participant
   (address optional):
   b. ☐ Other locations of the program *(addresses):*
4. **Participant to be restrained or excluded** is a "homeless person" dwelling at a "program site" as defined in Civil Code section 1954.12 *(name all to be restrained or excluded):*
   Name — Age (if under 18)
5. Persons living with participant in participant's dwelling unit who are **not** to be restrained or excluded *(name all below)*.
   If none, check this box: ☐
   Name — Family relationship — Age (if under 18)
6. Participant has signed a contract with the program operator. The contract includes *(attach a copy of the signed contract)*
   a. Program rules and regulations.
   b. A statement of program operator's right of control over and access to the program unit occupied *by* participant.
   c. A summary of the requirements and procedures of Civil Code sections 1954.10-1954.18.

(Continued on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
TH-100 [Rev. September 1, 2018]

PETITION FOR ORDER PROHIBITING ABUSE OR PROGRAM MISCONDUCT
(Transitional Housing Misconduct)

Civil Code, § 1954.13
www.courts.ca.gov

PROGRAM OPERATOR: PARTICIPANT:	CASE NUMBER:

7. Participant to be restrained or excluded *(names):*
   a. ☐ **(Program misconduct)** has intentionally violated the program rules and regulations. The violation substantially interferes with the orderly operation of the program AND involves (check at least one and cite the rule number):
      (1) ☐ drunkenness on the program site *(rule no.):*
      (2) ☐ unlawful use or sale of controlled substances (drugs) *(rule no.):*
      (3) ☐ theft *(rule no.):*
      (4) ☐ arson *(rule no.):*
      (5) ☐ destruction of property of the program operator, program employees, other participants, or persons living within 100 feet of the program site *(names and relationships to program and rule no.)*:

      (6) ☐ violence or threats of violence and harassment of program employees, other participants, or persons living within 100 feet of the program site *(names and relationships to program and rule no.)*:

   b. ☐ **(Abuse)** has intentionally or recklessly
      (1) ☐ caused or attempted bodily injury
      (2) ☐ caused or attempted sexual assault
      (3) ☐ caused fear of serious bodily injury

      to program employees, other participants, or persons living within 100 feet of the program site *(names and relationships to program)*:

   c. FACTS. *Describe in detail the most recent incidents of program misconduct or abuse. State what happened, the dates and times, and who did what to whom. Describe any injuries or damage. For alleged program misconduct, cite the rules and regulations violated by each incident of misconduct. If more space is needed, attach additional pages and check this box:* ☐ *(You may use form MC-031 (on the reverse of form MC-030) as an attachment or for the declarations (affidavits) of witnesses.)*

(Continued on next page)

PROGRAM OPERATOR: PARTICIPANT:	CASE NUMBER:

PROGRAM OPERATOR REQUESTS THE COURT TO MAKE THE ORDERS INDICATED BY THE CHECK MARKS IN THE BOXES BELOW.

8. ☐ PROGRAM MISCONDUCT RESTRAINING ORDERS (BREAKING RULES). **Participant must not** intentionally violate the program rules and regulations so as to interfere substantially with the orderly operation of the program and specifically the rules and regulations on
   a. ☐ drunkenness on the program site *(rule no.):*
   b. ☐ unlawful use or sale of controlled substances (drugs) *(rule no.):*
   c. ☐ theft *(rule no.):*
   d. ☐ arson *(rule no.):*
   e. ☐ destruction of property *(rule no.):*
   f. ☐ violence or threats of violence and harassment *(rule no.):*

9. ☐ ABUSE RESTRAINING ORDERS. **Participant must not** attack, strike, batter, or sexually assault, or threaten to attack, strike, batter, or sexually assault
   a. ☐ program employees
   b. ☐ program participants
   c. ☐ persons living within 100 feet of the program site

   ☐ and specifically the following persons *(names):*

10. ☐ PROGRAM SITE EXCLUSION ORDERS. **Participant must** immediately move from and must not return to the program site and the dwelling unit assigned to participant *(address optional):*

    and may take participant's personal property needed until the hearing.

11. ☐ STAY-AWAY ORDERS.**Participant must** stay at least 200 feet away from the following places:
    a. ☐ Dwelling unit assigned to participant *(address optional):*

    b. ☐ Other program site locations *(addresses):*

12. ☐ OTHER ORDERS *(specify other orders you request to help carry out the orders requested in items 8-11):*

13. I request that copies of orders be given to the following law enforcement agencies *(specify all with jurisdiction over the program sites)*:

    Law Enforcement Agency — Address

14. ☐ PREVIOUS PETITIONS. I have asked for restraining orders against participant before *(specify case numbers and dates):*

(Continued on next page)

PROGRAM OPERATOR: PARTICIPANT:	CASE NUMBER:

☐ **REQUEST FOR TEMPORARY RESTRAINING ORDER**
To Be Effective From Now Until the Hearing

15. ☐ I request that the orders requested in items ☐ 8 ☐ 9 ☐ 10 ☐ 11 ☐ 12 be effective from now until the hearing. *(Note: Temporary exclusion orders under items 10-11 require an emergency.)*

a. **Participant**
(1) ☐ has not been under contract with the program for more than six months *(date of contract):*
(2) ☐ has been under contract with the program for more than six months, but
(i) ☐ a restraining order is in effect and subject to further orders *(specify in item 14).*
(ii) ☐ an action is pending against participant *(specify in item 14).*

b. **Notice to participant.** ☐ Program operator ☐ Operator's attorney *(attach attorney's affidavit)*
(1) ☐ informed participant or his or her attorney on *(date):*
at *(time):* of the date, time, and place this petition would be filed.
(2) ☐ made the following good-faith efforts to inform participant or his or her attorney of the date, time, and place this petition would be filed *(specify efforts):*
(3) ☐ should not be required to inform the participant or his or her attorney of the date, time, and place this petition would be filed because *(specify reasons):*

c. NEED FOR IMMEDIATE ORDER BEFORE THE HEARING. Program operator, program participants, or persons living within 100 feet of the program site will suffer great and irreparable harm before this petition can be heard in court unless the court makes those orders requested above effective now and until the hearing. *(Specify the harm and why it will occur before the hearing. For temporary exclusion orders under items 10-11, show emergency and need to prevent imminent serious bodily injury.)*

16. ☐ Number of pages attached:

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

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PROGRAM OPERATOR)

TITLE of person signing:

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** **04-09-2018** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PROGRAM OPERATOR: PARTICIPANT:	
ORDER TO SHOW CAUSE ☐ **and Temporary Restraining Order**	CASE NUMBER:

THIS ORDER SHALL EXPIRE AT THE DATE AND THE TIME OF THE HEARING SHOWN IN THE BOX BELOW UNLESS EXTENDED BY THE COURT.

To Participant *(name all persons to be restrained or excluded)*:

YOU ARE ORDERED to appear in this court at the date, time, and place shown in the box below to give any legal reason why the orders requested in the attached petition should not be granted.

NOTICE OF HEARING

Date:	Time:	Dept.:	Room:

- ***You have the right to attend the court hearing and oppose the petition, with or without an attorney.***
- ***You have the right to file a response (form TH-120, copy attached) with the court without paying a fee.***
- ***If you do not attend the court hearing, the court may make restraining orders against you that will last up to one year.***

You may obtain legal services by calling the following office:
(Name of local legal services office):
(Address and telephone no.):

TEMPORARY RESTRAINING ORDER

Not requested **Denied** **Granted as follows:**

THE COURT FINDS

1. Before the court can hold a hearing on the petition, great and irreparable harm would result to
   a. ☐ program operator
   b. ☐ program employees or their property
   c. ☐ other program participants or their property
   d. ☐ persons living within 100 feet of the program site or their property.

2. Participant
   a. ☐ has not been under contract with the program for more than six months *(date of contract):*
   b. ☐ has been under contract with the program for more than six months, but
      (1) ☐ a restraining order is in effect and subject to further orders.
      (2) ☐ an action is pending against participant.

NOTICE TO PARTICIPANT: ***Violation of this temporary restraining order is a misdemeanor, punishable by a $1,000 fine, six months in jail, or both. This order shall be enforced by all law enforcement officers in the State of California.***

(Temporary Restraining Order continued on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
TH-110 [Rev. September 1, 2018]

ORDER TO SHOW CAUSE AND TEMPORARY RESTRAINING ORDER
(Transitional Housing Misconduct)

Civil Code, § 1954.13
www.courts.ca.gov

PROGRAM OPERATOR: PARTICIPANT:	CASE NUMBER:

THE COURT FINDS (continued)

3. **Notice**
   a. ☐ Participant or his or her attorney was informed of the date, time, and place the petition would be filed.
   b. ☐ Program operator or his or her attorney made a good-faith effort to inform participant or his or her attorney of the date, time, and place the petition would be filed.
   c. ☐ For good reasons, program operator is excused from informing participant or his or her attorney of the date, time, and place the petition would be filed.

4. ☐ EXTENSION OF TEMPORARY RESTRAINING ORDER. Good cause exists for extending these orders until the time of the hearing.

THE COURT ORDERS UNTIL THE TIME OF HEARING

5. ☐ **Program misconduct.** Participant shall not intentionally violate the program rules and regulations so as to interfere substantially with the orderly operation of the program and specifically the rules and regulations on
   a. ☐ drunkenness on the program site *(rule no.):*
   b. ☐ unlawful use or sale of controlled substances (drugs) *(rule no.):*
   c. ☐ theft *(rule no.):*
   d. ☐ arson *(rule no.):*
   e. ☐ destruction of property *(rule no.):*
   f. ☐ violence or threats of violence and harassment *(rule no.):*

6. ☐ **Do not abuse.** Participant shall not attack, strike, batter, or sexually assault, or threaten to attack, strike, batter, or sexually assault
   a. ☐ program employees
   b. ☐ program participants
   c. ☐ persons living within 100 feet of the program site

   and specifically the following persons *(names):*

7. ☐ **Move from program site.** Participant shall immediately move from and must not return to the program site and the dwelling unit assigned to participant *(address optional):*

   and may take participant's personal property needed until the hearing.

   The court finds participant must be excluded from the program site because of an emergency, and it is necessary to protect another participant, a program employee, or a person living within 100 feet of the program site from imminent serious bodily injury.

8. ☐ **Stay away.** Participant shall stay at least 200 feet away from the following places:
   a. ☐ Dwelling unit assigned to participant *(address optional):*

   b. ☐ Other program site locations *(addresses):*

The court finds participant must stay away at least 200 feet from the program site because of an emergency, and it is necessary to protect another participant, a program employee, or a person living within 100 feet of the program site from imminent serious bodily injury.

(Temporary Restraining Order continued on reverse)

PROGRAM OPERATOR: PARTICIPANT:	CASE NUMBER:

THE COURT ORDERS (continued)

9. ☐ OTHER ORDERS *(specify the orders needed to help carry out the orders in items 5-8):*

10. By the close of business on the date of this order, a copy of this order and any proof of service shall be given to the law enforcement agencies listed below as follows:
    a. ☐ Program operator shall deliver.
    b. ☐ Program operator's attorney shall deliver.
    c. ☐ The clerk of the court shall mail.

    Law enforcement agency Address

This order is effective when made. The law enforcement agency shall enforce the order immediately upon receipt. It is enforceable anywhere in California by any law enforcement agency that has received the order or is shown a copy of the order.
If proof of service on the restrained person has not been received, the law enforcement agency shall advise the restrained person of the terms of the order and then shall enforce it.

Date:

JUDGE OF THE SUPERIOR COURT

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a copy of the foregoing was mailed first class, postage prepaid, in a sealed envelope addressed as shown in item 10 and that the foregoing was mailed and this certificate was executed at *(place)*: , California,

on *(date)*: CLERK, by , Deputy

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** **04-09-2018** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PROGRAM OPERATOR: PARTICIPANT:	
PARTICIPANT'S RESPONSE to Petition for Order Prohibiting Abuse or Program Misconduct	
HEARING DATE TIME DEPT. ROOM	CASE NUMBER:

Each participant should file a separate response. (A family may file one response.)

- *If your printing is legible, you may handprint this form.*
- *Your response will be considered by the judge at the court hearing. No filing fee is required.*
- *You must still obey any orders already granted until the hearing.*
- *You have a right to ask the judge to postpone the hearing date.*
- *If you do not appear at the court hearmg, the court may grant restraining orders against you that may last up to one year.*
- *Read the Instructions for Participants before completing this form.*

I RESPOND to the Petition for Order Prohibiting Abuse or Program Misconduct as follows:

If you need additional space, attach form MC-031 (on the reverse of form MC-030). Also use form MC-031 for statements by witnesses. Reference each part on form MC-031 by a number from this form.

1. ☐ DENIAL
   a. ☐ I deny doing all of the acts stated in item 7 of the petition.
   b. ☐ I deny doing some of the acts stated in item 7 of the petition. *(Specify the acts you deny doing):*
   (Specify on attached form MC-031 if you need more room, and check this box: ☐)

2. ☐ DENIAL OF PROGRAM MISCONDUCT
   a. ☐ My acts, if any, did not substantially interfere with the orderly operation of the transitional housing program.
   b. ☐ My acts, if any, did not violate the rules and regulations of the transitional housing program *(explain):*
   (Specify on attached form MC-031 if you need more room, and check this box: ☐)

(Continued on reverse)

Form Adopted for Mandatory Use
Judicial Council of California
TH-120 [Rev. September 1, 2018]

PARTICIPANT'S RESPONSE
(Transitional Housing Misconduct)

Civil Code, § 1954.13(c)
www.courts.ca.gov

PROGRAM OPERATOR: PARTICIPANT:	CASE NUMBER:

3. ☐ JUSTIFICATION OR EXCUSE
I have done some or all of the acts of which I am accused, but the actions are justified or excused for the following reasons:
   a. ☐ My acts served a legitimate purpose *(specify):*
   (Specify on attached form MC-031 if you need more room, and check this box: ☐ *)*

   b. ☐ My acts were constitutionally protected *(specify):*
   (Specify on attached form MC-031 if you need more room, and check this box: ☐ *)*

4. ☐ WRONG PROGRAM. Program operator does **not** operate a "transitional housing program" as defined in Civil Code, section 1954.12(g) *(explain):*

5. ☐ PROGRAM CONTRACT
   a. ☐ I have no contract with the program operator.
   b. ☐ The contract does not include the program rules and regulations.
   c. ☐ The contract does not include a statement of program operator's right of control over and right of access to my dwelling unit.
   d. ☐ The contract does not contain a restatement or summary of the requirements and procedures of the Transitional Housing Participant Misconduct Act.

6. ☐ OTHER DEFENSES. I have other defenses or reasons a court order should **not** be granted *(specify):*
   (Specify on attached form MC-031 if you need more room, and check this box: ☐ *)*

7. ☐ Number of pages attached:

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

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PARTICIPANT)

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** **04-09-2018** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PROGRAM OPERATOR: PARTICIPANT:	
ORDER AFTER HEARING **on Petition For Order Prohibiting Abuse or Program Misconduct** ☐ **Modification of Previous Order *(dated):***	CASE NUMBER:

NOTE: A separate order is required for each participant or family unit to be restrained or excluded.

To participant *(names of all to be restrained or excluded)*:

1. THIS ORDER SHALL EXPIRE AT MIDNIGHT ON *(date not more than one year from now)*:
2. This proceeding was heard
   on *(date)*: at *(time)*: in Dept.: Room:
   by Judge *(name)*: Temporary Judge
   on the order to show cause filed by program operator on *(date)*:
   - ☐ Program operator present ☐ Attorney for operator present *(name):*
   - ☐ Participant present *(names):*
   - ☐ Attorney for participant present *(name):*

NOTICE TO PARTICIPANT: ***Violation of this order is a misdemeanor, punishable by a $1,000 fine, six months in jail, or both. This order shall be enforced by all law enforcement officers in the State of California.***

THE COURT ORDERS

3. ☐ **Program misconduct.** Participant shall not intentionally violate the program rules and regulations so as to interfere substantially with the orderly operation of the program and specifically the rules and regulations on
   - a. ☐ drunkenness on the program site *(rule no.):*
   - b. ☐ unlawful use or sale of controlled substances (drugs) *(rule no.):*
   - c. ☐ theft *(rule no.):*
   - d. ☐ arson *(rule no.):*
   - e. ☐ destruction of property *(rule no.):*
   - f. ☐ violence or threats of violence and harassment *(rule no.):*
4. ☐ **Do not abuse.** Participant shall not attack, strike, batter, or sexually assault, or threaten to attack, strike, batter, or sexually assault
   - a. ☐ program employees
   - b. ☐ program participants
   - c. ☐ persons living within 100 feet of the program site

   ☐ and specifically the following persons *(names):*

(Continued on reverse)

PROGRAM OPERATOR: PARTICIPANT:	CASE NUMBER:

THE COURT ORDERS (continued)

5. ☐ **Move from program site.** Participant shall immediately move from and must not return to the program site and the dwelling unit assigned to participant and shall take only participant's personal property *(address optional):*

   a. ☐ **The court finds** clear and convincing evidence that the participant abused a program employee, another participant, or a person living within 100 feet of the program site, and that great or irreparable injury would result to one of them if this order were not issued. *(This finding is necessary to obtain an exclusion order* unless *participant is in contempt of a previous order.)*

   b. ☐ (For a modification only) The court finds the participant is in contempt of the court order issued *(date)*:

6. ☐ **Stay away.** Participant shall stay at least 200 feet away from the following places:

   a. ☐ Dwelling unit assigned to participant *(address optional):*

   b. ☐ Other program site locations *(addresses):*

   The court finds clear and convincing evidence that the participant abused a program employee, another participant, or a person living within 100 feet of the program site, and that great or irreparable injury would result to one of them if this order were not issued.

7. ☐ OTHER ORDERS *(specify the orders needed to help carry out the orders in items 3-6):*

8. By the close of business on the date of this order a copy of this order and any proof of service shall be given to the law enforcement agencies listed below as follows:

   a. ☐ Program operator shall deliver.
   b. ☐ Program operator's attorney shall deliver.
   c. ☐ The clerk of the court shall mail.

   Law enforcement agency Address

This order is effective when made. The law enforcement agency shall enforce the order immediately upon receipt. It is enforceable anywhere in California by any law enforcement agency that has received the order or is shown a copy of the order.
If proof of service on the restrained person has not been received, the law enforcement agency shall advise the restrained person of the terms of the order and then shall enforce it.

Date:

JUDGE OF THE SUPERIOR COURT

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a copy of the foregoing was mailed first class, postage prepaid, in a sealed envelope addressed as shown in item 10 and that the foregoing was mailed and this certificate was executed at *(place)*: , California,

on *(date)*: CLERK, by , Deputy

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** **04-09-2018** **Not approved by the Judicial Council**
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PROGRAM OPERATOR: PARTICIPANT:	
PROOF OF PERSONAL SERVICE (Transitional Housing Misconduct)	CASE NUMBER:

PERSONAL SERVICE

Instructions: *After having the other party served with any of the documents identified in item 1, have the person who served the documents complete this Proof of Personal Service. Give the completed Proof of Personal Service to the clerk for filing. Complete a separate Proof of Personal Service for each participant or family unit. The program operator and its employees and the participant may* ***not*** *serve these papers.*

1. ☐ **Program operator's papers.** I served a copy of the following documents on participant *(check the box before the title of each document you served)*:
   - a. ☐ Order to Show Cause (Transitional Housing Misconduct) ☐ and Temporary Restraining Order
   - b. ☐ Petition for Order Prohibiting Abuse or Program Misconduct ☐ and Application for Temporary Restraining Order
   - c. ☐ blank Participant's Response AND a copy of the Instructions for Participants
   - d. ☐ blank Attached Declaration (form MC-031) (two copies)
   - e. ☐ blank Proof of Personal Service (Transitional Housing Misconduct)
   - f. ☐ Order After Hearing
   - g. ☐ other *(specify):*
2. ☐ **Participant's papers.** I served a copy of the following documents on program operator *(check the box before the title of each document you served)*:
   - a. ☐ completed Participant's Response
   - b. ☐ other *(specify):*
3. I served ☐ program operator ☐ participant *(only one name):*
   by **personally delivering copies** to him or her.
   a. Date of service: b. Time of service:
   c. Place of service *(address)*:
4. **Person serving.** At the time of service I was at least 18 years of age and **not a party to this lawsuit.**
   Name:
   Address:

   Telephone:

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

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF PERSON SERVING)

Form Adopted for Mandatory Use
Judicial Council of California
TH-140 [Rev. September 1, 2018]

Civil Code, § 1954.13
www.courts.ca.gov

(Attach to the program contract) **TH-190**

RESTATEMENT OF TRANSITIONAL HOUSING MISCONDUCT ACT

(Civil Code section 1954.10 et seq.)

YOU HAVE RIGHTS AND RESPONSIBILITIES UNDER THE LAW

When you sign your housing contract, you agree to follow the program's rules. If you break those rules, the program operator can ask a court to order you to obey the rules or to move out of the program housing in some cases.

The program operator can get these orders if you abuse certain other people or engage in program misconduct. Abuse is attacking, striking, battering, or sexually assaulting another participant, a program employee, or an immediate neighbor of the program site, or threatening or attempting to do so. Program misconduct is intentional behavior that substantially interferes with the running of the program and involves drunkenness, unlawful use or sale of drugs, theft, arson, destruction of property, violence or threats of violence, or harassment.

The program operator must follow the procedures outlined below to get a court order.

TEMPORARY RESTRAINING ORDERS

A program operator can get orders that go into effect immediately without a court hearing. These temporary orders can forbid you from breaking the program rules or doing certain things.

The program operator must tell you or your attorney (if you have one) before asking the court for these orders, unless he or she has a good reason for not notifying you. The program operator cannot get a temporary order to make you move from housing unless he or she convinces the judge that you will cause serious bodily injury to another participant, a program employee, or an immediate neighbor of the program site before a full hearing can be held.

If you have lived in program housing for at least six months since signing your contract, the program operator cannot get a temporary restraining order against you unless another order is already in effect or an action is pending against you. He or she can still get a "permanent" order for up to one year.

"PERMANENT" ORDERS (Orders After a Hearing)

The program operator can get orders lasting up to one year that forbid you from breaking the program rules or engaging in abuse. These orders are sometimes called "permanent" orders because they last longer than the temporary orders.

Before the program operator can get a permanent order, there must be a full hearing before a judge. At this hearing, both you and the program operator can be represented by attorneys and present evidence and testimony. If you do not attend the hearing, the court may make orders against you that last up to one year.

At least two days before the hearing, someone must give you a copy of the request for the orders, a notice of the hearing (called an "Order to Show Cause"), the instructions and legal forms you need to fight the orders, and any materials the program operator will use at the hearing to get the orders.

If the program operator proves you engaged in abuse or program misconduct, the court can order you to stop the behavior. If the program operator proves abuse by clear and convincing evidence and shows that you might do it again, the court can order you to move out of or stay away from program housing, or both.

YOU CAN FIGHT THE ORDERS

Read the papers you receive very carefully, especially the description of what the program operator said happened. If you disagree with the facts or you think it would be unfair for the court to grant orders against you, GO TO THE HEARING and tell the judge your side of the story. You can also fight the program operator's request for orders by filing a response telling your side of the story. You do not have to pay to file a response. Forms and instructions for filing a response are available from the county clerk's office. You also should receive these forms with the notice of the hearing.

The name, address, and phone number of the legal services office in your county must be on the notice of hearing. You may be able to get free legal advice from that office.

If you need more time to find an attorney or to prepare a response, you must ask the judge for a continuance (extension) on or before the hearing date shown on the notice of the hearing.

DISOBEYING THE ORDERS MAY MEAN YOU HAVE TO MOVE OUT

If you are found in contempt of court for disobeying the court's orders, the court can change the orders to force you to move out of the program housing.

I have read this restatement of the law. I understand it becomes part of my housing contract.

▶ _____ _____

SIGNATURE OF PARTICIPANT DATE

▶ _____ _____

SIGNATURE OF PROGRAM OPERATOR DATE

INSTRUCTIONS FOR PROGRAM OPERATORS
LAWSUITS TO PROHIBIT ABUSE OR PROGRAM MISCONDUCT
(Transitional Housing Misconduct Act)

(Civil Code section 1954.10 et seq.)

Read the "General Instructions" first. Then read the *special instructions* for program operators on page three.

GENERAL INSTRUCTIONS

WHO CAN GET ORDERS PROHIBITING ABUSE OR MISCONDUCT?

Individuals or organizations that run a transitional housing program can ask the court for these orders. The Transitional Housing Misconduct Act applies only if the housing program

(1) is run by a government agency, a private nonprofit corporation that receives program funds from a government agency, or an operator hired by one of the above to run the program;
(2) helps homeless persons obtain the skills necessary for independent living in permanent housing;
(3) includes regular individualized case management services;
(4) provides a structured living environment and requires compliance with program rules; **and**
(5) restricts the occupancy period to not less than 30 days but not more than 24 months.

Only the program operator can ask the court for orders against a participant. A program participant cannot ask the court for orders against a fellow participant, nor can program employees or neighbors of the program site ask for orders. The program operator can, however, petition on their behalf.

TO WHOM DO THESE ORDERS APPLY?

A program operator can ask the court for orders against a homeless person who is now a participant in the housing program. Someone is a homeless person if, before coming to the housing program, he or she lacked a regular and adequate nighttime residence **or** the most recent nighttime residence was

(1) a supervised shelter designed to provide temporary housing; or
(2) an institution that provides temporary housing for individuals intended to be institutionalized; or
(3) a place not designed or ordinarily used as sleeping accommodations for humans.

Someone is a participant in a housing program if he or she signed a contract with the program as a condition to getting housing. The program operator can get orders only against a participant who has signed a contract that includes

(1) the housing program's rules;
(2) a statement of the program operator's right of control and access over the unit occupied by the participant; **and**
(3) a restatement of the procedures and rights created by the Transitional Housing Misconduct Act.

The program operator can ask for orders against the participant and anyone living with the participant at the program site. The operator must prove program misconduct or abuse, however, for each individual against whom orders are granted.

Restraining orders issued under this act apply only to the persons named in the order. That means that if the court orders only one member of a family to move out of program housing, the rest of the family members may remain in the program (unless they are all minors).

(Continued on reverse)

WHEN CAN THE COURT MAKE ORDERS PROHIBITING ABUSE OR MISCONDUCT?

Program operators can ask the court for orders if the participant has engaged in program misconduct or abuse. Theparticipant's conduct is program misconduct if

(1) the participant intentionally broke the program rules;
(2) the participant's conduct substantially interferes with the program operator's ability to run the housingprogram; **and**
(3) the conduct relates to
  (a) drunkenness, sale or use of drugs, theft, arson, or destruction of another person's property; or
  (b) violence or threats of violence directed at, and harassment of, immediate neighbors of the program site, program employees, or other participants.

The participant's conduct is abuse if

(1) the participant did or attempted to attack, strike, batter, or sexually assault other participants, program employees, or immediate neighbors of the program site; or
(2) the participant threatened to attack, strike, batter, or sexually assault the above individuals.

WHAT KINDS OF ORDERS ARE AVAILABLE TO PREVENT ABUSE OR MISCONDUCT?

A program operator can request a Temporary Restraining Order or a "permanent" order (Order After Hearing), or both. These both are court orders forbidding someone from engaging in the activity described in the order. A Temporary Restraining Order is issued by a judge after a request for a permanent order has been filed, but before there has been a full hearing. Permanent orders can be issued only after a full hearing before a judge, where both the participant and the program operator can be represented by attorneys and have the opportunity to present evidence.

TEMPORARY RESTRAINING ORDERS ("TRO") BEFORE THE HEARING

A TRO orders the participant to stop the abuse or misconduct and goes into effect immediately. The order lasts a maximum of five days. The court may not be able to grant a hearing within five days, in which case the order will last until the hearing. To get a TRO the program operator must prove that the participant has engaged in program misconduct or abuse and that great or irreparable harm will result before the hearing if the TRO is not granted.

In limited circumstances, the judge can use a TRO to order the participant to move out. The judge will do this only if it is necessary to protect another participant, a program employee, or an individual who lives within 100 feet of the program site from imminent serious bodily injury. To get a TRO excluding the participant from program housing, the program operator must provide clear and convincing evidence that the participant engaged in abuse and that great or irreparable injury will result before the hearing if the participant is not ordered to move out or stay away from the housing program, or both.

If the participant has been living in program housing under contract for six months or longer, the program operator cannot get a TRO unless an action is pending against the participant or a TRO is already in effect and is subject to further orders. The program operator may still use unlawful detainer procedures or file for a permanent order only.

You must give notice to the participant before asking for a TRO. Notice requires you to show the judge that

(1) before applying for the TRO you told the participant or the participant's attorney when and where the application would be made; or
(2) you made a good-faith effort to tell the participant or the participant's attorney; or
(3) you should not have to give notice because great harm would result to a program operator, participant, or immediate neighbor of the program site before the hearing.

ORDER AFTER HEARING ("PERMANENT" ORDERS)

Temporary restraining orders last a maximum of five days or until the hearing. When the judge issues the TRO, he or she will set a date for the hearing on the permanent order (also called the Order After Hearing or "injunction"). A "per-manent" order issued after a hearing lasts up to one year.

The program operator seeking the order must have the following papers delivered (served) to the participant at leasttwo days before the hearing

(1) a copy of the Order to Show Cause (Transitional Housing Misconduct);
(2) a copy of the Temporary Restraining Orders (if any);
(3) a copy of the Petition for Order Prohibiting Abuse or Program Misconduct;
(4) a blank Participant's Response (Transitional Housing Misconduct);
(5) two copies of a blank Attached Declaration (form MC-031);

(Continued on reverse)

Order After Hearing *continued*

(6) a blank Proof of Personal Service (Transitional Housing Misconduct);
(7) a copy of these instructions; **and**
(8) copies of all materials (affidavits and supporting memoranda) to be used in the hearing.

The Order to Show Cause must contain the name and phone number of the Legal Services Office in the county where the petition was filed, and must inform the participant this office may be called for legal advice about responding to the request for court orders.

In limited circumstances the court will make a permanent order for the participant to move out of or keep away from the program site. To get this type of order, the program operator must provide clear and convincing evidence that the participant engaged in abuse and that great or irreparable injury will result if the order is not granted.

WHAT IS NEEDED TO GET THE COURT ORDERS OR TO OBJECT TO THEM?

1. Transitional Housing Misconduct forms, available from the superior court clerk's office or from legal publishers. The court clerk can tell you where to get the forms.
2. A typewriter with which to fill out the forms. The forms should be typed. Some volunteer legal service groups have typewriters you can use, and some libraries offer the use of typewriters for a small fee. If you cannot type, print clearly.
3. Money for a court filing fee, unless the court excuses you from paying. If you cannot afford to pay the court filing fee, ask the clerk for the Information Sheet on Waiver of Court Fees and Costs. If you are a participant objecting to the court orders, you do not have to pay to file your response.
4. Someone 18 years of age or older to deliver (serve) certain papers to the other party. This person must be someone other than yourself, and not an employee of the program.

WHAT FORMS ARE AVAILABLE FOR OBTAINING OR OPPOSING AN ORDER?

1. **Petition for Order Prohibiting Abuse or Program Misconduct ["Petition"].** This four-page form tells the judge the facts of the program operator's case and what orders the program operator wants the judge to make.
2. **Order to Show Cause and Temporary Restraining Order ["OSC/TRO"].** The judge signs this order to tell the participant to come to court for the court hearing. It may contain court orders that take effect immediately and stay in effect for up to five days or until the hearing.
3. **Participant's Response ["Response"].** The participant may file this form to object to the orders the program operator asked the court to make, and to give his or her side of the story.
4. **Order After Hearing ["Order"].** This is the permanent order or injunction. This form is signed by the court following the hearing. It will expire in one year or less unless the court terminates, modifies, or extends it.
5. **Proof of Personal Service.** This form shows that a participant or program operator has been served with legal papers as required by law.

INSTRUCTIONS FOR THE PROGRAM OPERATOR

STEPS TO TAKE TO GET A COURT ORDER

1. **Complete the forms.** Fill in the Petition and the OSC/TRO except for the date of the court hearing and the judge's signature. (Remember, most courts require that all forms be typewritten.)
   a. If you are not represented by an attorney, fill in the name of the person signing the petition, the program name, mailing address, and phone number at the top of each form. If you do not want to disclose your home or work address or phone number, you may use an address or phone number where you will be able to receive any communications.
   b. Fill in the name of the county where the action will be filed and the address of the superior court.
   c. Type your full name and the participant's full name.
   d. Mark with an "X" all boxes that apply to your case. Read each item carefully and fill in the necessary information. Be specific.
   e. You can type any witness statements (called affidavits or declarations) on form MC-031 and attach the form to your Petition.
   f. Remember to date and sign the Petition.

(Continued on reverse)

Steps to Take to Get a Court Order *(continued)*

2. **Make copies.** You will need at least five copies of each Transitional Housing Misconduct form: one for a worksheet,the original to file with the court, a copy to be personally delivered (served) to the participant, and two copies for yourself. You will need more than five copies of the OSC/TRO, the Order, and the Proof of Service form. In additionto the five copies above, get one for each law enforcement agency you want to enforce your orders, and two for yourself.
3. **TRO.** If you are requesting a TRO you must give details of the participant's misconduct or abuse, the problems it has caused you, and why you need an order before a full hearing. Place an "X" in the box marked "To be ordered now and to be effective until the hearing" under numbers 8, 9,10, 11, or 13 on the Petition.
4. **Court clerk.** Take all your completed forms and all copies to the clerk's office in the superior court. The clerk will tell you where to take your papers and when to pay your filing fee, if required.
5. **Court papers.** If the judge signs the OSC/TRO, take the original and all copies back to the court clerk. The clerk will stamp all the papers with a case number. The copies must include an "Endorsed-Filed" stamp (showing the date of filing), the judge's signature, and the date of signing. The clerk will file the originals and give you the copies. KEEP TWO ENDORSED-FILED COPIES FOR YOURSELF. Carry one with you and keep one in a safe place. You may need one if you have to call the police.
6. **Personal service.** Have the participant personally served with copies of the Petition and the OSC/TRO, a blank copy of the Response, two blank copies of form MC-031, a blank copy of the Proof of Personal Service, a copy of these instructions, and a copy of all materials (affidavits and supporting memoranda) to be used in the hearing. On the OSC/ TRO you must fill in the box on the first page with the name, address, and phone number of the Legal Services Office in the county in which the petition is filed.

   You cannot serve the participant yourself. Service may be made by a licensed process server, the sheriff's department, or any person 18 years of age or older, other than you or a program employee. The papers must be delivered to the participant personally, and cannot be mailed or left at the participant's dwelling unit.

   Service is very important. It tells the participant about the order and the hearing. Without it there will not bea court hearing and your TRO will no longer be good unless it is extended by the court. The participant must bepersonally served at least two days before the hearing.
7. **Copy to the police.** If you have requested a TRO and the judge has granted them, immediately deliver copies to eachlaw enforcement agency (police, marshal, or sheriff's office) that you want to enforce the order.
8. **After service.** After the participant has been personally served, the person who served the participant must complete and sign the original of the Proof of Personal Service form. Take the signed original and the copies back to the court clerk. The clerk will file the original and stamp "Endorsed-Filed" on the copies. Deliver one Endorsed-Filed copy to each law enforcement agency at which you filed your TRO. Keep two Endorsed-Filed copies for yourself.
9. **Court hearing.** Go to the court hearing with any evidence you have. Any witnesses to the participant's conduct also should come to the hearing. The Order should be filled in and given to the judge for signing.
10. **File the Order.** If the judge signs the Order, file the original with the clerk, get the copies stamped with an "Endorsed-Filed" stamp, and immediately deliver copies to law enforcement agencies.

    If the participant was not present in court for the hearing, arrange to have the participant personally served with a copy of the Order. File the completed Proof of Personal Service with the court and deliver copies stamped "Endorsed-Filed" to law enforcement agencies. KEEP TWO COPIES FOR YOURSELF. Carry one with you and keep one in a safe place.
11. **Renewal.** An Order will expire within one year, but you can apply for an extension. The law requires you to file for a renewal by filing a new Petition any time within three months before the Order expires. Do not check the modification box on the Petition when you file for renewal.

WHAT TO DO IF THE PARTICIPANT DISOBEYS THE ORDER

1. **Reports.** Report violations of the Order as soon as possible to your local law enforcement agency. Keep a written record of the incidents and obtain copies of police reports concerning them.
2. **Contempt of court.** Violation of a restraining order is punishable by civil contempt of court. You must file a civil contempt action in the same court that issued the restraining order. If the participant is in contempt of court, you can file for a modification of the order (use form TH-100) and ask the court to order the participant to move out of the program housing.

NOTE: See sample filled-in Petition on pages 5–8.

(Continued on reverse)

The next four pages show a Petition that has been completed with examples of the kind of information a court is likely to want.

After this form is filed, the clerk will stamp this box on the copies so everyone knows it is a copy of an official paper. This is the place for the "Endorsed--Filed" stamp.

The county clerk will give you this number. Use it on all forms you file later.

If you are not represented by an attorney, fill in your name, mailing address, and phone number at the top of each form.

County where you are filing your case. Contact the county clerk if you do not know the address.

Your full name or the name of the organization requesting the orders.

The full name of the person you want the orders against.

Check this box if you are asking for orders to go into effect immediately when the TRO is signed by the judge. You will also need to check the boxes in 8-14 and give the necessary information.

Put an **X** in the box that applies in items 2 and 3. You must check one box in each of those items.

Name all the people you want the judge to grant orders against. Only those people named here will be restrained or excluded by the orders.

Name any people here who live with the participant but should not have orders granted against them.

Be sure to attach a copy of the contract that was signed by the participant.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*:
Robert Hoe, Program Director (123) 456-7890
Family First Transitional Housing Program
123 Front St., Suite 230
Big City, California 90135

ATTORNEY FOR *(Name)*: In Pro. Per.

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ANY COUNTY

STREET ADDRESS: 100 Elm Street
MAILING ADDRESS: P.O. Box 109
CITY AND ZIP CODE: Anytown, California 91235
BRANCH NAME:

PROGRAM OPERATOR: Family First Transitional Housing Program

PARTICIPANT: Danny Doe

CASE NUMBER:

PETITION FOR ORDER PROHIBITING ABUSE OR PROGRAM MISCONDUCT

[X] **Application for Temporary Restraining Order**
[ ] **Modification of Previous Order *(date)*:**

(THIS IS NOT AN ORDER)

- *Read the Instructions for Program Operators before completing this form.*
- *You must have a copy served on the participant at least two days before the hearing.*

1. **Jurisdiction.** This suit is filed in this county because participant resides in this county.

2. **Program Operator *(name)*:** Family First Transitional Housing Program operates a "transitional housing program" as defined in Health and Safety Code section 50582(g).
   a. [ ] Governmental agency *(specify)*: [ ] Manager or operator
   b. [X] Private nonprofit corporation receiving program funds from a governmental agency. [X] Manager or operator
   The funding agency is *(specify)*: Department of Housing

3. **Program site *(specify street address, city, ZIP code)*:**
   a. [X] Dwelling unit of participant *(address optional)*: 200 Hill St., Apt. 16 Big City, California 90135
   b. [ ] Other locations of the program *(addresses)*:

4. **Participant to " restrained or excluded** is a "homeless person" dwelling at a "program site" as defined in Health and SafetyCode section 50582 *(name all to be restrained or excluded)*:

Name	Age (if under 18)
Danny Doe	

5. Persons living with participant h participant's dwelling unit who are not to be restrained or excluded *(name all below).* If none, check this box: [ ]

Name	Family relationship	Age (if under 18)
Margaret Doe	wife	
Denise Doe	daughter	5 years

6. Participant has signed a contract with the program operator. The contract includes *(attach a copy of the signed contract)*
   a. Program rules and regulations.
   b. A statement of program operator's right of control over and access to the program unit occupied by participant.
   c. A summary of the requirements and procedures of Health and Safety Code sections 50580-50591.

(Continued on reverse)

Form Adopted by the Judicial Council of California
TH-100 [Rev. September 1, 2018]

PETITION FOR ORDER PROHIBITING ABUSE OR PROGRAM MISCONDUCT (Transitional Housing Misconduct)

Civil Code, § 1954.13

(Continued on reverse)

Fill this in.

Leave this blank.

(THIS IS NOT AN ORDER)

PROGRAM OPERATOR: Family First Transitional Housing Program

PARTICIPANT: Danny Doe

CASE NUMBER:

Put an **X** in the boxes that apply to your case. Leave the boxes empty if they do not apply to your case. At least two boxes must be checked in either *a* or *b*. Boxes in both *a* and *b* can apply.

7. **Participant to be restrained or excluded *(names)*:**

a. [X] ***(Program misconduct)*** has intentionally violated the program rules and regulations. The violation substantially interferes with the orderly operation of the program AND involves *(check at least one and cite the rule number)*:

(i) [X] drunkenness on the program site *(rule no.)*: 4(a)

(ii) [ ] unlawful use or sale of controlled substances (drugs) *(rule no.)*:

(iii) [ ] theft *(rule no.)*:

(iv) [ ] arson (*rule no.)*:

(v) [ ] destruction of property of the program operator, program employees, other participants, or persons living within 100 feet of the program site *(names and relationships to program and rule no.)*:

(vi) [X] violence or threats of violence and harassment of program employees, other participants, or persons living within 100 feet of the program site *(names and relationships to program and rule no.)*:

Margaret Doe, participant in program. (Rule 7(b).)
John Roe, night manager in Danny Doe's building and program employee. (Rule 7(a).)

b. [ ] ***(Abuse)*** has intentionally or recklessly

(1) [ ] caused or attempted bodily injury

(2) [ ] caused or attempted sexual assault

(3) [ ] caused fear of serious bodily injury

to program employees, other participants, or persons living within 100 feet of the program site *(names and relationships to program)*: Margaret Doe, participant in the program.
John Roe, night manager in Danny Doe's building and program employee.

Item 7c is the most important part of your petition. This information is all the judge will know about your case until the hearing. Give details of the most recent incidents.

c. FACTS. Describe in detail the most recent incidents of program misconduct or abuse. State what happened, the dates and times,and who did what to whom. Describe any injuries or damage. For alleged program misconduct, cite the rules and regulations violated by each incident of misconduct. If more space is needed, attach additional pages and check this box: [ ] (You may use form MC-031 (on the reverse of form MC-030) as an attachment or for the declarations (affidavits) of witnesses.)

If you have so many facts they will not all fit, put an **X** in this box and write the facts on a separate piece of paper and attach it to the back of your petition, after page four. Use white paper the same size as this form or form MC-031 .

Participant, his wife, and their five-year-old daughter live in an apartment in a security building where a program employee is always on duty.

On June 22, 1992, participant returned home after the program curfew of 11 p.m. (Rule 10(a).) He staggered in with the smell of alcohol on his breath and clothes and required the assistance of his wife and the night manager to make it to bed. (Rule 4(a).) On June 24, 1992, participant yelled loudly at his wife, disturbing other residents, when she asked him to stop drinking. On June 25, 1992, participant again returned home drunk. (Rule 4(a).) When his wife attempted to help him to their apartment, participant cursed at her, hit her in the face, and tried to push her down the stairs. (Rule 7(b).) When the night manager attempted to intervene, participant cursed at him and told him to mind his own business. (Rule 7(a).)

On June 26, 1992, participant's wife had a cut lip and large bruise near her mouth as a result of participant's actions. (Rule 7(b).) That evening, participant returned home sober, but told the night manager (John Roe) that he (participant) would "get him" if he intervened between participant and his wife again. (Rule 7(a).)

Several residents have complained about the noise made by participant. Participant's drinking interferes with other residents' efforts to refrain from drinking. Residents do not understand why participant is not disciplined for breaking the program rules against drinking and disruptive behavior. (Rule 7(b).) The night manager is afraid to work a shift alone when participant might again return home drunk. (Rule 7(a).)

(Continued on next page)

(Continued on reverse)

Fill this in.

Leave this blank.

(THIS IS NOT AN ORDER)

PROGRAM OPERATOR: Family First Transitional Housing Program

PARTICIPANT: Danny Doe

CASE NUMBER:

PROGRAM OPERATOR REQUESTS THE COURT TO MAKE THE ORDERS INDICATED BY THE CHECK MARKS IN THE BOXES BELOW.

8. [X] PROGRAM MISCONDUCT RESTRAINING ORDERS (BREAKING RULES). **Participant must not** intentionally violate the program rules and regulations so as to interfere substantially with the orderly operation of the program and specificallythe rules and regulations on

   a. [X] drunkenness on the program site *(ruleno.)*: 4(a)
   b. [ ] unlawful use or sale of controlled substances (drugs) *(rule no.)*:
   c. [ ] theft *(rule no.)*:
   d. [ ] arson *(rule no.)*:
   e. [ ] destruction of property *(rule no.)*:
   f. [X] violence or threats of violence and harassment *(rule no.)*: 7(a), 7(b)

9. [X] ABUSE RESTRAINING ORDERS. **Participant must not** attack, strike, batter, or sexually assault, or threaten to attack, strike, batter, or sexually assault

   a. [X] program employees
   b. [X] program participants
   c. [ ] persons living within 100 feet of the program site

   [X] and specifically the following persons *(names)*:
   Margaret Doe, wife of participant.
   John Roe, program employee.

10. [ ] PROGRAM SITE EXCLUSION ORDERS. **Participant must** immediately move from and must not return to the program site and dwelling unit assigned to participant *(address optional)*:

    and may take participant's personal property needed until the hearing.

11. [ ] STAY-AWAY ORDERS. **Participant must** stay at least 200 feet away from the following places:

    a. [ ] Dwelling unit assigned to participant *(address optional)*:

    b. [ ] Other program site locations *(addresses)*:

12. [ ] OTHER ORDERS *(specify other orders you request to help carry out the orders requested in items 8-11)*:

13. I request that copies of orders be given to the following law enforcement agencies *(specify all with jurisdiction over program sites)*:

Law Enforcement Agency	Address
Big City Police Department	100 Dale Ave., Big City, CA 90134
Anycounty Sheriff's Dept.	200 Government Hall, Anytown, CA 90135
Faraway Police Department	90 Valley Blvd., Faraway, CA 90147

14. [ ] PREVIOUS PETITIONS. I have asked for restraining orders against participant before *(specify case numbers and dates)*:

(Continued on next page)

Put an **X** in the boxes that apply to your case. Leave the boxes empty if they do not apply to your case.

This space is where you ask for other orders you need. If you use this space, be sure to put in facts and dates in item 7c on page two of your petition that would give the court a reason to order what you ask for here.

List all the agencies you may want to enforce your order. The court will either tell the clerk to mail copies of the orders to the agencies or direct you or your attorney (if you have one) to deliver them personally.

(Continued on reverse)

Whenever you check these boxes you are asking for the order to go into effect immediately, as soon as the TRO is signed by the judge. You will also need to give the necessary information in item 15c.

Fill this in.

Leave this blank.

(THIS IS NOT AN ORDER)

PROGRAM OPERATOR: Family First Transitional Housing Program

PARTICIPANT: Danny Doe

CASE NUMBER:

[X] **REQUEST FOR TEMPORARY RESTRAINING ORDER**
To Be Effective From Now Until the Hearing

Check this box if you are requesting TROs. Check the boxes for the item numbers in which you requested TROs.

15. [X] I request that the orders requested in items [X] 8 [X] 9 [ ] 10 [ ] 11 [ ] 12 be effective from now until the hearing . *(Note: Temporary exclusion orders under items 10-11 require an emergency.)*

If you are requesting TROs, you must choose one option under both *a* and *b.* Check the boxes that apply.

a. **Participant**
(1) [X] **has not** been under contact with the program for more than six months *(date of contract)*: 5/1/92
(2) [ ] **has** been under contract with the program for more than six months, but
(i) [ ] a restraining order is in effect and subject to further orders (*specify in item 14).*
(ii) [ ] an action is pending against participant *(specify in item 14).*

b. **Notice to participant.** [X] Program operator [ ] Operator's attorney *(attach attorneys affidavit)*
(1) [X] informed participant or his or her attorney on *(date)*: June 27, 1992
at *(time)*: 10:30 a.m. of the date, time, and place this petition would be filed.
(2) [ ] made the following good-faith efforts to inform participant or his or her attorney of the date, time, and place this petition would be filed *(specify efforts)*:
(3) [ ] should not be required to inform the participant or his or her attorney of the date, time, and place this petition would be filed because *(specify reasons)*:

If you are asking for the orders to go into effect immediately, as soon as the judge signs the TRO, you must state the reasons. State what harm would result to you if the orders were not made immediately.

c. NEED FOR IMMEDIATE ORDER BEFORE THE HEARING. Program operator, program participants, or persons living within 100 feet of the program site will suffer great and irreparable harm before this petition can be heard in court unless the court makes those orders requested above effective now and until the hearing. *(Specify the harm andwhy it will occur before the hearing. For temporary exclusion orders under items 10-11, show emergency and need to prevent imminent serious bodily injury.*)

Participant has threatened the night manager (John Roe), and the manager is afraid to work a shift alone in participant's building. The program has a limited staff, and we cannot replace John until the hearing. Other participants have been disturbed by participant's behavior and we need to be able to restrain him to continue to operate the program in his building. The night manager may need the assistance of the police to protect Margaret Doe from her husband if participant again returns home drunk.

15. [X] Number of pages attached: 3 Contract dated May 1, 1992)

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

Date: June 29, 1992

Robert Hoe
(TYPE OR PRINT NAME)

Robert Hoe
(SIGNATURE OF PROGRAM OPERATOR)

TITLE of person signing: Program Director

VERY IMPORTANT:
1. The date you sign.
2. Your signature.
DO NOT FORGET THESE OR ALL YOUR WORK WILL BE WASTED.

INSTRUCTIONS FOR PARTICIPANTS
LAWSUITS TO PROHIBIT ABUSE OR PROGRAM MISCONDUCT
(Transitional Housing Misconduct Act)

(Civil Code section 1954.10 et seq.)

Read the "General Instructions" first. Then read the *special instructions* for participants on page three.

GENERAL INSTRUCTIONS

WHO CAN GET ORDERS PROHIBITING ABUSE OR MISCONDUCT?

Program operators can get orders. **Program operators** are individuals or organizations that run a transitional housing program. The Transitional Housing Misconduct Act applies only if the housing program

(1) is run by a government agency, a private nonprofit corporation that receives program funds from a government agency, or an operator hired by one of the above to run the program;
(2) helps homeless persons obtain the skills necessary for independent living in permanent housing;
(3) includes regular individualized case management services;
(4) provides a structured living environment and requires compliance with program rules; **and**
(5) restricts the occupancy period to not less than 30 days but not more than 24 months.

Only the program operator can ask the court for orders against a participant. A program participant cannot ask the court for orders against a fellow participant, nor can program employees or neighbors of the program site ask for orders. The program operator can, however, petition on their behalf.

TO WHOM DO THESE ORDERS APPLY?

These orders apply to participants in transitional housing programs. A **participant** is someone who lives in housing run by a program operator and who has a contract with the operator. The participant must have been homeless before entering the program.

Someone is a homeless person if, before coming to the housing program, he or she lacked a regular and adequate nighttime residence or the most recent nighttime residence was

(1) a supervised shelter designed to provide temporary housing; or
(2) an institution that provides temporary housing for individuals intended to be institutionalized; or
(3) a place not designed or ordinarily used as sleeping accommodations for humans.

Someone is a **participant** in a housing program if he or she signed a contract with the program as a condition to gettinghousing. The program operator can get orders only against a participant who has signed a contract that includes

(1) the housing program's rules;
(2) a statement of the program operator's right of control and access over the unit occupied by the participant; **and**
(3) a restatement of the procedures and rights created by the Transitional Housing Misconduct Act.

The program operator can ask for orders against the participant and anyone living with the participant at the programsite. The operator must prove program misconduct or abuse, however, for each individual against whom orders are granted.

Restraining orders issued under this act apply only to the persons named in the order. That means that if the court orders only one member of a family to move out of program housing, the rest of the family members may remain in the program (unless they are all minors).

WHEN CAN THE COURT MAKE ORDERS PROHIBITING ABUSE OR MISCONDUCT?

Program operators can ask the court for orders if the participant has engaged in program misconduct or abuse. The participant's conduct is program misconduct if

(1) the participant intentionally broke the program rules;
(2) the participant's conduct substantially interferes with the program operator's ability to run the housing program; **and**

(Continued on reverse)

When Can The Courts Make Orders Prohibiting Abuse or Misconduct? *continued*

(3) the conduct relates to
  (a) drunkenness, sale or use of drugs, theft, arson, or destruction of another person's property; or
  (b) violence or threats of violence directed at, and harassment of, immediate neighbors of the program site, program employees, or other participants.

The participant's conduct is abuse if
(1) the participant did or attempted to attack, strike, batter, or sexually assault other participants, program employees, or immediate neighbors of the program site; or
(2) the participant threatened to attack, strike, batter, or sexually assault the above individuals.

WHAT KINDS OF ORDERS ARE AVAILABLE TO PREVENT ABUSE OR MISCONDUCT?

There are two kinds of orders a program operator can request--a Temporary Restraining Order ("TRO") or a "permanent" order (Order After Hearing), or both. These both are court orders forbidding someone from engaging in the activity described in the order.

(1) A Temporary Restraining Order ("TRO") is issued by a judge after a request for a permanent order has been filed, but before there has been a full hearing.
(2) Permanent orders can be issued only after a full hearing before a judge, where both the participant and the program operator can be represented by attorneys and have the opportunity to present evidence.

TEMPORARY RESTRAINING ORDERS ("TRO") BEFORE THE HEARING

A TRO orders the participant to stop the abuse or misconduct and goes into effect immediately. The order lasts a maximum of five days. The court may not be able to grant a hearing within five days, in which case the order will last until the hearing. To get a TRO the program operator must prove that the participant has engaged in program misconduct or abuse and that great or irreparable harm will result before the hearing if the TRO is not granted.

In limited circumstances, the judge can use a TRO to order the participant to move out. The judge will do this only f it is necessary to protect another participant, a program employee, or an individual who lives within 100 feet of the program site from imminent serious bodily injury. To get a TRO excluding the participant from program housing, the program operator must provide clear and convincing evidence that the participant engaged in abuse and that great or irreparable injury will result before the hearing if the participant is not ordered to move out or stay away from the housing program, or both.

If the participant has been living in program housing under contract for six months or longer, the program operator cannot get a TRO unless an action is pending against the participant or a TRO is already in effect and is subject to further orders. The program operator may still use unlawful detainer procedures or file for a permanent order only.

You must give notice to the participant before asking for a TRO. Notice requires you to show the judge that
(1) before applying for the TRO you told the participant or the participant's attorney when and where the application would be made; or
(2) you made a good-faith effort to tell the participant or the participant's attorney; or
(3) you should not have to give notice because great harm would result to a program operator, participant, or immediate neighbor of the program site before the hearing.

ORDER AFTER HEARING ("PERMANENT" ORDERS)

Temporary restraining orders last a maximum of five days or until the hearing. When the judge issues the TRO, he she will set a date for the hearing on the permanent order (also called the Order After Hearing or "injunction"). A "permanent" order issued after a hearing lasts up to one year.

The program operator seeking the order must have the following papers delivered (served) to the participant at least two days before the hearing
(1) a copy of the Order to Show Cause (Transitional Housing Misconduct);
(2) a copy of the Temporary Restraining Orders (if any);
(3) a copy of the Petition for Order Prohibiting Abuse or Program Misconduct;
(4) a blank Participant's Response (Transitional Housing Misconduct);
(5) two copies of a blank Attached Declaration (form MC-031);
(6) a blank Proof of Personal Service (Transitional Housing Misconduct);
(7) a copy of these instructions; **and**
(8) copies of all materials (affidavits and supporting memoranda) to be used in the hearing.

(Continued on next page)

Order After Hearing *continued*

The Order to Show Cause must contain the name and phone number of the Legal Services Office in the county where the petition was filed, and must inform the participant this office may be called for legal advice about responding to the request for court orders.

In limited circumstances the court will make a permanent order for the participant to move out of or keep away from the program site. To get this type of order, the program operator must provide clear and convincing evidence that the participant engaged in abuse and that great or irreparable injury will result if the order is not granted.

WHAT IS NEEDED TO GET THE COURT ORDERS OR TO OBJECT TO THEM?

1. Transitional Housing Misconduct forms, available from the superior court clerk's office or from legal publishers. The court clerk can tell you where to get the forms.
2. A typewriter with which to fill out the forms. The forms should be typed. Some volunteer legal service groups have typewriters you can use, and some libraries offer the use of typewriters for a small fee. If you cannot type, print clearly.
3. Money for a court filing fee, unless the court excuses you from paying. If you cannot afford to pay the court filing fee, ask the clerk for the Information Sheet on Waiver of Court Fees and Costs. If you are a participant objecting to the court orders, you do not have to pay to file your response.
4. Someone 18 years of age or older to deliver (serve) certain papers to the other party. This person must be someone other than yourself, and not an employee of the program.

WHAT FORMS ARE AVAILABLE FOR OBTAINING OR OPPOSING AN ORDER?

1. **Petition for Order Prohibiting Abuse or Program Misconduct ["Petition"].** This four-page form tells the judge the facts of the program operator's case and what orders the program operator wants the judge to make.
2. **Order to Show Cause and Temporary Restraining Order ["OSC/TRO"].** The judge signs this order to tell the participant to come to court for the court hearing. It may contain court orders that take effect immediately and stay in effect for up to five days or until the hearing.
3. **Participant's Response ["Response"].** The participant may file this form to object to the orders the program operator asked the court to make, and to give his or her side of the story.
4. **Order After Hearing ["Order"].** This is the permanent order or injunction. This form is signed by the court following the hearing. It will expire in one year or less unless the court terminates, modifies, or extends it.
5. **Proof of Personal Service.** This form shows that a participant or program operator has been served with legal papers as required by law.

INSTRUCTIONS FOR THE PARTICIPANT

1. **Legal advice.** If you are served with an Order to Show Cause and Temporary Restraining Order ["OSC/TRO"] and a Petition, you should seek legal advice right away. The OSC/TRO should list the name, address, and phone number of the Legal Services Office in the county where the petition is filed. You may be able to get legal services by contacting this office. If you do not have an attorney, you can also call the attorney's referral service of your local bar association for help.
2. **Read the Instructions.** Whether or not you choose to talk to an attorney, you should read all of these instructions and the other papers you have received.
3. **Obey the Order.** Read the papers served on you very carefully. The Petition tells you what orders the program operator is asking the court to make. The OSC/TRO tells you when to appear in court and may contain a temporary order telling you that you cannot do certain things. YOU HAVE TO OBEY THE ORDER. IF YOU DO NOT OBEY THE COURT'S ORDERS, CRIMINAL CHARGES MAY BE FILED AGAINST YOU. IF YOU ARE FOUND IN CONTEMPT OF COURT FOR NOT FOLLOWING THE COURT'S ORDERS, THE COURT CAN CHANGE THE ORDERS TO FORCE YOU TO MOVE OUTOF THE PROGRAM'S HOUSING.
4. **Review the facts.** Read the description of the facts on the Petition very carefully. This is where the program operator tells the judge what he or she thinks happened. If you do not agree with the facts on the petition or you think it would not be fair for the court to grant orders against you, GO TO THE HEARING. The place and time of the hearing are on the first page of the form named "Order to Show Cause and Temporary Restraining Order."
5. **Respond to the court.** If you want to fight the petition you should file a Participant's Response. YOU DO NOT HAVE TO PAY A FEE TO FILE THIS FORM. A blank copy of the Response should have been given to you with the OSC/TRO.

(Continued on reverse)

Instructions For The Participant *continued*

You can also file and serve statements signed by people who have personal knowledge of the facts. These are called "declarations." You can type these declarations on form MC-031 and attach them to your Response. If you do not know how to prepare a declaration, you should see an attorney.

6. **Serve a copy on program operator.** After you have filed the Participant's Response with the superior court clerk, acopy must be delivered personally or by mail to the program operator or the program operator's attorney.
   You cannot serve the program operator yourself. Service may be made by a licensed process server, the sheriff's department, or any person 18 years of age or older, other than you. The person should complete and sign a Proof of Personal Service form. (A blank copy should have been given to you with the OSC/TRO.) You should take the completed form back to the court clerk or bring it with you to the hearing.
7. **Extensions.** If you need more time to find an attorney or to prepare your Response, you must ask the judge for acontinuance (extension) by the hearing date shown on the OSC/TRO.
8. **Opposing the Petition.** If you wish to fight the lawsuit, you should file a Participant's Response and also go to thehearing. If you have any witnesses, they also must be present. If you do not attend the hearing, the court may make "permanent" orders against you that will last up to one year. If you can't file and serve a Response (or find an attor-ney who will), SHOW UP AT THE HEARING ANYWAY. At the hearing, explain your difficulties to the judge, and ask to be allowed to tell your side of the case.

NOTE: See sample filled-in Participant's Response on pages 5–6.

(Continued on next page)

Make sure you copy boxes 2, 3, and 4 exactly as they are on the OSC/TRO forms you got from the housing program.

If you do not have an attorney, fill in your name, mailing address, and telephone number. If you have an attorney, the attorney will help you fill out this form. If you need help, call legal aid at the number on the form.

In Pro. Per. means you do not have an attorney.

You can find this number on the front page of the OSC/TRO forms that were given to you along with this form. Find the box that says "Case Number" and copy that number exactly into this box.

Do not fill in this box.

Address of the court where you are filing your response. If you are not sure of the correct address, call the county clerk.

Housing program name.

Your name.

You can find the hearing date, time, department number, and room number on the first page of the OSC/TRO forms you were given.

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*:
Danny Doe
200 Hill St., Apt. 16
Big City, California 90135
(123) 456-7891

1.

ATTORNEY FOR *(Name)*: In Pro. Per.

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

2.
STREET ADDRESS: 200 Main Street
MAILING ADDRESS: P.O. Box 4000
CITY AND ZIP CODE: Anytown, California 90134
BRANCH NAME:

3.
PROGRAM OPERATOR: Family First Transitional Housing Program
PARTICIPANT: Danny Doe

PARTICIPANT'S RESPONSE
to Petition For Order Prohibiting Abuse or Program Misconduct

4.

HEARING DATE	TIME	DEPT.	ROOM
July 3, 1992	10:00 a.m.	3	765

CASE NUMBER: C-12345

Read the Petition, especially item 7c, before you answer.

Each participant should file a separate response. (A family may file one response.)
- *If your printing is legible, you may handprint this form.*
- *Your response will be considered by the judge at the court hearing. No filing fee is required.*
- *You must still obey any orders already granted until the hearing.*
- *You have a right to ask the judge to postpone the hearing date.*
- *If you do not appear at the court hearing, the court may grant restraining orders against you that may last up to one year.*
- *Read the Instructions for Participants before competing this form.*

I RESPOND to the Petition or Order Prohibiting Abuse or Misconduct as follows:

If you need additional space, attach form MC-031 (on the reverse side of MC-030). Also use form MC-031 for statements by witnesses. Reference each part on form MC-031 by a number from this form.

Mark the box that applies to your case. Do not mark *both* boxes *a* and *b.*

1. [X] DENIAL
   - a. [ ] I deny doing all of the acts stated in item 7 of the petition.
   - b. [X] I deny doing some of the acts stated in item 7 of the petition. *(Specify acts you deny doing)*:
     (Specify on attached form MC-031 if you need more room, and check this box: [ ] *)*

If you marked box *b,* use this space to explain which acts you did not do.

I did not yell loudly at my wife or disturb other residents. I did not hit my wife or try to push her down the stairs. I did not threaten the night manager.

2. [X] DENIAL OF PROGRAM MISCONDUCT
   - a. [X] My acts, if any, did not substantially interfere with the orderly operation of the transitional housing program.
   - b. [ ] My acts, if any, did not violate the rules and regulations of the transitional housing program *(explain)*:
     Specify on attached form MC-031 if you need more room, and check this box: [ ] *)*

Mark each box that applies to your case. You can mark both boxes a and *b* if they both apply.

If you marked box *b,* use this space to explain why your acts did not violate the rules.

If you need more space to write your answer, mark this box and use a separate sheet of paper or form MC-031. Attach any extra paper to this form.

(Continued on reverse)

Form Adopted by the Judicial Council of California
TH-120 [Rev. September 1, 2018]

PARTICIPANT'S RESPONSE
(Transitional Housing Misconduct)

Civil Code, § 1954.13(c)

(Continued on reverse)

Your name.

Housing program name.

Use the same case number from page one of this form.

If you marked box 1.b. on page one of this form, you may want to explain here.

Use this space to explain why your acts served a legitimate purpose (box *a*) or were constitutionally protected (box *b*).

Read the definition of "Transitional Housing Program" (see "Who Can Get Orders Prohibiting Abuse or Misconduct?" on page one of these Instructions). If your housing does not match the definition, mark this box. Don't forget to explain why in the space below.

When you moved in, the program should have given you a contract. Mark the boxes to show what you did not get.

If you have any other reasons that justify your actions, mark this box and explain what they are.

After you are done, count the number of pages you are attaching to this form and put that number here. Do not include the two pages of this form in that number.

VERY IMPORTANT:
1. The date you sign.
2. Your signature.
DO NOT FORGET THESE OR ALL YOUR WORKWILL BE WASTED.

Keep a copy for your records. Make sure the court stamps your copy.

PROGRAM OPERATOR: Family First Transitional Housing Program
PARTICIPANT: Danny Doe
CASE NUMBER: C-12345

3. [X] JUSTIFICATION OR EXCUSE
I have done some or all of the acts of which I am accused, but the actions are justified or excused for the following reasons:

a. [X] My acts served a legitimate purpose *(specify)*:
(Specify on attached form MC-031 if you need more room, and check this box: [ ] *)*

On June 25, 1992, I did tell the night manager to mind his own business because he has been trying to interfere with my marriage to my wife.

b. [ ] My acts were constitutionally protected *(specify):*
(Specify on attached form MC-031 if you need more room , and check this box: [ ] *)*

4. [ ] WRONG PROGRAM. Program operator does not operate a "transitional housing program" as defined in Health and Safety Code section 50582(g) *(explain)*:

If you need more space to write your answer, mark this box and use a separate sheet of paper or form MC-031. Attach any extra paper to this form.

5. [X] PROGRAM CONTRACT
a. [ ] I have no contract with the program operator.
b. [ ] The contract does not include the program rules and regulations.
c. [ ] The contract does not include a statement of program operator's right of control over and right of access to mydwelling unit.
d. [X] The contract does not contain a restatement or summary of the requirements and procedures of the Transitional Housing Participant Misconduct Act.

6. [X] OTHER DEFENSES. I have other defenses or reasons a court order should not be granted *(specify)*:
(*Specify on attached form MC-031 if you need more room, and check this box:* [ ] *)*

I never got copies of the program rules. The program is not giving me the job training it promised. Also, I just got a new job that starts in a week that I may not be able to keep if I am homeless again.

7. [ ] Number of pages attached: _____

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

Date: July 2, 1992

Danny Doe
(TYPE OR PRINT NAME)

Danny Doe
(SIGNATURE OF PARTICIPANT)

TH-120 [Rev. September 1, 2018] **PARTICIPANT'S RESPONSE** **Page 2**
(Transitional Housing Misconduct)

Item number: 09

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: TBD

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Forms: Technical Changes—Redesignate and Renumber 41 Miscellaneous (MC) Forms and Amend One Rule of Court

Committee or other entity submitting the proposal:
Judicial Council Staff

Staff contact (name, phone and e-mail): Patrick O'Donnell, 415-865-7665 patrick.o'donnell @jud.ca.gov

Bruce Greenlee, 415-865-7698 bruce.greenlee@jud.ca.gov,

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

If requesting July 1 or out of cycle, explain:
September 1 is effective date for technical corrections to forms.

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

JUDICIAL COUNCIL OF CALIFORNIA

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

www.courts.ca.gov

REPORT TO THE JUDICIAL COUNCIL

For business meeting on May 24–25, 2018

Title
Forms: Technical Changes—Redesignate and Renumber 41 Miscellaneous (MC) Forms and Amend One Rule of Court

Rules, Forms, Standards, or Statutes Affected
Redesignate and renumber forms CR-174, MC-001, MC-002, MC-003, MC-060, MC-070, MC-095, MC-100, MC-101, MC-210, MC-265, MC-270, MC-275, MC-280, MC-281, MC-300, MC-301 (and foreign language versions), MC-305, MC-306, MC-310, MC-315, MC-360, MC-360A, MC-361, MC-361A, MC-362, MC-362A, MC-400, MC-600, MC-601, MC-602, MC-603, MC-700, MC-701, MC-702, MC-703, MC-704, MC-950, MC-955, MC-956, and MC-958; and amend Cal. Rules of Court, rule 3.36

Recommended by
Judicial Council staff
Patrick O'Donnell, Principal Managing Attorney
Legal Services

Agenda Item Type
Action Required

Effective Date
September 1, 2018

Date of Report
March 22, 2018

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Executive Summary

There are currently over 75 Judicial Council forms (including a few foreign language versions) that bear a subject-area identifier of MC (Miscellaneous). "Miscellaneous" is not a very helpful term to a user who is searching for a particular form from the "Select a Category" drop-down list on the California Courts website. Many of the MC forms actually fit into discrete subject areas

that could be assigned unique category-identifying labels. Others could fit within an existing category-identifying label. Judicial Council staff recommend redesignating and renumbering 41 of these MC forms (plus four foreign language forms) to give them a more specific identifying label.

Recommendation

Judicial Council staff recommend that the council, effective September 1, 2018:

1. Create new forms category Birth, Marriage, Death (BMD) and renumber forms as follows:
    a. MC-361 to BMD-001
    b. MC-361A to BMD-001A
    c. MC-362 to BMD-002
    d. MC-362A to BMD-002A
    e. MC-360 to BMD-003
    f. MC-360A to BMD-003A

2. Create new forms category Emancipation of Minors (EM) and renumber forms as follows:
    a. MC-300 to EM-100
    b. MC-301 (and foreign language versions MC-301-C, MC-301-K, MC-301-S, and MC-301-V) to EM-100-INFO (and corresponding C, K, S, and V versions)
    c. MC 305 to EM-109
    d. MC-306 to EM-115
    e. MC-310 to EM-130
    f. MC-315 to EM-140

3. Create new forms category Habeas Corpus (HC) and renumber forms as follows:
    a. MC-275 to HC-001
    b. MC-265 to HC-002
    c. MC-270 to HC-003
    d. CR-175 to HC-004

4. Create new forms category Jury Selection (JURY) and renumber forms as follows:
    a. MC-001 to JURY-001
    b. MC-002 to JURY-002
    c. MC-003 to JURY-003
    d. MC-070 to JURY-010

5. Create new forms category Menacing Dog (MD) and renumber forms as follows:
    a. MC-600 to MD-100
    b. MC-601 to MD-109
    c. MC-602 to MD-130
    d. MC-603 to MD-140

6. Create new forms category Vexatious Litigants (VL) and renumber forms as follows:
    a. MC-700 to VL-100

b. MC-701 to VL-110
c. MC-702 to VL-115
d. MC-703 to VL-120
e. MC-704 to VL-125

7. Move the following forms to the Civil (CIV) category as follows:
    a. MC-950 to CIV-150
    b. MC-955 to CIV-151
    c. MC-956 to CIV-152
    d. MC-958 to CIV-153
    e. MC-100 to CIV-160
    f. MC-101 to CIV-161
    g. MC-095 to CIV-170

8. Move the following forms to the Criminal (CR) category as follows:
    a. MC-210 to CR-105
    b. MC-280 to CR-173
    c. MC-281 to CR-174
    d. MC-400 to CR-220

9. Move form MC-060 to the Case Management (CM) category and renumber as CM-011.

10. Amend rule 3.36 of the California Rules of Court to conform the internal references to forms to the new form designations and numbers.

A spreadsheet of redesignated and renumbered forms by name, old number, and new number is attached at pages 6–7. Drafts of the revised forms are attached at pages 8–118. The text of the amended rule is attached at pages 119–120.

Relevant Previous Council Action

All forms proposed to be redesignated and renumbered have previously been adopted or approved by the Judicial Council.

Analysis/Rationale

Legal Services staff reviewed all of the MC forms and allocated each form to one of three destinations: (1) forms to move to a new, unique category; (2) forms to move to an existing category; and (3) forms to remain MC (Miscellaneous). The criteria used to make the determination were that there be a subject-area connection among forms to be moved to a new category and that there be a subject-area connection between a form and an existing category. There are at least four forms in each newly created category.

The redesignation of these MC forms will make it easier for users to find the form they are looking for. For example, if a user wants the form to commence an emancipation-of-minor proceeding, instead of having to search through the 75 forms in the Miscellaneous category for

Petition for Declaration of Emancipation of Minor (form MC-300), one will look for the form in the Emancipation of Minor category, where it will be listed as form EM-100. By having "Emancipation of Minor" appear in the category drop-down list, the user's search will be simplified and the time spent looking for a form will be shortened substantially.

Other than changing to the revision date and changing internal cross-references to other forms being renumbered, no other changes are proposed for any of the forms.

Input from subject-area staff

Legal Services staff solicited the views of staff for the various advisory committees and subject matter groups with responsibility for the MC forms proposed to be redesignated and renumbered. The Center for Families, Children & the Courts agreed with the new forms identifiers BMD (Birth, Marriage, and Death) and EM (Emancipation of Minors). Criminal Justice Services agreed with the new forms identifier HC (Habeas Corpus) and to moving four forms from MC to CR (Criminal Law). The Jury Services group agreed with the new identifier JURY for the four forms related to jury service. Civil and Small Claims agreed with moving forms from MC to CIV (Civil) and CM (Case Management).[1]

Minors Compromise MC forms

The Probate and Mental Health Advisory Committee staff agreed with the new forms identifier CC (Compromise of Claims) for the Minors Compromise forms, which are currently MC-350 through MC-358. However, this group is considering other substantive changes to these forms. For this reason, the Minors Compromise forms are not included in this technical change proposal. Probate and Mental Health will be proceeding separately, and will be presenting both substantive changes and the new identifiers.

Policy implications

These proposals would make technical changes only. While policy implications are limited the changed designations may improve access to courts by making forms easier to find.

Comments

These proposals were not circulated for public comment because they are noncontroversial and involve only technical revisions. They are, therefore, on a recommendation from its Rules and Projects Committee, within the Judicial Council's purview to adopt without circulation. (See Cal. Rules of Court, rule 10.22(d)(2).)

[1] Form titles will remain unchanged and are shown on the spreadsheet of redesignated and renumbered forms at pages 6–7.

The form numbers for the HC and CR forms were chosen by staff in Criminal Justice Services. The request to redesignate CR-175 as an HC form also came from Criminal Justice Services. The form numbers for the JURY forms were chosen by staff for Jury Services.

Alternatives considered

Consideration was given to changing the identifier for Miscellaneous forms from MC to MISC, so that MC could then be used for the new category Minors Compromise. But too many forms cross-refer to current form MC-025, *Attachment*. It would be prohibitively burdensome to rename this form everywhere that it appears in other forms.

Fiscal and Operational Impacts

Operational impacts are expected to be minor. The proposed revisions may result in reproduction costs if courts provide hard copies of any of the forms recommended for revision. Case management systems may need updating to revise form identifiers and numbers.

Attachments and Links

1. Spreadsheet of redesignated and renumbered forms by name, old number, and new number, at pages 6–7
2. Draft forms as redesignated and renumbered, at pages 8–118
3. Cal. Rules of Court, rule 3.36, at pages 119–120
4. Current forms categories on the California Courts website, *www.courts.ca.gov/forms.htm?filter=MC*

Form Title	Old MC #	New #
Petition to Establish Fact, Time, and Place of Birth	MC-361	BMD-001
Declaration in Support of Petition to Establish Fact, Time, and Place of Birth	MC-361A	BMD-001A
Petition to Establish Fact, Date, and Place of Marriage	MC-362	BMD-002
Declaration in Support of Petition to Establish Fact, Date, and Place of Marriage	MC-362A	BMD-002A
Petition to Establish Fact, Time, and Place of Death	MC-360	BMD-003
Declaration in Support of Petition to Establish Fact, Date, and Time of Death	MC-360A	BMD-003A
Notice of Limited Scope Representation	MC-950	CIV-150
Application to Be Relieved As Attorney On Completion of Limited Scope Representation	MC-955	CIV-151
Objection to Application to Be Relieved As Attorney On Completion of Limited Scope Representation	MC-956	CIV-152
Order On Application to Be Relieved As Attorney On Completion of Limited Scope Representation	MC-958	CIV-153
Petition for Order Striking and Releasing Lien, etc. (Government Employee)	MC-100	CIV-160
Order to Show Cause (Government Employee)	MC-101	CIV-161
Petition and Declaration Regarding Unresolved Claims and Deposit of Undistributed Surplus Proceeds of Trustee's Sale	MC-095	CIV-170
Confidential Cover Sheet False Claims Action	MC-060	CM-011
Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense	MC-210	CR-105
Order for Commitment (Sexually Violent Predator)	MC-280	CR-173
Order for Extended Commitment (Sexually Violent Predator	MC-281	CR-174
Proof of Enrollment or Completion (Alcohol or Drug Program)	MC-400	CR-220
Petition for Declaration of Emancipation of Minor, Order Prescribing Notice, Declaration of Emancipation, and Order Denying Petition	MC-300	EM-100
Emancipation Pamphlet (and foreign language translations)	MC-301	EM-100-INFO
Notice of Hearing-Emancipation of Minor	MC-305	EM-109
Emancipation of Minor Income and Expense Declaration	MC-306	EM-115

Declaration of Emancipation of Minor After Hearing	MC-310	EM-130
Emancipated Minor's Appllication to California Department of Motor Vehicles	MC-315	EM-140
Petition for Writ of Habeas Corpus	MC-275	HC-001
Petition for Writ of Habeas Corpus-LPS Act (Mental Health]	MC-265	HC-002
Petition for Writ of Habeas Corpus-Penal Commitment (Mental Health)	MC-270	HC-003
Notice and Request for Ruling (Criminal)	CR-175	HC-004
Juror Questionnaire for Civil Cases	MC-001	JURY-001
Juror Questionnaire for Criminal Cases/Capital Case Supplement	MC-002	JURY-002
Juror Questionnaire for Expedited Jury Trial	MC-003	JURY-003
Juror's Motion to Set Aside Sanctions and Order	MC-070	JURY-010
Petition to Determine if Dog Is Potentially Dangerous or Vicious	MC-600	MD-100
Notice of Hearing (Menacing Dog)	MC-601	MD-109
Order After Hearing (Menacing Dog)	MC-602	MD-130
Notice of Appeal (Menacing Dog)	MC-603	MD-140
Prefiling Order - Vexatious Litigant	MC-700	VL-100
Request to File New Litigation by Vexatious Litigant	MC-701	VL-110
Order to File New Litigation by Vexatious Litigant	MC-702	VL-115
Application for Order to Vacate Prefiling and Remove Name from Statewide Vexatious Litigant List	MC-703	VL-120
Order on Application to Vacate Prefiling Order and Remove Plaintiff/Petitioner From Judicial Council Vexatious Litigant List	MC-704	VL-125

BMD-001

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
IN THE MATTER OF *(Name):*	CASE NUMBER:
PETITION TO ESTABLISH FACT, TIME, AND PLACE OF BIRTH	HEARING DATE AND TIME: / DEPT.:

Notice to Petitioners

At or before the court hearing on this petition, you must provide to the court a completed (filled-in) order for the judicial officer to sign. The order must be prepared on a form issued by the California Department of Public Health Vital Records (CDPH Vital Records), the *Order Establishing Fact of Birth* (form VS 108). The top portion of that form is the court order. The bottom portion of that form is the birth certificate you must submit for filing to CDPH Vital Records with a copy of the signed order certified by the clerk of the court. Form VS 108 may be obtained from CDPH Vital Records or from a county recorder or health department. Information about the form, including instructions on how to get it and how to complete and file it with the court and with CDPH Vital Records, is available online at ***www.cdph.ca.gov/certlic/birthdeathmar/Pages/CorrectingorAmendingVitalRecords.aspx.***

1. a. Petitioner *(name each):*

   is beneficially interested in and entitled under section 103450 of the California Health and Safety Code to an order establishing the fact and the time and place of the birth of the person named in item 2a.

   b. Petitioner's beneficial interest in this matter is as follows:

   (1) ☐ I am the person named in item 2a.

   (2) ☐ I am related to the person named in item 2a as follows *(specify the relationships of all petitioners to that person):*

   (3) ☐ I am not related to the person named in item 2a.

   (4) ☐ I am interested in this matter for the following reasons *(complete unless item 1b(1) is selected):*

   ☐ Continued in Attachment 1b(4).

2. Petitioner requests the court to establish the fact, time, and place of the birth of the person named in item 2a.

   a. Name:

   b. Father's Name: Mother's Name:

   c. Time of birth *(date and time of day):* ☐ a.m. ☐ p.m.

   d. Place of birth: City, town, township, or other *(identify "other" if known):*

   (1) ☐ County: State (U.S.):

   (2) ☐ State or province: Country:

Form Adopted for Mandatory Use
Judicial Council of California
BMD-001 [Rev. September 1, 2018]

Health and Safety Code,
§§ 103450–103490
www.courts.ca.gov

IN THE MATTER OF *(Name):*	CASE NUMBER:

3. *(Check one of the following):*
   a. ☐ There is no official record of the fact, time, and place of the birth of the person named in item 2a.
   b. ☐ A certified copy of the official record of the birth of the person named in item 2a cannot be obtained for the following reasons:

☐ Continued in Attachment 3b.

4. The person named in item 2a now resides at *(street address and city):*

County: State:

5. Petitioner requests that the court make an order determining that the birth of the person named in item 2a did in fact occur at the time and at the place stated in items 2c and 2d, as shown by the *Declaration in Support of Petition to Establish Fact, Time, and Place of Birth* (form BMD-001A) and attachments, filed herewith, and by other proofs adduced at the hearing.
6. Number of pages attached: _____

Date:

(TYPE OR PRINT NAME OF ATTORNEY FOR PETITIONER) ▶ (SIGNATURE OF ATTORNEY)

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct, except as to those matters stated on information and belief, and as to those matters, I am informed and believe them to be true.

Date:

(TYPE OR PRINT NAME OF PETITIONER) ▶ (SIGNATURE OF PETITIONER)

Date:

(TYPE OR PRINT NAME OF PETITIONER) ▶ (SIGNATURE OF PETITIONER)

Date:

(TYPE OR PRINT NAME OF PETITIONER) ▶ (SIGNATURE OF PETITIONER)

BMD-001A

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
IN THE MATTER OF *(Name):*	CASE NUMBER:
DECLARATION IN SUPPORT OF PETITION TO ESTABLISH FACT, TIME, AND PLACE OF BIRTH	HEARING DATE AND TIME: / DEPT.:

(Name of declarant): declares as follows:

1. I make the statements in this declaration based on my personal knowledge or on the contents of the documents identified in item 5. (*"Personal knowledge" of a fact is knowledge that is **not** gained from another person's statements to you about that fact.)*
2. a. I am at least 18 years of age.
   b. I reside at *(street address and city):*

   County: State:
3. *(Name):* was born at
   approximately *(time of birth):* ☐ a. m. ☐ p. m. on *(date):* at the following place:
   a. City, town, township, or other *(identify "other" if known):*
   b. ☐ County: State (U.S.):
   c. ☐ State or province: Country:
4. Facts showing when and where the person named in item 3 was born and explaining how I have personal knowledge of those facts
   ☐ are stated in the space below ☐ are stated in Attachment 4 to this declaration.
   (If you are relying solely on the contents of the documents identified in item 5, please advise in the space below.)

IN THE MATTER OF *(Name):*	CASE NUMBER:

5. ☐ Attached are true and correct copies of the following documents *(check each box that applies; statements of witnesses must be signed under oath, in an affidavit sworn before a Notary Public or with the following statement just above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct"):*
   a. ☐ Hospital records dated *(date of each):*
   b. ☐ Physician's report dated *(date of each):*
   c. ☐ Witness statements dated *(date of each):*
   d. ☐ Other documents dated *(describe and give the date of each document; "Other documents" could include school or college records, vaccination certificates and other medical records, employment records, documents showing sources of support other than employment, family correspondence, diaries, photographs, and other similar family records):*

   ☐ Continued on Attachment 5d.

6. The birth of the person named in item 3, or the date, time, or place of birth ☐ **is not** ☐ **is** important to a court case or proceeding that is now pending and described below. *(If you selected "is," briefly describe the proceeding and provide the case name and number, the name and address of the court where the proceeding is pending, the names of all parties to the proceeding, and the names, addresses, and telephone numbers of their attorneys.* ***Note: A court order made on a petition under Health and Safety Code section 103450, et seq., may not be effective against claims of persons or organizations not given notice of the petition for the order.****)*

   ☐ Continued on Attachment 6.

7. Number of pages attached: ____

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

Date:

(TYPE OR PRINT NAME OF DECLARANT) (SIGNATURE OF DECLARANT)

BMD-002

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
IN THE MATTER OF *(Names):*	CASE NUMBER:
PETITION TO ESTABLISH FACT, DATE, AND PLACE OF MARRIAGE *	HEARING DATE AND TIME: / DEPT.:

Notice to Petitioners

At or before the court hearing on this petition, you must provide to the court a completed (filled-in) order for the judicial officer to sign. The order must be prepared on a form issued by the California Department of Public Health Vital Records (CDPH Vital Records), the *Order Establishing Fact of Marriage (*form VS 122). The top portion of that form is the court order. The bottom portion of that form is the marriage certificate you must submit for filing to CDPH Vital Records with a copy of the signed order certified by the clerk of the court. Form VS 122 may be obtained from CDPH Vital Records or from a county recorder or health department. Information about the form, including instructions on how to get it and how to complete and file it with the court and with CDPH Vital Records, is available online at ***www.cdph.ca.gov/certlic/birthdeathmar/Pages/CorrectingorAmendingVitalRecords.aspx.***

*** Note: This form may help you establish the fact, date, and place of a marriage so you can create a record of the marriage. But the order on this petition or the marriage certificate filed with CDPH Vital Records will not necessarily establish the validity of the marriage for all purposes. Consultation with a California lawyer is recommended before you proceed.**

1. a. Petitioner *(name each):*

   is beneficially interested in and entitled under section 103450 of the California Health and Safety Code to an order establishing the fact and the date and place of the marriage of the persons named in item 2a.

   b. Petitioner's beneficial interest in this matter is as follows:

   (1) ☐ I am one of the persons named in item 2a.

   (2) ☐ I am related to a person named in item 2a as follows *(specify the relationships of all petitioners to that person):*

   (3) ☐ I am not related to a person named in item 2a.

   (4) ☐ I am interested in this matter for the following reasons *(complete unless item 1b(1) is selected):*

   ☐ Continued in Attachment 1b(4).

2. Petitioner requests the court to establish the fact, date, and place of the marriage of:

   a. Names: and:

   b. Date of marriage:

   c. Place of marriage: City, town, township, or other *(identify "other" if known):*

   (1) ☐ County: State (U.S.):

   (2) ☐ State or province: Country:

IN THE MATTER OF *(Names):*	CASE NUMBER:

3. *(Check one of the following):*
   a. ☐ There is no official record of the fact, date, and place of the marriage of the persons named in item 2a.
   b. ☐ A certified copy of the official record of the marriage of the persons named in item 2a cannot be obtained for the following reasons:

☐ Continued in Attachment 3b.

4. The persons named in item 2a now reside at *(street address and city of each person):*
   (Name):

   County: State:

   (Name):

   County: State:

5. Petitioner requests that the court make an order determining that the marriage of the persons named in item 2a did in fact occur on the date and at the place stated in items 2b and 2c, as shown by the *Declaration in Support of Petition to Establish Fact, Date, and Place of Marriage* (form BMD-002A) and attachments, filed herewith, and by other proofs adduced at the hearing.

6. Number of pages attached: _____

Date:

(TYPE OR PRINT NAME OF ATTORNEY FOR PETITIONER) ▶ (SIGNATURE OF ATTORNEY)

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct, except as to those matters stated on information and belief, and as to those matters, I am informed and believe them to be true.

Date:

(TYPE OR PRINT NAME OF PETITIONER) ▶ (SIGNATURE OF PETITIONER)

Date:

(TYPE OR PRINT NAME OF PETITIONER) ▶ (SIGNATURE OF PETITIONER)

Date:

(TYPE OR PRINT NAME OF PETITIONER) ▶ (SIGNATURE OF PETITIONER)

BMD-002A

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
IN THE MATTER OF *(Names):*	CASE NUMBER:
DECLARATION IN SUPPORT OF PETITION TO ESTABLISH FACT, DATE, AND PLACE OF MARRIAGE	HEARING DATE AND TIME: / DEPT.:

(Name of declarant): declares as follows:

1. I make the statements in this declaration based on my personal knowledge or on the contents of the documents identified in item 5. (*"Personal knowledge" of a fact is knowledge **not** gained from another person's statements to you about that fact.)*
2. a. I am at least 18 years of age.
   b. I reside at *(street address and city):*

   County: State:
3. *(Names):* and
   were married on *(date):* at the following place:
   a. City, town, township, or other *(identify "other" if known):*
   b. ☐ County: State (U.S.):
   c. ☐ State or province: Country:
4. Facts showing when and where the persons named in item 3 were married and explaining how I have personal knowledge of those facts ☐ are stated in the space below ☐ are stated in Attachment 4 to this declaration.
   (If you are relying solely on the contents of the documents identified in item 5, please advise in the space below.)

IN THE MATTER OF *(Names):*	CASE NUMBER:

5. ☐ Attached are true and correct copies of the following documents *(check each box that applies; statements of officiating persons and witnesses must be signed under oath, in an affidavit sworn before a Notary Public or with the following statement just above the signature: "I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct"):*
   a. ☐ Marriage license***** dated *(date of each):*
      **** (A marriage license is required for a valid marriage in California. The procedure described in Health and Safety Code sec. 103450 et seq., cannot establish the validity of a California marriage if no marriage license was obtained.)***
   b. ☐ Officiating person's statement dated *(date of each):*
   c. ☐ Witness statements dated *(date of each):*
   d. ☐ Other documents dated *(describe and give the date of each document):*

   ☐ Continued on Attachment 5d.

6. The marriage of the persons named in item 3, or the date or place of the marriage ☐ **is not** ☐ **is** important to a court case or proceeding that is now pending and described below. *(If you selected "is," briefly describe the proceeding and provide the case name and number, the name and address of the court where the proceeding is pending, the names of all parties to the proceeding, and the names, addresses, and telephone numbers of their attorneys.* ***Note: A court order made on a petition under Health and Safety Code section 103450, et seq., may not be effective against claims of persons or organizations not given notice of the petition for the order.)***

   ☐ Continued on Attachment 6.

7. Number of pages attached: _____

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

Date:

(TYPE OR PRINT NAME OF DECLARANT) (SIGNATURE OF DECLARANT)

BMD-003

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
IN THE MATTER OF *(Name):*	CASE NUMBER:
PETITION TO ESTABLISH FACT, TIME, AND PLACE OF DEATH	HEARING DATE AND TIME: / DEPT.:

Notice to Petitioners

At or before the court hearing on this petition, you must provide to the court a completed (filled-in) order for the judicial officer to sign. The order must be prepared on a form issued by the California Department of Public Health Vital Records (CDPH Vital Records), the *Order Establishing Fact of Death* (form VS 109). The top portion of that form is the court order. The bottom portion of that form is the death certificate you must submit for filing to CDPH Vital Records with a copy of the signed order certified by the clerk of the court. Form VS 109 may be obtained from CDPH Vital Records or from a county recorder or health department. Information about the form, including instructions on how to get it and how to complete and file it with the court and with CDPH Vital Records, is available online at ***www.cdph.ca.gov/certlic/birthdeathmar/Pages/CorrectingorAmendingVitalRecords.aspx.***

1. a. Petitioner *(name each):*

   is beneficially interested in and entitled under section 103450 of the California Health and Safety Code to an order establishing the fact and the time and place of the death of the person named in item 2a.

   b. Petitioner's beneficial interest in this matter is as follows:

      (1) ☐ I am related to the person named in item 2a as follows *(specify the relationships of all petitioners to that person):*

      (2) ☐ I am not related to the person named in item 2a.

      (3) I am interested in this matter for the following reasons *(complete in all cases):*

      ☐ Continued in Attachment 1b(3).

2. Petitioner requests the court to establish the fact, time, and place of the death of the person named in item 2a.

   a. Name:

   b. Time of death *(date and time of day):* ☐ a.m. ☐ p.m.

   c. Place of death: City, town, township, or other *(identify "other" if known):*

      (1) ☐ County: State (U.S.):

      (2) ☐ State or province: Country:

Form Adopted for Mandatory Use
Judicial Council of California
BMD-003 [Rev. September 1, 2018]

PETITION TO ESTABLISH FACT, TIME, AND PLACE OF DEATH
(Establishment of Birth, Marriage, Death)

Health and Safety Code,
§§ 103450–103490
www.courts.ca.gov

IN THE MATTER OF *(Name):*	CASE NUMBER:

3. *(Check one of the following):*
   a. ☐ There is no official record of the fact, time, and place of the death of the person named in item 2a.
   b. ☐ A certified copy of the official record of the death of the person named in item 2a cannot be obtained for the following reasons:

   ☐ Continued in Attachment 3b.
4. The person named in item 2a resided at the time of death at *(street address and city):*

   County: State:
5. Petitioner requests that the court make an order determining that the death of the person named in item 2a did in fact occur on the time and at the place stated in items 2b and 2c, as shown by the *Declaration in Support of Petition to Establish Fact, Time, and Place of Death* (form BMD-003A) and attachments, filed herewith, and by other proofs adduced at the hearing.
6. Number of pages attached: _____

Date:

(TYPE OR PRINT NAME OF ATTORNEY FOR PETITIONER) ▶ (SIGNATURE OF ATTORNEY)

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct, except as to those matters stated on information and belief, and as to those matters, I am informed and believe them to be true.

Date:

(TYPE OR PRINT NAME OF PETITIONER) ▶ (SIGNATURE OF PETITIONER)

Date:

(TYPE OR PRINT NAME OF PETITIONER) ▶ (SIGNATURE OF PETITIONER)

Date:

(TYPE OR PRINT NAME OF PETITIONER) ▶ (SIGNATURE OF PETITIONER)

BMD-003A

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
IN THE MATTER OF *(Name):*	CASE NUMBER:
DECLARATION IN SUPPORT OF PETITION TO ESTABLISH FACT, TIME, AND PLACE OF DEATH	HEARING DATE AND TIME: / DEPT.:

(Name of declarant): declares as follows:

1. I make the statements in this declaration based on my personal knowledge or on the contents of the documents identified in item 5. (*"Personal knowledge" of a fact is knowledge that is **not** gained from another person's statements to you about that fact.)*
2. a. I am at least 18 years of age.
   b. I reside at *(street address and city):*

   County: State:
3. *(Name of deceased person):* died at
   approximately *(time):* ☐ a.m. ☐ p.m. on *(date):* at the following place:
   a. City, town, township, or other *(identify "other" if known):*
   b. ☐ County: State (U.S.):
   c. ☐ State or province: Country:
4. Facts showing how, when, and where the person named in item 3 died and explaining how I have personal knowledge of those facts
   ☐ are stated in the space below ☐ are stated in Attachment 4 to this declaration.
   (If you are relying solely on the contents of the documents identified in item 5, please advise in the space below.)

Form Approved for Mandatory Use Judicial Council of California BMD-003A [Rev. September 1, 2018]

Health & Safety Code, §§ 103450–103490
www.courts.ca.gov

IN THE MATTER OF *(Name):*	CASE NUMBER:

5. ☐ Attached are true and correct copies of the following documents *(check each box that applies):*
   a. ☐ Police report dated *(date of each):*
   b. ☐ Coroner's report dated *(date):*
   c. ☐ Private physician's report dated *(date of each):*
   d. ☐ Other documents dated *(describe and give the date of each document):*

☐ Continued on Attachment 5d.

6. The death of the person named in item 3, or the date, time, or place of death ☐ **is not** ☐ **is** important to a court case or proceeding that is pending and described below. *(If you selected "is," briefly describe the proceeding and provide the case name and number, the name and address of the court where the proceeding is pending, the names of all parties to the proceeding, and the names, addresses, and telephone numbers of their attorneys.* ***Note: A court order made on a petition under Health and Safety Code section 103450 et seq., may not be effective against claims of persons or organizations not given notice of the petition for the order.****)*

☐ Continued on Attachment 6.

7. Number of pages attached: ____

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

Date:

(TYPE OR PRINT NAME OF DECLARANT) ▶ (SIGNATURE OF DECLARANT)

ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER:	CASE NUMBER:
NOTICE OF LIMITED SCOPE REPRESENTATION ☐ Amended	JUDGE: DEPT.:

[Note: This form is for use in civil cases other than family law. For family law cases, use form FL-950.]

1. Attorney *(name):*
   and party *(name):*
   who is the ☐ petitioner/plaintiff ☐ respondent/defendant ☐ other *(describe):*

   have an agreement that the attorney will provide limited scope representation in this case to the party.

2. The attorney will represent the party
   a. ☐ at the hearing on *(date):*
      ☐ and at any continuance of that hearing
      ☐ until submission of the order after hearing

   b. ☐ at the trial on *(date):*
      ☐ and at any continuance of that trial
      ☐ until judgment

   c. ☐ other *(specify nature and duration of representation):*

3. By signing this form, the party agrees to sign *Substitution of Attorney–Civil* (form MC-050) at the completion of the representation described above.

Form Adopted for Mandatory Use
Judicial Council of California
CIV-150 [Rev. September 1, 2018]

Cal. Rules of Court, rule 3.36
www.courts.ca.gov

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER:	CASE NUMBER:

4. During the limited scope representation, parties and the court must serve papers on both the attorney named above and directly on the party. (Cal. Rules of Court, rule 3.36.) The party's name and address for purpose of service are as follows:

Name:

Address *(for the purpose of service):*

Telephone: Fax:

This notice accurately states all current matters and issues on which the attorney has agreed to serve as an attorney for the party in this case. The information provided on this form is not intended to state all of the terms and conditions of the agreement between the party and the attorney for limited scope representation.

Date:

(TYPE OR PRINT NAME OF PARTY) (SIGNATURE OF PARTY)

Date:

(TYPE OR PRINT NAME OF ATTORNEY) (SIGNATURE OF ATTORNEY)

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER:	CASE NUMBER:

PROOF OF SERVICE BY FIRST-CLASS MAIL

1. I am at least 18 years old and **not a party to this action.** I am a resident of or employed in the county where the mailing took place, and my residence or business address is *(specify):*

2. I served copies of the *Notice of Limited Scope Representation* (form CIV-150) by enclosing each of them in a sealed envelope with first-class postage fully prepaid and *(check one):*
   a. ☐ deposited the sealed envelopes with the United States Postal Service.
   b. ☐ placed the sealed envelopes for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. Copies of the *Notice of Limited Scope Representation* (form CIV-150) were mailed:
   a. on *(date):*
   b. from *(city and state):*

4. The envelopes were addressed and mailed as follows:

   a. Name of person served:
      Street address:
      City:
      State and zip code:

   b. Name of person served:
      Street address:
      City:
      State and zip code:

   c. Name of person served:
      Street address:
      City:
      State and zip code:

   d. Name of person served:
      Street address:
      City:
      State and zip code:

☐ Names and addresses of additional persons served are attached. *(You may use form POS-030(P).)*

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

Date:

(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: E-MAIL ADDRESS: FAX NO.: ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER:	CASE NUMBER:
APPLICATION TO BE RELIEVED AS ATTORNEY ON COMPLETION OF LIMITED SCOPE REPRESENTATION ☐ **UPDATED APPLICATION**	JUDGE: DEPT.:

1. I request an order to be relieved as attorney in this matter.
2. In accordance with the terms of an agreement in this case between *(name):*

   who is the ☐ plaintiff/petitioner ☐ defendant/respondent ☐ other *(describe):*
   and me, I agreed to provide limited scope representation.
3. I was retained as attorney for the following limited scope services *(describe in detail):*

   ☐ See *Notice of Limited Scope Representation* (form CIV-150). ☐ Continued in Attachment 3.
4. I have completed all services within the scope of my representation and have completed all acts ordered by the court.
5. The last known address for the party identified in item 2 is:

6. The last known telephone number for the party identified in item 2 is:
7. ☐ a. The party identified in item 2 was served with a copy of this application by ☐ mail ☐ personal delivery.
   b. ☐ 20 ☐ 15 days have passed since the application was served.
   ☐ c. I have not been served with any objection by the party in item 2.

Form Approved for Optional Use
Judicial Council of California CIV-151
[Rev. September 12, 2018]

Cal. Rules of Court, rule 3.36
www.courts.ca.gov

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER:	CASE NUMBER:

NOTICE TO PARTY: Your attorney has filed this *Application to Be Relieved as Attorney on Completion of Limited Scope Representation* with the court stating that he or she no longer represents you in this action because the tasks that you agreed the attorney would perform for you have been completed.

If you do not agree that these tasks have been completed and you want the attorney to continue to represent you until the tasks are completed, you must file an *Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form CIV-152) with the court within 15 calendar days of the date that this notice was served on you, asking the court to require the attorney to remain your attorney in the action until these tasks are completed. If you were served with this notice by mail, you must file the *Objection* (form CIV-152) within 20 days of the date you were served. You must also serve this objection on your attorney and any other parties in the case. If you do not file a form CiV-152, the court will grant your attorney's request to be relieved as counsel.

Please refer to the *Proof of Service* to determine the date that this application was served on you. (If this form was served by mail in California, the date of service is 5 days after the date of mailing.)

This procedure may be used **ONLY** if you believe that the attorney has not completed the tasks that he or she agreed to perform for you. It is **NOT** to be used to resolve other disagreements you may have with the attorney, such as disagreements concerning fees.

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning or sign language interpreter services are available on request if at least 5 days' notice is provided. Contact the clerk's office or go to *www.courts.ca.gov/forms* for *Request for Accommodations by Persons With Disabilities and Response* (form MC-410). (Civ. Code, section 54.8.)

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

Date:

(TYPE OR PRINT NAME OF ATTORNEY)

(SIGNATURE OF ATTORNEY)

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER:	CASE NUMBER:

PROOF OF SERVICE BY FIRST-CLASS MAIL

1. I am at least 18 years old and **not a party to this action.** I am a resident of or employed in the county where the mailing took place, and my residence or business address is *(specify):*

2. I served copies of the *Application to Be Relieved as Attorney on Completion of Limited Scope Representation* and a blank *Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation* by enclosing each of them in a sealed envelope with postage fully prepaid and *(check one):*
   a. ☐ deposited the sealed envelopes with the United States Postal Service.
   b. ☐ placed the sealed envelopes for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. The *Application to Be Relieved as Attorney on Completion of Limited Scope Representation* and a blank *Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation* were mailed:
   a. on *(date):*
   b. from *(city and state):*

4. The envelopes were addressed and mailed as follows:

   a. Name of person served:
      Street address:
      City:
      State and zip code:

   b. Name of person served:
      Street address:
      City:
      State and zip code:

   c. Name of person served:
      Street address:
      City:
      State and zip code:

   d. Name of person served:
      Street address:
      City:
      State and zip code:

☐ Names and addresses of additional persons served are attached. *(You may use form POS-030(P).)*

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

Date:

(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

[Note: This form is for use in civil cases other than family law. In family law cases, use form FL-956.] **CIV-152**

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PARTY *(Name and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER:	CASE NUMBER:
OBJECTION TO APPLICATION TO BE RELIEVED AS ATTORNEY ON COMPLETION OF LIMITED SCOPE REPRESENTATION	JUDGE: DEPT.:
Hearing Date: Time: Dept.: Room:	

1. I am the ☐ plaintiff/petitioner ☐ defendant/respondent ☐ other *(describe):* in this case.
2. I do not believe that all the services that my attorney agreed to do for me are completed.
3. I request that the court not allow my attorney to withdraw from representation until those services have been completed. The services that were agreed on that remain to be completed are *(specify):*

The reason that I think these tasks are supposed to be completed is *(explain):*

☐ Continued in Attachment 3.

NOTICE

If you object to your attorney's *Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form CIV-151), you must file this objection with the clerk of the court where the application was filed within 20 days of the day that the application was put in the mail to you. If you were personally served, you have to file this form 15 days from the day you were served. That date is on the proof of service at the end of the application (form CIV-151). Also, you must have the attorney and any other parties in the case served with this *Objection* (form CIV-152). A blank proof of service is on the back of this form.

I declare under penalty of perjury under the laws of the State of California that the above information and all attachment are true and correct.

Date:

▶ _____

(TYPE OR PRINT NAME OF PARTY) (SIGNATURE OF PARTY)

Form Approved for Optional Use
Judicial Council of California
CIV-152 [Rev. September 1, 2018]

OBJECTION TO APPLICATION TO BE RELIEVED AS ATTORNEY ON COMPLETION OF LIMITED SCOPE REPRESENTATION

Cal. Rules of Court, rule 3.36
www.courts.ca.gov

PLAINTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER:	CASE NUMBER:

PROOF OF SERVICE BY FIRST-CLASS MAIL

(NOTE: You cannot serve the* Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation *if you are a party in the action. The person who served the Notice of Limited Scope Representation must complete this proof of service.)

1. I am at least 18 years old and **not a party to this action.** I am a resident of or employed in the county where the mailing took place, and my residence or business address is *(specify):*

2. I served copies of the *Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form CIV-152) by enclosing each of them in a sealed envelope with first-class postage fully prepaid and *(check one):*
   a. ☐ deposited the sealed envelopes with the United States Postal Service.
   b. ☐ placed the sealed envelopes for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is paced for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. Copies of the *Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation (*form CIV-152*)* were mailed:
   a. on *(date):*
   b. from *(city and state):*

4. The envelopes were addressed and mailed as follows:

   a. Name of person served:
      Street address:
      City:
      State and zip code:

   b. Name of person served:
      Street address:
      City:
      State and zip code:

   c. Name of person served:
      Street address:
      City:
      State and zip code:

   d. Name of person served:
      Street address:
      City:
      State and zip code:

☐ Names and addresses of additional persons served are attached. *(You may use form POS-030(P).)*

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

Date:

(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

[Note: This form is for use in civil cases other than family law. In family law cases, use form FL-958.] 28 **CIV-153**

ATTORNEY *(Name, State Bar number, and address):*	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. : E-MAIL ADDRESS: ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLANTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER:	CASE NUMBER(S):
ORDER ON APPLICATION TO BE RELIEVED AS ATTORNEY ON COMPLETION OF LIMITED SCOPE REPRESENTATION	JUDGE: DEPT.: DATE:

1. The application of *(name of attorney):*
   to be relieved as attorney for *(name of client):*
   a party to this action or proceeding, was filed on *(specify date):*

2. ☐ **UNCONTESTED**

   a. The *Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form CIV-151) and any attachments, and a blank *Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form CIV-152) were served on the client.

   b. The client was
      (1) ☐ personally served with the papers.
      (2) ☐ served by mail.

   c. No *Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form CIV-152) was filed or served within the time prescribed under rule 3.36 of the California Rules of Court.

   d. It appears from the application to be relieved as attorney and any attached documents that the attorney has completed the tasks that the client and attorney agreed that the attorney would perform as well as any acts ordered by the court.

3. ☐ **CONTESTED**

   a. The party filed an *Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form CIV-152) on *(date):*

   b. ☐ Attorney demonstrated that he or she has completed the tasks that the party and attorney agreed that the attorney would perform on the *Notice of Limited Scope Representation* (form CIV-150) as well as any acts ordered by the court.

ORDER

4. ☐ Attorney is relieved as attorney for the party identified in 1:
   a. ☐ effective immediately.
   b. ☐ effective on the filing of the proof of service of this signed order on the client.
   c. ☐ effective on *(date):*

PLANTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER:	CASE NUMBER:

5. ☐ The *Application to Be Relieved as Attorney on Completion of Limited Scope Representation* is denied for the following reasons:

6. ☐ The court further orders *(specify):*

7. The current mailing address for of the party identified in 1 is:

NOTICE TO PARTY: When this order becomes effective, you will represent yourself in all aspects of your case.

The court and the other parties in the case need to know how to contact you. It is your responsibility to keep the court and the other parties informed of your address. If the address in item 7 above is wrong, you must let the court and the parties know your correct mailing address as soon as possible. You can use form MC-040, *Notice of Change of Address,* for this notification.

If you do not let the court and the other parties know where to send you copies of papers, you may not get notices of hearings or orders in your case. Decisions may be made without your participation, and your case could be ended.

NOTICE TO ATTORNEY WHO FILED APPLICATION FOR RELIEF: You must serve copies of this order on all parties or their attorneys in this case. Proof of service must be filed with the court.

Date:

(JUDICIAL OFFICER)

PLANTIFF/PETITIONER: DEFENDANT/RESPONDENT: OTHER:	CASE NUMBER:

PROOF OF SERVICE BY FIRST-CLASS MAIL

1. I am at least 18 years old and **not a party to this action.** I am a resident of or employed in the county where the mailing took place, and my residence or business address is *(specify):*

2. I served copies of the *Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form MC-958) by enclosing each of them in a sealed envelope with first-class postage fully prepaid and *(check one):*
   a. ☐ deposited the sealed envelopes with the United States Postal Service.
   b. ☐ placed the sealed envelopes for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. Copies of the *Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation (form MC-958)* were mailed:
   a. on *(date):*
   b. from *(city and state):*

4. The envelopes were addressed and mailed as follows:

   a. Name of person served:
      Street address:
      City:
      State and zip code:

   b. Name of person served:
      Street address:
      City:
      State and zip code:

   c. Name of person served:
      Street address:
      City:
      State and zip code:

   d. Name of person served:
      Street address:
      City:
      State and zip code:

☐ Names and addresses of additional persons served are attached. *(You may use form POS-030(P).)*

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

Date:

(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

CIV-160

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
PETITIONER:		
RESPONDENT:		
PETITION FOR		CASE NUMBER:
☐ **Order Striking and Releasing Lien or Other Encumbrance on Property of Public Officer or Employee**		
☐ **Ex Parte Order to Show Cause Why Lien or Encumbrance Should Not Be Stricken and Released**		

NOTICE: This form applies only to petitions by public officers and employees under Code of Civil Procedure sections 765.010–765.060 that involve lawsuits, liens, and encumbrances pertaining to actions that arise in the course and scope of the officer's or employee's duties.

1. Petitioner *(name)*: requests the following:
   a. ☐ Order striking and releasing lien or encumbrance.
   b. ☐ Ex parte order to show cause why the lien or other encumbrance should not be stricken and released.
2. Respondent *(name)*:
3. Petitioner is a public officer or employee *(specify position)*:
4. There ☐ is ☐ is not a related case. *(If there is, provide case name, case number, and counsel):*

5. Petitioner has an interest in property on which a lien or encumbrance has been filed or recorded. The property is *(describe)*:

6. Respondent has filed or recorded a lien or other encumbrance against petitioner's property or has directed another to record or file a lien or other encumbrance against the property. The lien or encumbrance is *(describe)*:

7. Petitioner is entitled to relief because respondent filed a lawsuit or lien or other encumbrance against petitioner, knowing it is false, with the intent to harass petitioner or to hinder petitioner in discharging his or her official duties, or respondent directed another to record or file a lawsuit, lien, or other encumbrance against petitioner, knowing it is false, with the intent to harass petitioner or to influence petitioner in discharging his or her official duties. A declaration of petitioner or petitioner's attorney setting forth a concise statement of the facts upon which this petition is based is ☐ on page two of this form ☐ attached *(see Attachment 7)*.
8. The lien or encumbrance that this petition seeks to have stricken and released does not involve a document that acts as a claim or encumbrance by a financial institution, as defined in Penal Code section 14161, subdivision (a) or Code of Civil Procedure section 481.113, or by a public entity as defined in Code of Civil Procedure section 481.200.
9. Petitioner requests relief as follows:
   a. ☐ Order to show cause why the lien or other encumbrance described in item 6 should not be stricken and released.
   b. ☐ Order striking and releasing the lien or other encumbrance described in item 6.
   c. ☐ Award of civil penalties against respondent under Code of Civil Procedure section 765.040 and Government Code section 6223, subdivision (c) ☐ of: $ ☐ according to proof.

(Continued on reverse)

Form Approved for Optional Use
Judicial Council of California
CIV-160 [Rev. September 1, 2018]

PETITION FOR ORDER STRIKING AND RELEASING LIEN, ETC.
(Government Employee)

Code of Civil Procedure
§§ 765.010-765.080;
Government Code, § 6223

PETITIONER: RESPONDENT:	CASE NUMBER:

d. ☐ Award of attorney's fees and costs under Code of Civil Procedure section 765.030
☐ of: $ ☐ according to proof.

e. ☐ Other relief *(specify)*:

Date:

(TYPE OR PRINT NAME OF PETITIONER)

(SIGNATURE OF PETITIONER OR PETITIONER'S ATTORNEY)

By:

(NAME AND TITLE)

DECLARATION IN SUPPORT OF PETITION
(Code Civ. Proc., §§ 765.010, 2015.5)

1. I, the undersigned, declare that I am the ☐ petitioner ☐ other *(specify)*:
in the above-entitled proceeding.

2. The facts upon which this petition is based are as follows:

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

Date:

(TYPE OR PRINT NAME)

(SIGNATURE)

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
PETITIONER:		
RESPONDENT:		
ORDER TO SHOW CAUSE WHY LIEN OR OTHER ENCUMBRANCE ON THE PROPERTY OF A PUBLIC OFFICER OR EMPLOYEE SHOULD NOT BE STRICKEN AND RELEASED		CASE NUMBER:

NOTICE: This order to show cause applies to a petition by a public officer or employee to strike or release a lien or encumbrance on the officer's or employee's property under Code of Civil Procedure section 766.010. The date of the hearing noticed below shall be set no earlier than 14 days after the date of this order.

1. To Respondent *(name)*:
2. YOU ARE ORDERED to appear in this court at the date, time, and place shown in the box below to give any legal reason that the lien or other encumbrance on the property of the public officer or employee described in the attached petition should not be stricken and the other relief requested in the petition should not be granted.

NOTICE OF HEARING

a. Date: Time: Dept.: Room:

b. The address of the court ☐ is shown above ☐ is *(specify)*:

3. IT IS FURTHER ORDERED that
   a. Petitioner shall serve this *Order to Show Cause*, the attached petition, and any other supporting papers by *(specify manner of service)*:
      no later than *(date)*:
   b. Any opposition papers shall be filed and served on petitioner by *(specify manner of service)*:
      no later than *(date)*:
   c. Any reply papers shall be filed and served by *(specify manner of service)*:
      no later than *(date)*:
   d. Proof of service of petitioner's papers shall be delivered to the court hearing this *Order to Show Cause*
      no later than *(date)*:
4. You have the right to attend the hearing to oppose the petition, with or without an attorney. If you do not attend the hearing, the court may grant the requested order without any further notice to you.

Date:

▶ _____
JUDGE OF THE SUPERIOR COURT

Form Approved for Optional Use
Judicial Council of California
CIV-161 [Rev. September 1, 2018]

ORDER TO SHOW CAUSE
(Government Employee)

Code of Civil Procedure, § 765.010;
Government Code, § 6223

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
IN RE (ADDRESS OF REAL PROPERTY):		

PETITION AND DECLARATION REGARDING UNRESOLVED CLAIMS AND DEPOSIT OF UNDISTRIBUTED SURPLUS PROCEEDS OF TRUSTEE'S SALE

Jurisdiction *(check all that apply):*	CASE NUMBER:
☐ **ACTION IS A LIMITED CIVIL CASE**	
Amount deposited ☐ **does not exceed $10,000**	
☐ **exceeds $10,000, but does not exceed $25,000**	
☐ **ACTION IS AN UNLIMITED CIVIL CASE (exceeds $25,000)**	

1. Petitioner *(name):* is the trustee under the Deed of Trust described in items 2 and 3 below.

The Deed of Trust

2. *The Deed of Trust encumbered the real property commonly known as (describe):*

   (the "property") and legally described ☐ in Attachment 2 ☐ as follows:

3. The Deed of Trust was
   a. Executed by *(name):* as trustor.
   b. Executed on *(date):*
   c. Recorded:
      (1) Date:
      (2) County:
      (3) Instrument number:

IN RE:	CASE NUMBER:

The Trustee's Sale, Surplus Proceeds, and Notice to Potential Claimants

4. The property was the subject of a trustee's sale that was held on *(date):*
5. A trustee's sale guarantee was prepared for the trustee's sale. *(A copy of the trustee's sale guarantee must be attached as Attachment 5.)*
6. The total sale price of the property was: $
7. After payment of the amounts required by Civil Code section 2924k(a)(1)–(2), there were surplus proceeds from the trustee's sale available to potential claimants in the total amount of: $
8. *Within 30 days after the trustee's sale, the trustee sent written notice under Civil Code section 2924j(a) to all persons with a recorded interest in the real property as of the date immediately prior to the trustee's sale who would be entitled to notice. The names and addresses of all persons sent notice under Civil Code section 2924j(a) are as follows:*

☐ Continued on Attachment 8.

The Claims

9. The trustee has received a total of *(specify number):* written claims from potential claimants.
10. The trustee has exercised due diligence to determine the priority of the written claims received by the trustee to the trustee's sale surplus proceeds from the persons identified in item 8 to whom notice was sent.
11. The trustee submits this declaration under Civil Code section 2924j(c) for the following reason:
    a. ☐ After due diligence, the trustee is unable to determine the priority of the written claims received by the trustee to the trustee's sale surplus proceeds. *(If this reason applies, describe the problem of determining priorities in Attachment 11a.)*
    b. ☐ The trustee has determined that there is a conflict between potential claimants to the surplus proceeds. *(If this reason applies, identify the claimants and describe the conflict in Attachment 11b.)*
12. *The trustee provides the following additional information relevant to the identity, location, priority of potential claimants, and the conflict of claims:*

☐ Continued on Attachment 12.

Notice of Intent to Deposit Funds and Proof of Service

13. The trustee has provided written notice to all persons with a recorded interest in the property who would be entitled to notice under Civil Code section 2924b(b)–(c). The notice includes the following information:
    a. The trustee intends to deposit funds from the trustee's sale with the clerk of the court.
    b. A claim for funds must be filed with the court within 30 days from the date of notice.
    c. The address of the court in which the funds are to be deposited and a telephone number for obtaining further information.

    *(Proof of Service of the notice on **all** persons entitled to notice under Civil Code section 2924j(d) must be attached to this declaration as Attachment 13.)*

IN RE:	CASE NUMBER:

Deposit

14. **Distributions**

The trustee has distributed the total amount of: $ to the following claimants based on their written claims:

Name of claimant:	Amount:
	$
	$
	$
	$
	$
	$
	$
	$

☐ Continued on Attachment 14.

15. **Trustee's Fees and Expenses**

The trustee has incurred reasonable fees and expenses totaling: $. These fees and expenses are recoverable under Civil Code section 2924k(a)(1) and (b) and are described ☐ in Attachment 15 ☐ as follows *(specify):*

16. **Deposit**

The amount to be deposited is calculated as follows:

a.	Trustee's sale proceeds	$
b.	Debt to foreclosing creditor	$
c.	Available surplus proceeds *(a minus b)*	$
d.	Claims paid by trustee *(from item 14)*	$
e.	Trustee's fees and expenses *(from item 15)*	$
f.	Remaining surplus proceeds *(c minus (d plus e))*	$
g.	Filing fee	$
h.	Deposit *(f minus g)*	$

(*If the trustee is represented by an attorney, the attorney's signature follows*):

Date:

(TYPE OR PRINT NAME OF ATTORNEY) ▶ (SIGNATURE OF ATTORNEY)

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

Date:

(TYPE OR PRINT NAME OF TRUSTEE) ▶ (SIGNATURE OF TRUSTEE)

CONFIDENTIAL

CM-011

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: ☐ PLAINTIFF ☐ OTHER *(SPECIFY):*	***FOR COURT USE ONLY***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Plaintiff **[UNDER SEALI]** Defendant **[UNDER SEALI]**	
CONFIDENTIAL COVER SHEET–FALSE CLAIMS ACTION	CASE NUMBER:

INSTRUCTIONS: This civil action is brought under the False Claims Act, Government Code section 12650 et seq. The documents filed in this case are under seal and are confidential pursuant to Government Code section 12652(c). **This Confidential Cover Sheet must be affixed to the caption page of the complaint and to any other paper filed in this case until the seal is lifted.** **You should check with the court to determine whether papers filed in False Claims Act cases must be filed at a particular location.**	Seal to expire on (*date*): **UNLESS:** (1) Motion to extend time is pending; or (2) Extended by court order

1. The document to which this cover sheet is affixed is:
   a. ☐ Complaint for damages for violation of the False Claims Act
   b. ☐ Civil Case Cover Sheet (form 982.2(b)(1))
   c. ☐ Motion for an extension of time to intervene
   d. ☐ Affidavit or other document in support of the motion for an extension of time
   e. ☐ Order extending time to intervene *(specify date order expires)*:
   f. ☐ Other order *(describe)*:

   g. ☐ Notice from the Attorney General of additional prosecuting authority that may have access to the file
   h. ☐ Other *(describe)*:

2. This *Confidential Cover Sheet* and the attached document must each be separately file-stamped by the clerk of the court.

Date:

Form Adopted for Mandatory Use
Judicial Council of California
CM-011 [Rev. September 1, 2018]

CONFIDENTIAL COVER SHEET
FALSE CLAIMS ACTION

Gov. Code, § 12652(c)
Cal. Rules of Court, rules 2.570-2.573
www.courts.ca.gov

CR-105

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	***FOR COURT USE ONLY***
PEOPLE OF THE STATE OF CALIFORNIA v. **DEFENDANT:**	
DEFENDANT'S FINANCIAL STATEMENT AND NOTICE TO DEFENDANT *(check all that apply)*	
☐ **ELIGIBILITY FOR APPOINTMENT OF COUNSEL** ☐ **REIMBURSEMENT FOR COST OF COURT-APPOINTED COUNSEL** ☐ **ELIGIBILITY FOR RECORD ON APPEAL AT PUBLIC EXPENSE**	CASE NUMBER:

1. a. Defendant's name:
   b. Other names used:
   c. Address:
   d. Date of birth:
   e. Telephone number:
   f. Driver's license number:
2. Defendant's present employment:
   a. Occupation:
   b. Name of employer:
   c. Address:
   d. Gross pay per month: $ week: $ day: $
   e. Take-home pay per month: $ week: $ day: $
   f. Name of union:
   g. Name of credit union:
3. *If defendant is not now working, state the name and address of defendant's last employer and the last date defendant was employed.*
   a. Name:
   b. Address:
   c. Last date of employment:
4. Defendant ☐ is ☐ is not married.
5. a. Spouse's name:
   b. Other names used:
   c. Address:
   d. Date of birth:
   e. Telephone number:
   f. Driver's license number:
6. Spouse's present employment
   a. Occupation:
   b. Name of employer:
   c. Address:
   d. Gross pay per month: $ week: $ day: $
   e. Take-home pay per month: $ week: $ day: $
   f. Name of union:
   g. Name of credit union:
7. *If spouse is not now working, state the name and address of spouse's last employer and the last date spouse was employed.*
   a. Name:
   b. Address:
   c. Last date of employment:
8. Dependents

Name	Address	Relationship	Age

Form Approved for Optional Use
Judicial Council of California
CR-105 [Rev. September 1, 2018]

DEFENDANT'S FINANCIAL STATEMENT ON ELIGIBILITY FOR APPOINTMENT OF COUNSEL AND REIMBURSEMENT AND RECORD ON APPEAL AT PUBLIC EXPENSE

Pen. Code, § 987. 8
www.courts.ca.gov

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

9. OTHER MONTHLY INCOME

Defendant		Spouse	
a. Unemployment and disability	$	a. Unemployment and disability	$
b. Social Security	$	b. Social Security	$
c. Welfare, TANF	$	c. Welfare, TANF	$
d. Veteran's benefits	$	d. Veteran's benefits	$
e. Worker's compensation	$	e. Worker's compensation	$
f. Child support payments	$	f. Child support payments	$
g. Spousal support payments	$	g. Spousal support payments	$
h. All other income not elsewhere listed	$	h. All other income not elsewhere listed	$
Total:	$	**Total:**	$

EXPENSES

10. Monthly expenses being paid by defendant alone or by defendant and spouse

a. Rent or house payments	$	f. Clothing and laundry	$
b. Car payments	$	g. Food	$
c. Transportation payments	$	h. Support payments	$
d. Medical and dental payments	$	i. Insurance payments	$
e. Loan payments	$	j. Other payments (union, taxes, utilities)	$
		Total (a-j):	$

11. Installment payments other than those listed in item 10.

Name of Creditor	Monthly Payment	Balance Owed
a.	$	$
b.	$	$
c.	$	$
d.	$	$
e.	$	$
	Total: $	**Total:** $

ASSETS

12. What do you own? *(State value):*

a. Cash	$	
b. House equity	$	
c. Cars, other vehicles and boat equity *(List make, year, and license number of each)*	$	
d. Checking, savings, and credit union accounts *(List name and account number of each)*	$	
e. Other real estate equity	$	
f. Income tax refunds due	$	
g. Life insurance policies (ordinary life, face value)	$	Length of ownership
h. Other personal property (jewelry, furniture, furs, stocks and bonds, etc.)	$	
Total:	$	

13. **ELIGIBILITY FOR APPOINTMENT OF COUNSEL AND NOTICE TO DEFENDANT:** If an attorney is appointed to represent you, the court will, at the conclusion of the criminal proceedings, after a hearing, make a determination of your ability to pay all or a portion of the cost of the attorney. If the court determines that you are at that time able to pay, the court will order you to pay all or part of such cost. Such an order will have the same force and effect as a judgment in a civil action and will be subject to execution.

Declaration of Defendant

I declare under penalty of perjury that the foregoing is true and correct, and that I understand the notice contained in item 13, under the laws of the state of California.

Date:

▶ _____
SIGNATURE OF DEFENDANT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. Defendant:	
ORDER FOR COMMITMENT (Sexually Violent Predator)	CASE NUMBER:

After the trial in the above captioned matter on *(date):* the allegations in the petition were found true beyond a reasonable doubt. At the trial the ☐ court ☐ jury found:

1. That the respondent has suffered two prior convictions for violations of *(specify code sections):*

   and

2. That the respondent has a diagnosed mental disorder that makes him or her a danger to the health and safety of others in that it is likely that respondent will engage in sexually violent predatory criminal behavior.

3. Thus, the respondent is a "sexually violent predator" as defined in Welfare and Institutions Code section 6600.

THEREFORE, THE COURT ORDERS

4. That the respondent be committed to the custody of the California Department of Mental Health for appropriate treatment and confinement at *(name):* State Hospital under the provisions of Welfare and Institutions Code section 6604 for a two-year period commencing *(date):* and ending *(date):*

   That the respondent is hereby ordered to be transported immediately to the state hospital named above.

Date:

(JUDICIAL OFFICER)

Form Approved for Optional Use
Judicial Council of California
CR-173 [Rev. September 1, 2018]

Welfare and Institutions Code, § 6604
www.courts.ca.gov

SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	*FOR COURT USE ONLY*
PEOPLE OF THE STATE OF CALIFORNIA v. Defendant:	
ORDER FOR EXTENDED COMMITMENT (Sexually Violent Predator)	CASE NUMBER:

1. After a trial in the above captioned matter, the ☐ court ☐ jury found that the respondent, by reason of a diagnosed mental disorder, continues to be a sexually violent predator as defined in section 6600 of the Welfare and Institutions Code and remains a danger in that he or she is likely to engage in acts of sexual violence if released from custody.

THE COURT ORDERS

2. Respondent is recommitted under Welfare and Institutions Code 6604 for a period of two years at *(name):*
State Hospital and will be transported to the facility immediately.

3. Under Welfare and Institutions Code section 6604.1, the time of recommitment begins to run on the date the original commitment terminates, *(date):*

Date: _____

_____
(JUDICIAL OFFICER)

NAME AND ADDRESS OF COURT:

FOR COURT USE ONLY

NAME OF DEFENDANT:

STREET ADDRESS:

MAILING ADDRESS:

CITY AND ZIP CODE:

DATE OF COURT ORDER:

(check one)

☐ **PROOF OF ENROLLMENT IN ALCOHOL OR DRUG PROGRAM**

☐ **PROOF OF COMPLETION OF ALCOHOL OR DRUG PROGRAM**

CASE NUMBER:

DESCRIPTION OF ALCOHOL OR DRUG PROGRAM

Name of Program:

Address of Program:

Program License Number: Program Telephone Number:

PROOF OF ENROLLMENT

1. Defendant *(name)*: enrolled in the alcohol or drug education program described above on *(specify date of enrollment)*:

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

Date:

..... (TYPE OR PRINT NAME)

_____ (SIGNATURE OF DEFENDANT)

Date:

_____ (TYPE OR PRINT NAME)

_____ (SIGNATURE OF PROGRAM DIRECTOR OR INSTRUCTOR)

_____ (TITLE)

PROOF OF COMPLETION

2. Defendant *(name)*: successfully completed the alcohol or drug education program described above on *(specify date of completion)*:

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

Date:

..... (TYPE OR PRINT NAME)

_____ (SIGNATURE OF DEFENDANT)

Date:

..... (TYPE OR PRINT NAME)

_____ (SIGNATURE OF PROGRAM DIRECTOR OR INSTRUCTOR)

_____ (TITLE)

— INSTRUCTIONS —

YOU NEED TWO OF THESE FORMS:

1. **UPON ENROLLMENT IN A COURT-ORDERED ALCOHOL OR DRUG EDUCATION PROGRAM, FILL OUT THE PROOF OF ENROLLMENT PORTION OF ONE COPY OF THIS FORM AND FURNISH IT TO THE SENTENCING COURT WITHIN THE TIME AND IN THE MANNER SPECIFIED BY THE COURT.**
2. **UPON SUCCESSFUL COMPLETION OF THE PROGRAM, FILL OUT THE PROOF OF COMPLETION PORTION OF A SECOND COPY OF THIS FORM AND FURNISH IT TO THE SENTENCING COURT WITHIN THE TIME AND IN THE MANNER SPECIFIED BY THE COURT.**

FAILURE TO COMPLY WITH THESE REQUIREMENTS MAY RESULT IN THE REVOCATION OF YOUR PROBATION.

SI USTED NO CUMPLE CON ESTOS REQUISITOS, SU INCUMPLIMIENTO PUEDE RESULTAR EN LA REVOCACION DE SU LIBERTAD CONDICIONAL.

EM-100

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
IN THE MATTER OF *(NAME):* Petitioner, a minor		
PETITION FOR DECLARATION OF EMANCIPATION OF MINOR ☐ **ORDER PRESCRIBING NOTICE** ☐ **ORDER DENYING PETITION** ☐ **DECLARATION OF EMANCIPATION**		CASE NUMBER:

1. My name:
   My address:
   I am a resident of or temporarily domiciled in this county.
2. I request that the court declare me to be emancipated.
3. a. I am at least 14 years of age and my date of birth is:
   b. I am willingly living separate and apart from my parents or legal guardian, with the consent of my parents or legal guardian. I have been living apart from them since *(date):*
   c. I am managing my own financial affairs. I have completed my declaration of income and expenses on form EM-115 and attached it to this petition.
   d. No part of my income comes from any activity that is a crime under the laws of the State of California or of the United States.
4. My mother's name is:
   Her address is:
   ☐ Her consent to my emancipation is attached.
   ☐ Notice to her should not be required because *(state reasons):*
5. My father's name is:
   His address is:
   ☐ His consent to my emancipation is attached.
   ☐ Notice to him should not be required because *(state reasons):*
6. ☐ I have a legal guardian.
   My guardian's name is:
   My guardian's address is:
   ☐ My guardian's consent to my emancipation is attached.
   ☐ Notice to my guardian should not be required because *(state reasons):*
7. ☐ Other person entitled to notice.
   This person's name is:
   This person's address is:
   ☐ This person's consent to my emancipation is attached.
   ☐ Notice to this person should not be required because *(state reasons):*
8. ☐ I am a ☐ dependent child ☐ [probation] ward of the Juvenile Court of County.
   Case number (if known):
   My ☐ social worker ☐ probation officer is *(name)*:
   His / her consent is attached.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration is executed at *(place)*: , California,

Date:

▶ _____
(SIGNATURE)

Form Adopted for Mandatory Use
Judicial Council of California
EM-100 [Rev. September 1, 2018]

PETITION FOR DECLARATION OF EMANCIPATION OF MINOR, ORDER PRESCRIBING NOTICE, DECLARATION OF EMANCIPATION, AND ORDER DENYING PETITION

Family Code § 7000, et seq.
www.courts.ca.gov.

NAME OF MINOR	CASE NUMBER:

ORDER PRESCRIBING NOTICE

9. The court finds that
   a. ☐ All persons entitled to notice of this proceeding have consented to the emancipation and waived notice of hearing.
   b. ☐ The addresses of the following are unknown.
      (1) ☐ Father
      (2) ☐ Mother
      (3) ☐ Legal guardian
   c. ☐ Notice to the following persons cannot or should not be given:
   d. ☐ Other *(specify)*:
10. **IT IS ORDERED that notice of this proceeding**
   a. ☐ is not required. The declaration of emancipation may proceed without hearing.
   b. ☐ is required to the following persons:
      (1) ☐ Father
      (2) ☐ Mother
      (3) ☐ Legal guardian
      (4) ☐ Juvenile Court of County for service on social worker or probation officer
      (5) ☐ Legal guardian
   c. ☐ This matter is set for hearing on *(date):* at *(time)*: in *(dept.):*

Date:

(JUDGE OF THE SUPERIOR COURT)

DECLARATION OF EMANCIPATION WITHOUT HEARING

(Only if the court has ordered item 10a above.)

The court finds that the petitioner is a person described by Family Code section 7120. All notice requirements have been met or waived by the court. Emancipation is not contrary to the best interests of the child.
THE PETITION IS GRANTED. THE PETITIONER IS DECLARED TO BE EMANCIPATED FOR PURPOSES SET FORTH IN FAMILY CODE SECTION 7050 ET SEQ.

Date:

(JUDGE OF THE SUPERIOR COURT)

ORDER DENYING PETITION

The court finds that the petition on its face fails to establish that the petitioner is a person described by Family Code section 7120.
THE PETITION IS DENIED.

Date:

(JUDGE OF THE SUPERIOR COURT)

[SEAL]

CLERK'S CERTIFICATE
(Of Declaration of Emancipation)
I certify that the foregoing is a true and correct copy of the original on file in my office.

Date: Clerk, by , Deputy

- family counseling or mediation services between you and your parents
- living with another responsible adult (aunt, uncle, grandparent, or family friend)
- seeking assistance from public and private agencies
- an informal agreement with your parents allowing you to live outside your home

EMANCIPATION PAMPHLET

This pamphlet provides only basic information about emancipation proceedings. If you need additional information, you may wish to consult an attorney.

Form Approved for Optional Use
Judicial Council of California
EM-100-INFO (Rev. September 1, 2018)

WHAT IS EMANCIPATION?

Emancipation is a legal procedure that frees children from the custody and control of their parents or guardians before they reach the age of majority. (In California, this is age 18.) If you become emancipated, you will be able to do certain things without your parent's consent, such as:

- consent to medical treatment
- apply for a work permit
- enroll in school or college

You will also give up your right to be supported by your parents.

Even if you are emancipated:

- You must still attend school.
- You cannot get married without parental consent.
- You probably will remain under juvenile court jurisdiction, if you commit a crime.

IF YOU HAVE A LEGAL GUARDIAN:

All references in this pamphlet to parent or parents include legal guardians or guardians.

HOW DO I BECOME EMANCIPATED?

There are **three** ways you can become emancipated:

1. You can get married (This requires parental consent and permission from the court.)

WHAT DO I DO IF THE JUDGE GRANTS MY PETITION FOR EMANCIPATION?

If the judge grants your petition for emancipation after a hearing is held or without a hearing, you must take your papers back to the clerk's office and file them. The clerk will file the original declaration of emancipation, and give you copies to keep as proof of emancipation. You may need to show these copies to employers, landlords, doctors, school officials, or others who would otherwise require parental consent.

It you want to notify the Department of Motor Vehicles (DMV) about your emancipation, complete an Emancipated Minor's Application to California Department of Motor Vehicles (EM-140) form and take it to the DMV along with a certified copy of the declaration of emancipation.

IS EMANCIPATION PERMANENT?

Emancipation is usually permanent. However, if there are statements on your petition that are not true, or if you become unable to support yourself, the court may set aside the declaration of emancipation.

DO I HAVE CHOICES OTHER THAN EMANCIPATION?

Emancipation is only one of several alternatives available to you if you feel you cannot live with your parents. You may want to consider other options such as:

- set a hearing on your petition to be conducted within 30 days thereafter.

The clerk will provide you with an endorsed filed copy of the judge's order.

Declaration of emancipation without hearing

If the judge finds that all notice and consent requirements have been met or waived, and that emancipation is not contrary to your best interests, the judge may grant your petition without a hearing.

Setting a hearing and giving notice

If the judge wants more information, a hearing will be held within 30 days of the order prescribing notice and setting for hearing. If the judge orders the matter set for hearing, the clerk will notify the district attorney of the time and date of the hearing. The judge may require that you give notice to your parents and other people of the time and place of the hearing. This is very important, because the judge may be very strict about making sure that your parents were given proper notice before granting an emancipation petition.

Notice is provided by giving or mailing a copy of the emancipation petition to each person the judge lists for you. An adult, 18 years or older, must personally give or mail the copies for you as soon as possible after the hearing date is set, and complete a *Proof of Service* form to be filed with the clerk.

2. You can join the armed forces. (This requires parental consent and acceptance by the service.)

3. You can obtain a declaration of emancipation from a judge.

This pamphlet tells you only about how to be declared emancipated by a judge. If you want to be declared emancipated by a judge, you must convince the judge that you meet **ALL of the following requirements:**

1. You are at least 14 years old.
2. You willingly want to live separate and apart from your parents with the consent or acquiescence of your parents. (Your parents do not object to you living apart from them.)
3. You can manage your own finances.
4. You have a source of income that does not come from any illegal activity.
5. Emancipation would not be contrary to your best interests; it is good for you.

HOW DO I GET DECLARED EMANCIPATED BY A JUDGE?

You will need to complete certain forms and file them with the court. You can get blank forms to fill out from the court clerk's office. The forms you *must* fill out are:

- *Petition for Declaration of Emancipation of Minor, Order Prescribing Notice, Declaration of Emancipation, and Order Denying Petition* (EM-100)
- *Emancipation of Minor—Income and Expense Declaration* (EM-115)

- *Notice of Hearing* (EM-109)
- *Declaration of Emancipation of Minor After Hearing* (EM-130)

Emancipation petition

You must file a *Petition for Declaration of Emancipation of Minor* form (EM-100) in the county in which you live. (Check with your local clerk's office to find out which division of the court handles emancipations. If you are a dependent or ward of the juvenile court, the petition must be filed in juvenile court.) Only you may petition the court for emancipation. You will be asked to provide a verifiable residence address. You must also complete and attach to the petition an *Emancipation of Minor—Income and Expense Declaration* form (EM-115).

Filing fee or waiver

You may be required to pay a fee to file your emancipation petition. Ask the clerk if a fee is required. If you cannot afford to pay the fee, you can file an application to have the fees waived, including an *Application for Waiver of Court Fees and Costs* form and an *Order on Application of Court Fees and Costs* form. Unless waived, the petitioner shall pay the filing fee as specified. The ability or inability to pay the filing fee is not in and of itself evidence of the financial responsibility of the minor as required for emancipation.

Filling out the forms

- Print or type ALL information requested on the forms.
- Sign and date the petition.
- Include a statement explaining your living situation,

why you want to be emancipated, and how you are supporting yourself. If you have children, tell how you are supporting them. You could also include letters from your employer and your landlord.

- If you do not know where your parents or guardians live, you must tell the court when you last saw your parents and what efforts you have made to find out where your parents live.
- If you know where your parents live, but they refuse to sign the consent, you must get a hearing date from the clerk, and give notice of the hearing to your parents.
- If you know where your parents live, but you do not wish to notify one or both of them about this petition, you must state ALL your reasons and request the court to waive notification to your parents.

Filing the petition and the other forms

After you have completed the forms and all necessary attachments, and obtained your parents' signatures (if possible), take the forms and the attachments to the clerk's office for filing. (When you pick up the blank forms, ask the clerk how many copies of each form you will need to bring with you. Be sure to keep a copy for yourself.) When you get to the court, tell the clerk that you are filing a petition for emancipation and show the clerk your papers. The clerk will keep at least one copy of your petition. The clerk will either give or direct you to give the petition to the judge. Within 30 days from the filing of the petition, the judge will either

- grant your petition; or
- deny your petition; or

- 家庭心理諮詢或您與家長之間的調解服務
- 與另一位負責任的成年人（姑媽、姨媽、叔叔、舅舅、祖父母、外祖父母或家庭朋友）生活
- 向公共機構和民間機構請求協助
- 與家長簽訂一份非正式協議書，允許您離開家庭在別處生活

關於取得獨立生活資格的說明

本資料僅提供關於取得獨立生活資格的基本資訊。
您如果需要進一步資訊，請向律師洽詢。

Form Approved for Optional Use
Judicial Council of California
EM-100-INFO C (Chinese) (Rev. September 1,2018)

什麼是取得獨立生活資格？

「取得獨立生活資格」是一項法律程序，它允許孩子在成年（在加州為18歲）之前脫離家長或監護人的監護和管理。您如果取得獨立生活資格，就可以在未經家長同意的情形下做某些事情，例如：

- 同意接受醫生治療
- 申請工作許可
- 在中學或大學讀書

您同時也放棄了享受家長撫養的權力。

即使您取得獨立生活資格：

- 您必須繼續上學。
- 您不經家長許可不得結婚。
- 如果您犯罪，您可能仍然屬於青少年法庭管轄。

如果您有法定監護人：

本資料中凡是提及家長之處均包括法定監護人。

我如何取得獨立生活資格？

取得獨立生活資格有三種方法：

1. 您可以結婚（這需要家長同意和法庭許可）。

在法官批准取得獨立生活資格的申請後我應當做什麼？

如果法官在聽證後或未經聽證批准您取得獨立生活資格，您必須把文件交回書記官辦公室存檔。書記官會把取得獨立生活資格的宣告書原件存檔，把副本交給您作為取得獨立生活資格的證明。您可能需要把這些副本展示給雇主、房東、醫生、學校官員或其他要求您提供家長同意的人士。

如果您希望通知機動車輛管理局（DMV）您已經取得獨立生活資格，請填寫一份「加州機動車輛管理局獨立生活未成年人申請書」（EM-140），並連同一份經過認證的取得獨立生活資格宣告書副本交給DMV。

取得獨立生活資格的決定是否屬於永久性決定？

取得獨立生活資格的決定一般具有永久性。但是，如果您的申請表中有不符合事實的資訊，或者您喪失了謀生能力，法庭可能撤銷賦予您獨立生活資格的宣告書。

除取得獨立生活資格外我是否還有其他選擇？

如果您認為自己無法與家長在一起生活，除取得獨立生活資格外，還有數種其他方法可供您選擇。您可能應當考慮這些方法，例如：

- 安排一個申請聽證日期，在此後30天內舉行聽證。

書記官會向您提供一份經過背書的、已經存檔的法官命令副本。

不經過聽證宣佈取得獨立生活資格

法官如果認為已經符合或免除所有通知和徵求許可的要求，並且取得獨立生活資格與您的最大利益沒有沖突，法官可能會不經過聽證而批准您的申請。

安排聽證和發出通知

法官如果需要瞭解更多資訊，將會在申請命令通知和聽證通知發出後30天內舉行聽證。如果法官命令在聽證會上處理任何事項，書記官會把聽證時間和日期通知地區檢察官。法官可能要求把聽證會的時間地點通知您的家長及其他人士。這一點很重要，因為法官在批准取得獨立生活資格之前可能嚴格要求以適當形式通知您的家長。

發通知是指把取得獨立生活資格申請書的副本當面遞交或郵寄給法官認為應收到通知的每一位人士。在確定聽證日期後必須由一位成年人（年滿18歲）儘快投送或郵寄文件副本，該人士必須填寫一份「送達證明」表，並將該表呈報給書記官。

2. 您可以參軍（這需要家長許可和部隊接受）。
3. 您可以請求法官頒發給予您獨立生活資格的宣告書。

本資料僅僅向您介紹如何透過法官宣佈取得獨立生活資格。您如果希望透過法官宣佈取得獨立生活資格，就必須向法官證明您符合**所有下列要求**：

1. 您年滿14歲。
2. 您自願要求與家長分居，並且家長同意或默認（家長對您與他們分開居住不表示反對）。
3. 您有能力管理自己的財務。
4. 您有收入來源，並且該收入來源不是非法活動。
5. 取得獨立生活資格與您的最大利益沒有沖突；而是對您有好處。

我如何使法官宣佈我取得獨立生活資格？

您需要填寫某些表格，並將表格呈報給法庭。您可以在法庭書記官辦公室領取空白表格。您必須填寫的表格是：

- Petition for Declaration of Emancipation of Minor, Order Prescribing Notice, Declaration of Emancipation, and Order Denying Petition (EM-100)（「未成年人取得獨立生活資格申請書、申請命令通知、獨立生活資格宣告書和拒絕申請命令」）
- Emancipation of Minor—Income and Expense Declaration (EM-115)（「未成年人獨立生活資格－收入和支出報告」）

- Notice of Hearing（EM-109）（「聽證通知」）
- Declaration of Emancipation of Minor After Hearing（EM-130）（「聽證後未成年人取得獨立生活資格宣告書」）

取得獨立生活資格申請書

您必須在本郡提交「未成年人取得獨立生活資格申請書」(MC-300）。（請向當地書記官辦公室瞭解法庭下屬的哪個部門負責辦理取得獨立生活資格的申請。您如果是青少年法庭依附者或收押者，則必須在青少年法庭提出申請。）只有您本人能夠向法庭提出取得獨立生活資格的申請。您必須向法庭提供一個可以核實的居住地址。您還必須填寫並隨申請書附上「未成年人獨立生活資格－收入和支出報告」(MC-306）。

繳納申請費或免除費用

您在呈報取得獨立生活資格申請書時可能需要繳納手續費。請向書記官瞭解是否需要繳費。您如果無力支付該項費用，可以申請免除，請隨附一份「法庭收費與費用免除申請表」和一份「法庭收費和費用命令表」。除非經法庭免除，申請人必須按照規定支付申請費。是否有能力支付申請費並不證明未成年人是否具備取得獨立生活資格的經濟能力。

填表

- 在各種表格中工整填寫或列印全部資訊。
- 在申請書上簽名並註明日期。
- 隨附一份關於您目前生活狀況的陳述，說明您為什麼希望取得獨立生活資格以及您如何養活自己。您如果有子女，還要說明如何撫養子女。您也可以附上雇主和房東的信函。

- 如果您不知道自己的家長或監護人的住處，您必須告訴法庭最後一次是在何時見到家長以及您為查找家長的住處做出了哪些努力。
- 如果您知道家長的住處，但他們拒絕簽署同意書，您必須請書記官安排一個聽證日期，並把聽證時間通知您的家長。
- 如果您知道家長的住處，但不希望一位或兩位家長瞭解本申請，您必須說明所有原因，並請求法庭免除通知家長的責任。

提交申請書和其他表格

您在填寫完畢所有表格和必要附件後，請先取得家長簽字(如有可能），然後把表格和附件呈報給書記官辦公室。（當 您領取空白表格時，請向書記官瞭解每一份表格需要多少副本。請務必為您自己保存一份副本。）當您到達法庭時，告訴書記官您要提出取得獨立生活資格的申請，並把您的文件交給書記官。書記官至少會保留一份申請書。書記官可能把申請書轉給法官或讓您直接交給法官。在申請書呈報後30天內，法官將會採取下列措施之一：

- 批准申請；或
- 拒絕申請；或

- 자녀와 부모에 대한 가족 상담 또는 중재 서비스
- 책임을 질 수 있는 다른 성인(숙모, 숙부, 조부모, 또는 가족의 친구)과 함께 거주
- 공공기관 및 민간기관에 도움을 요청
- 부모와 자녀 사이에 자녀가 부모의 집을 떠나서 사는 것을 허용하는 비공식 계약을 체결

자립 팜플렛

이 팜플렛은 자립 절차에 관한 기본적인 정보만을 제공합니다. 더 상세한 정보가 필요하시면 변호사와 상의할 것을 권합니다.

Form Approved for Optional Use
by the Judicial Council of California
EM-100-INFO K (Rev. September 1, 2018)

자립이란 무엇일까요?

자립(emancipation)이란 자녀가 성년에 도달하기 전에 부모나 후견인의 양육권 및 감독권으로부터 벗어나게 하는 법적 절차입니다. (캘리포니아 주의 성년은 18세입니다.) 자립한 자녀는 다음과 같은 일을 부모의 동의 없이 할 수 있습니다:

- 치료에 대한 동의
- 노동 허가의 신청
- 학교나 대학에 입학

이러한 자녀는 부모로부터 부양 받을 권리를 포기해야 합니다.

자녀는 자립을 했더라도:

- 계속 학교에 다녀야 합니다.
- 부모의 동의 없이 결혼할 수 없습니다.
- 범죄를 저지른 경우에는 소년법원 관할 하에 남아있을 가능성이 많습니다.

법정 후견인이 있는 경우:

이 팜플렛에서 사용하는 부모 또는 부모들이라는 호칭에는 법정 후견인이나 후견인도 포함됩니다.

어떻게 자립할 수 있을까요?

자립하는 데는 다음과 같은 **세 가지** 방법이 있습니다:

1. 결혼(이것은 부모의 동의와 법원의 허가를 받아야 합니다.)

판사가 자립 신청을 승인하면 어떻게 해야 할까요?

판사가 심리를 한 후에 또는 심리를 하지 않고 신청을 승인하면, 신청자는 서류를 다시 서기 사무소로 가지고 가서 제출해야 합니다. 서기는 자립 선고 원본을 보관하고 신청자가 자립의 증거로 보관할 사본을 발급합니다. 신청자는 필요한 경우에 이 사본을 고용주, 집주인, 의사, 학교 교직원 또는 부모의 동의를 요구하는 다른 사람들에게 제시할 수 있습니다.

차량국(DMV)에 통지하기를 원하면, 캘리포니아 주 차량국에 대한 자립 미성년자 신청서(MC-315) 양식을 작성하여 자립 선고의 인증 사본과 함께 DMV에 제출하십시오.

자립은 영구적일까요?

자립은 보통 영구적입니다. 그러나, 신청에 포함된 진술이 사실이 아니거나, 자신을 부양할 수 없게 되면 자립 선고를 무효화할 수 있습니다.

자립 이외에 다른 방법을 선택할 수 있을까요?

자립은 자녀가 부모와 함께 살 수 없다고 생각하는 경우에 선택할 수 있는 몇 가지 방법 중의 하나입니다. 자녀는 다음과 같은 방법 중에서 선택할 수 있습니다:

- 이후 30일 이내에 신청에 대한 심리를 열도록 날짜를 정합니다.

서기는 판사 명령의 배서 보관 사본을 신청자에게 제공합니다.

심리를 열지 않는 자립 선고

판사가 모든 통지 및 동의 요건이 충족 및 면제되고 자립이 자녀의 최선의 이익에 배치되지 않는다고 판정하면 심리를 열지 않고 신청을 승인할 수 있습니다.

심리 일자 결정 및 통지

판사가 더 자세한 정보를 원하는 경우에는 통지 및 심리 일자 결정 명령 날짜로부터 30일 이내에 심리가 열립니다. 판사가 이 신청을 심리에 부치라고 명령하면 서기가 지방검사에게 심리 날짜 및 시간을 통보합니다. 판사는 자녀에게 부모 및 다른 사람들에게 심리가 열리는 시간 및 장소를 통지할 것을 요구할 수 있습니다. 판사는 자립 신청을 승인하기 전에 부모가 적절한 통지를 받는 것을 매우 엄격하게 확인할 수 있기 때문에 통지는 매우 중요합니다.

통지는 판사가 준 명단에 포함된 각 사람에게 자립 신청의 사본을 직접 전달하거나 우송하는 것을 말합니다. 심리 날짜가 결정된 후 가능한 한 빨리, 18세 이상 된 성인이 신청자를 대신해서 사본을 직접 전달하거나 우송하고 송달 증명서 양식을 작성하여 서기에게 제출해야 합니다.

2. 군대 입대(이것은 부모가 동의하고 군대에서 수락해야 합니다.)
3. 판사의 자립 선고

이 팜플렛에서는 판사의 선고에 의한 자립에 관해서만 설명합니다. 판사에 의해 자립을 선고 받으려면 판사에게 **다음의 모든 요건** 을 충족시킨다는 것을 확신시켜야 합니다:

1. 연령이 14세 이상 되었습니다.
2. 부모의 동의 또는 묵인을 받아 부모로부터 떨어져서 살기를 원합니다. (부모가 자녀가 떨어져서 사는 것에 반대하지 않습니다.)
3. 혼자서 재정을 관리할 수 있습니다.
4. 불법 활동이 아닌 수입원이 있습니다.
5. 자립이 자신의 최선의 이익과 배치되지 않습니다; 자신을 위해 유리합니다.

어떻게 판사에 의해 자립을 선고 받을 수 있을까요?

특정 양식을 작성하여 법원에 제출해야 합니다. 법원 서기 사무소에서 공백 양식을 받아 작성하십시오. 작성할 필수 양식은 다음과 같습니다:

- Petition for Declaration of Emancipation of Minor, Order Prescribing Notice, Declaration of Emancipation, and Order Denying Petition (EM-100) (미성년자에 대한 자립 선고 신청, 통지 명령, 자립 선고 및 명령 거부 신청)
- Emancipation of Minor - Income and Expense Declaration (EM-115) (미성년자의 자립—수입 및 지출 진술서)

• Notice of Hearing (EM-109) (심리 통지서) •

Declaration of Emancipation of Minor After Hearing (EM-130) (심리 후 미성년자 자립 선고)

자립 신청(Petition)

자녀가 거주하는 카운티에 미성년자에 대한 자립 선고 신청 양식(MC-300)을 제출해야 합니다. (지역 서기 사무소에 확인하여 법원의 어느 부서가 자립을 취급하는지 알아두십시오. 자녀가 소년법원의 피보호자 또는 피후견인이면 신청을 소년법원에 제출해야 합니다.) 자녀만이 법원에 자립을 신청할 수 있습니다. 자녀는 확인 가능한 거주지 주소를 알려주어야 합니다. 또한, 미성년자의 자립—수입 및 지출 진술서 양식(MC-306)을 작성하여 신청에 첨부해야 합니다.

제출 수수료 또는 면제

자립 신청을 제출하려면 수수료를 지불해야 할 수도 있습니다. 서기에게 수수료를 지불해야 하는지 문의하십시오. 수수료를 지불할 경제적 여유가 없으면 법원 수수료 및 비용 면제 신청서 양식과 법원 수수료 및 비용 면제 신청서에 대한 명령 양식을 포함하는 수수료 면제 신청서를 제출할 수 있습니다. 수수료가 면제되지 않으면, 자립 신청자는 규정에 따라 제출 수수료를 지불해야 합니다. 제출 수수료를 지불할 능력 또는 무능력은 그 자체로 또는 당연히 자립을 위해 요구되는 미성년자의 재정적인 책임에 대한 증거가 아닙니다.

양식의 작성

- 양식에서 요구하는 모든 정보는 정자로 기재하거나 타자하십시오.
- 신청 양식에 서명하고 날짜를 기재하십시오.

- 생활 상황, 자립을 원하는 이유, 재정적인 자립 방법을 설명하는 진술서를 첨부하십시오. 자녀가 있는 경우에는 그들을 부양할 방법을 설명하십시오. 또한, 고용주나 집주인의 편지도 첨부할 수 있습니다.
- 부모나 후견인이 거주하는 곳을 모르는 경우에는 언제 부모를 마지막으로 보았고 부모가 거주하는 곳을 찾기 위해 어떤 노력을 했는지를 법원에 설명해야 합니다.
- 부모가 거주하는 곳을 알고 있으나 부모가 동의한다는 서명을 하기를 거부하는 경우에는 법원 서기로부터 심리 날짜를 받아 부모에게 심리 통지서를 보내야 합니다.
- 부모가 거주하는 곳을 알고 있으나 양 부모 또는 한 부모에게 이 신청에 관해 통지하기를 원치 않는 경우에는 이에 관한 모든 사유를 기술하고 법원에 부모에 대한 통지를 면제해 줄 것을 요청해야 합니다.

신청 및 다른 양식의 제출

양식들과 필요한 모든 첨부 서류를 작성하고 부모의 서명(가능한 경우)을 받은 후에 양식과 첨부 서류를 법원 서기 사무소로 가지고 가서 제출하십시오. (공백 양식을 받을 때, 서기에게 각 양식에 대해 사본을 몇 부씩 제출해야 하는지 문의하십시오.사본 한 부는 반드시 자신이 보관해야 합니다.) 법원에 가서 서기에게 자립 신청을 제출하려고 한다고 말하고 서기에게 서류를 보여주십시오. 서기는 신청을 한 부 이상 보관합니다. 서기는 신청을 판사에게 전달하거나 또는 신청자가 판사에게 전달하는 방법을 알려줍니다. 신청을 제출한 날로부터 30일 이내에, 판사는

- 신청을 승인하거나; 또는
- 신청을 거부하거나; 또는

- obtener ayuda de agencias públicas y privadas
- un acuerdo informal con sus padres que le permita vivir fuera de la casa

Folleto de Emancipación

Este folleto sólo contiene información básica sobre los procedimientos de emancipación. Si necesita más información, le puede convenir consultar con un abogado.

Form Adopted for Optional Use
Judicial Council of California
EM-100-INFO S (Spanish) (Rev. September 1, 2018)

¿Qué es la emancipación?

La emancipación es un procedimiento legal que libera a hijos de la custodia y control de sus padres o tutores antes de ser mayores de edad. (En California, es mayor a los 18 años de edad.) Si se emancipa, podrá hacer ciertas cosas sin el consentimiento de sus padres, como por ejemplo:

- prestar consentimiento para el tratamiento médico
- solicitar un permiso de trabajo
- inscribirse en la escuela o universidad

También tendrá que renunciar a su derecho a que sus padres lo mantengan.

Aunque esté emancipado:

- Igual tiene que asistir a la escuela.
- No se puede casar sin el consentimiento de sus padres.
- Probablemente permanecerá bajo la jurisdicción de la corte de menores, si comete un delito.

Si tiene un tutor legal:

Todas las veces que este folleto hace referencia al padre o padres, incluye a los tutores legales y tutores.

¿Cómo me emancipo?

Hay **tres** maneras para emanciparse:

1. Puede casarse (Esto requiere el consentimiento de sus padres y permiso de la corte).
2. Puede incorporarse a las fuerzas armadas. (Esto requiere el consentimiento de sus padres y las fuerzas armadas lo tienen que aceptar).

¿Qué hago si el juez aprueba mi petición de emancipación?

Si el juez aprueba su petición de emancipación después de celebrar una audiencia, o sin audiencia, tiene que llevar sus documentos a la oficina del secretario y presentarlos. El secretario presentará la declaración de emancipación original y le dará copias que guardará como prueba de su emancipación. Es posible que tenga que mostrarle estas copias a empleadores, propietarios, médicos, funcionarios escolares u otros que normalmente requieren el consentimiento de sus padres.

Si quiere avisarle al Departamento de Vehículos Motorizados (DMV) de su emancipación, llene un formulario llamado Solicitud de un menor emancipado al Departamento de Vehículos Motorizados de California (EM-140) y llévelo al DMV junto con una copia certifi cada de la declaración de emancipación.

¿La emancipación es permanente?

Por lo general, la emancipación es permanente. Sin embargo, si hay declaraciones en su petición que no son ciertas, o si se vuelve incapaz de mantenerse, la corte puede anular la declaración de emancipación.

¿Tengo otras opciones aparte de la emancipación?

La emancipación es sólo una de varias alternativas que tiene a su disposición si cree que no puede vivir con sus padres. Le puede convenir considerar otras opciones como:

- consejería familiar o servicios de mediación para usted y sus padres
- vivir con otro adulto responsable (tía, tío, abuelo/a, o amigo de la familia)

- fijará una fecha para una audiencia sobre su petición a celebrarse en los 30 días siguientes.

El secretario de la corte le dará una copia "endosada y presentada" de la orden del juez.

Declaración de emancipación sin audiencia

Si el juez determina que se cumplieron o se renunciaron a todos los requisitos de aviso y consentimiento, y que la emancipación no va en contra de su mejor interés, es posible que le apuebe la petición sin tener una audiencia.

Fijar una fecha de audiencia y dar aviso

Si el juez quiere más información, se celebrará una audiencia dentro de los 30 días de la orden que requiere aviso y fija una fecha de audiencia. Si el juez ordena que haya una audiencia para tratar la cuestión, el secretario le informará al fiscal de la hora y fecha de la audiencia. Es posible que el juez le obligue dar aviso del horario y lugar de la audiencia a sus padres y otras personas. Esto es muy importante porque es posible que el juez sea muy estricto al verificar que sus padres recibieron el aviso debido antes de aprobar su petición de emancipación.

Para dar aviso es necesario enviar por correo o dar personalmente una copia de la petición de emancipación a cada persona que el juez le indique. Un adulto, de 18 años de edad o más, tiene que dar personalmente o enviar las copias lo antes posible después de que se fije la fecha. Luego, esa persona tiene que llenar un formulario de *Prueba de entrega* para que usted lo presente ante el secretario de la corte.

3. Puede obtener una declaración de emancipación de un juez.

Este folleto sólo le dice cómo ser declarado emancipado por un juez. Si quiere que un juez lo declare emancipado, tiene que convencerlo de que cumpla **TODOS los siguientes requisitos:**

1. Que tiene por lo menos 14 años de edad.
2. Voluntariamente quiere vivir separado y aparte de sus padres con el consentimiento o acuerdo de sus padres. (Sus padres no se oponen a que viva separado de ellos.)
3. Puede manejar sus propias finanzas.
4. Tiene una fuente de ingresos que no proviene de ninguna actividad ilegal.
5. La emancipación no estaría en contra de su mejor interés; sería bueno para usted.

¿Cómo consigo que un juez me declare emancipado?

Tendrá que llenar ciertos formularios y presentarlos ante la corte. Puede obtener formularios en blanco para llenar desde la oficina del secretario de la corte. Los formularios que *tiene que* llenar son:

- *Petición para una declaración de emancipación de un menor, Orden de prescripción de aviso, Declaración de emancipación, y Orden denegando petición* (EM-100)
- *Emancipación de un menor – Declaración de ingresos y gastos* (EM-115)
- *Aviso de audiencia* (EM-109)
- *Declaración de emancipación de un menor después de la audiencia* (EM-130)

Petición de emancipación

Tiene que presentar una *Petición de declaración de emancipación de un menor* (formulario EM-100) en el condado en que vive. (Consulte la ofi cina del secretario en su zona para averiguar qué división de la corte trata las emancipaciones. Si es dependiente o pupilo de la corte de menores, la petición se tiene que presentar en la corte de menores.) Sólo usted puede presentar una petición de emancipación a la corte. También le pedirán que dé una dirección de residencia verifi cable. También tiene que llenar y adjuntar a la petición un formulario llamado *Emancipación de un menor – Declaración de ingresos y gastosy gastosy gastos* (formulario EM-115).

Honorarios de presentación o exención

Es posible que tenga que pagar una cuota para presentar su petición de emancipación. Pregúntele al secretario si tiene que pagar una cuota. Si no puede pagar, puede presentar una solicitud para no tener que pagar el honorario. Llene y presente estos formularios: *Solicitud de exención de cuotas y costos de la corte* y *Orden sobre la solicitud de exención de cuotas y costos de la corte.* A menos que lo eximan, el solicitante pagará el honorario de presentación que se indique. La responsabilidad fi nanciera del menor requerida para obtener emancipación no queda comprobada simplemente por haber pagado el honorario.

Cómo llenar los formularios

- Escriba en letra de molde o a máquina TODA la información en los formularios.
- Firme la petición y escriba la fecha.
- Incluya una declaración explicando cómo y dónde vive, por qué quiere ser emancipado, y cómo se está manteniendo. Si tiene hijos, diga cómo los está manteniendo. También puede incluir cartas de su empleador y el propietario de su vivienda.
- Si no sabe dónde viven sus padres o tutores, tiene que decir a la corte cuándo vio a sus padres por última vez y qué esfuerzos ha hecho para averiguar dónde viven.
- Si sabe donde viven sus padres, pero se niegan a firmar el consentimiento, tiene que obtener una fecha de audiencia del secretario de la corte y dar aviso a sus padres de la audiencia.
- Si sabe donde viven sus padres pero no quiere avisar a uno o a ambos que presentó esta petición, tiene que escribir TODOS sus motivos y solicitarle a la corte que le eximan el requisito de avisarle a sus padres.

Cómo presentar la petición y otros formularios

Después de haber llenado los formularios y todos los adjuntos necesarios, y de obtener las firmas de sus padres (si es posible), lleve los formularios y adjuntos a la oficina del secretario para presentarlos. (Cuando vaya a buscar los formularios en blanco, pregúntele al secretario cuántas copias de cada formulario llenado tiene que llevar. No se olvide de quedarse con una copia.) Cuando llegue a la corte, dígale al secretario que está presentando una petición de emancipación y muéstrele sus documentos. El secretario se quedará con por lo menos una copia de su petición. El secretario le dará la petición al juez, o le indicará cómo tiene que hacer para dársela usted. Dentro de los 30 días después de presentar la petición, el juez

- aprobará su petición; o
- denegará su petición; o

- các dịch vụ cố vấn cho gia đình hoặc hòa giải giữa bạn và cha mẹ của bạn
- sống với một người lớn khác có trách nhiệm (cô dì, chú bác, ông bà, hoặc bạn của gia đình)
- nhờ các cơ quan công và tư trợ giúp
- một thỏa thuận không nghi thức với cha mẹ bạn để cho phép bạn sống riêng

Tập Hướng Dẫn về Giải Tỏa Tư Cách Nương Tựa

Tập hướng dẫn này chỉ thông tin cơ bản về những phiên xử giải tỏa tư cách nương tựa.
Nếu bạn cần thêm chi tiết, bạn có thể hỏi luật sư.

Form Adopted for Optional Use
Judicial Council of California
EM-100-INFO V (Vietnamese) (Rev. September 1,2018)

GIẢI TỎA TƯ CÁCH NƯƠNG TỰA LÀ GÌ?

Giải tỏa tư cách nương tựa là một thủ tục pháp lý giải tỏa cho trẻ để không còn chịu quyền nuôi dưỡng và kiểm soát của cha mẹ hoặc người giám hộ trước khi trẻ đến tuổi thành niên. (Tại California, tuổi thành niên là 18.) Nếu được giải tỏa tư cách nương tựa, bạn sẽ có thể làm một số việc mà không cần phải được cha mẹ ưng thuận, chẳng hạn như:

- ưng thuận điều trị y khoa
- xin giấy phép làm việc
- ghi danh đi học tại một trường hoặc viện đại học

Bạn cũng từ bỏ quyền được cha mẹ cấp dưỡng.

Dù bạn được giải tỏa tư cách nương tựa:

- Bạn vẫn phải đi học.
- Bạn không được kết hôn nếu không được cha mẹ ưng thuận.
- Bạn có thể vẫn thuộc thẩm quyền của tòa thiếu niên nếu phạm pháp.

NẾU BẠN CÓ NGƯỜI GIÁM HỘ PHÁP LÝ:

Tất cả những chỗ trong tập hướng dẫn này nói về cha mẹ đều gồm cả người giám hộ pháp lý hoặc người giám hộ.

LÀM THẾ NÀO ĐỂ TÔI ĐƯỢC GIẢI TỎA TƯ CÁCH NƯƠNG TỰA?

Có **ba** cách để bạn được giải tỏa tư cách nương tựa:

1. Bạn có thể kết hôn (Trường hợp phải được cha mẹ ưng thuận và được tòa cho phép.)

TÔI PHẢI LÀM GÌ NẾU TÒA CHẤP THUẬN ĐƠN XIN GIẢI TỎA TƯ CÁCH NƯƠNG TỰA CỦA TÔI?

Nếu tòa chấp thuận đơn xin giải tỏa nương tựa của bạn sau khi mở phiên xử hoặc không cần xử, bạn phải đem giấy tờ lại nộp cho văn phòng lục sự. Lục sự sẽ nộp bản gốc tuyên bố giải tỏa tư cách nương tựa, và giao cho bạn những bản sao để lưu làm bằng chứng giải tỏa tư cách nương tựa. Bạn có thể cần xuất trình những bản sao này cho sở làm, chủ nhà, bác sĩ, các viên chức nhà trường, hoặc những người khác cần phải có giấy ưng thuận của cha mẹ.

Nếu bạn muốn thông báo cho Nha Lộ Vận (DMV) về tình trạng được giải tỏa tư cách nương tựa của mình, hãy điền một Mẫu Đơn của Vị Thành Niên Được Giải Tỏa Tư Cách Nương Tựa cho Nha Lộ Vận California (EM-140) và đem đến DMV cùng với một bản sao thị thực của tuyên bố giải tỏa tư cách nương tựa.

LỆNH GIẢI TỎA TƯ CÁCH NƯƠNG TỰA CÓ VĨNH VIỄN HAY KHÔNG?

Lệnh giải tỏa tư cách nương tựa thông thường có giá trị vĩnh viễn. Tuy nhiên, nếu có những lời khai trong đơn của bạn không đúng sự thật, hoặc nếu bạn không thể tự nuôi thân, tòa có thể hủy bỏ lệnh tuyên bố giải tỏa nương tựa.

TÔI CÓ CHỌN LỰA GÌ KHÁC NGOÀI VIỆC GIẢI TỎA TƯ CÁCH NƯƠNG TỰA?

Giải tỏa tư cách nương tựa là một trong nhiều giải pháp cho bạn nếu bạn cảm thấy không thể sống với cha mẹ. Bạn có thể xét đến những giải pháp khác như:

- ấn định ngày xử trên đơn trong vòng 30 ngày sau đó.

Lục sự sẽ giao cho bạn một bản sao lệnh tòa được chứng nhận là đã nộp.

Tuyên bố giải tỏa nương tựa mà không cần xử

Nếu tòa kết luận rằng tất cả các điều kiện về thông báo và ưng thuận đã được đáp ứng hoặc miễn, và giải tỏa nương tựa không đi ngược lại quyền lợi tốt nhất của bạn, tòa có thể chấp thuận đơn xin của bạn mà không cần phải mở phiên xử.

Ấn định phiên xử và thông báo

Nếu tòa muốn có thêm chi tiết, một phiên xử sẽ được tổ chức trong vòng 30 ngày sau khi ra lệnh phải thông báo và ấn định ngày xử. Nếu tòa ra lệnh sẵn sàng phân xử nội vụ, lục sự sẽ thông báo cho biện lý địa hạt về ngày giờ của phiên xử. Tòa có thể đòi hỏi bạn phải thông báo cho cha mẹ và những người khác về ngày giờ và địa điểm phiên xử. Điều kiện này rất quan trọng, vì tòa có thể rất nghiêm ngặt về việc bảo đảm là cha mẹ bạn phải được thông báo đúng mức trước khi chấp thuận đơn xin giải tỏa nương tựa.

Bạn có thể thông báo bằng cách nhờ giao tay hoặc gửi qua đường bưu điện bản sao của đơn xin giải tỏa nương tựa cho mỗi người được tòa liệt kê cho bạn. Một người lớn, từ 18 tuổi trở lên, phải đích thân giao tay hoặc gửi qua đường bưu điện những bản sao này cho bạn càng sớm càng tốt sau khi ấn định ngày xử, và điền mẫu *Proof of Service (Bằng Chứng Tống Đạt)* và nộp cho lục sự.

2. Bạn có thể nhập ngũ. (Trường hợp phải được cha mẹ ưng thuận và quân đội nhận nhập ngũ.)
3. Bạn có thể xin tòa tuyên bố giải tỏa tư cách nương tựa.

Tập hướng dẫn này chỉ cho biết về cách xin tòa tuyên bố giải tỏa tư cách nương tựa. Nếu bạn muốn tòa tuyên bố giải tỏa tư cách nương tựa, bạn phải thuyết phục tòa là bạn hội đủ **TẤT CẢ các điều kiện sau đây:**

1. Bạn đã đủ ít nhất là 14 tuổi.
2. Bạn muốn sống riêng rẽ với cha mẹ nếu được cha mẹ ưng thuận hoặc không phản đối. (Cha mẹ bạn không phản đối việc bạn ở riêng.)
3. Bạn có thể tự lo liệu về tài chánh.
4. Bạn có một nguồn lợi tức không phải do hoạt động bất hợp pháp mà ra.
5. Giải tỏa tư cách nương tựa phải không đi ngược với các quyền lợi tốt nhất của bạn; mà là có lợi cho bạn.

LÀM THẾ NÀO ĐỂ TÔI XIN TÒA TUYÊN BỐ GIẢI TỎA TƯ CÁCH NƯƠNG TỰA?

Bạn cần phải điền một số mẫu đơn và nộp cho tòa. Bạn có thể đến văn phòng lục sự tòa để lấy những mẫu đơn trống để điền. Những mẫu đơn bạn *phải* điền là:

- *Petition for Delaration of Emancipation of Minor, Order Prescribing Notice, Declaration of Emancipation, và Order Denying Petition* (EM-100) *(Đơn Xin Giải Tỏa Tư Cách Nương Tựa của Vị Thành Niên, Thông Báo Ghi lệnh, Tuyên Bố Giải Tỏa Tư Cách Nương Tựa, và Lệnh Bác Đơn Xin)*
- *Emancipation of Minor—Income and Expense Declaration* (MC-306) *(Giải Tỏa Tư Cách Nương Tựa của Vị Thành Niên—Bản Tuyên Khai Lợi Tức và Chi Phí)*

- *Notice of Hearing* (EM-109) *(Thông Báo Phiên Xử)*
- *Declaration of Emancipation of Minor After Hearing* (EM-130) *(Tuyên Bố Giải Tỏa Tư Cách Nương Tựa của Vị Thành Niên Sau Khi Xử)*

Đơn xin giải tỏa tư cách nương tựa

Bạn phải điền *Petition for Declaration of Emancipation of Minor* (EM-100) *(Đơn Xin Giải Tỏa Tư Cách Nương Tựa của Vị Thành Niên)* tại quận cư ngụ của bạn. (Hỏi văn phòng lục sự địa phương để biết ban nào của tòa lo về giải tỏa tư cách nương tựa. Nếu bạn là người đang nương tựa hoặc thuộc trách nhiệm của tòa thiếu niên, đơn phải được nộp tại tòa thiếu niên.) Chỉ có bạn mới được nộp đơn xin tòa giải tỏa nương tựa. Bạn sẽ được yêu cầu cung cấp địa chỉ cư ngụ có thể kiểm chứng được. Bạn cũng phải điền và kèm theo đơn xin một mẫu *Emancipation of Minor—Income and Expense Declaration* (MC-306) *(Giải Tỏa Tư Cách Nương Tựa của Vị Thành Niên—Bản Tuyên Khai Lợi Tức và Chi Phí).*

Lệ phí nộp đơn hoặc miễn khoản

Bạn có thể phải đóng một khoản lệ phí nộp đơn xin giải tỏa tư cách nương tựa. Hỏi lục sự xem có phải đóng lệ phí hay không. Nếu bạn không có khả năng đóng lệ phí, bạn có thể nộp đơn xin miễn lệ phí, kể cả mẫu *Application for Waiver of Court Fees and Costs (Đơn Xin Miễn Lệ Phí và Án Phí)* và một mẫu *Order on Application of Court Fees and Costs (Lệnh về Đơn Xin Miễn Lệ Phí và Án Phí)*. Nếu không được miễn, đương đơn phải đóng lệ phí nộp đơn như được quy định. Khả năng trả được hay không trả được lệ phí nộp đơn không phải là bằng chứng về trách nhiệm tài chánh của trẻ vị thành niên theo điều kiện được giải tỏa tư cách nương tựa.

Điền đơn

- Viết chữ in hoặc đánh máy TẤT CẢ các chi tiết hỏi trên những mẫu đơn này.
- Ký tên và đề ngày trong đơn xin.

- Kèm theo một bản ghi giải thích về tình trạng sinh sống của bạn, tại sao bạn muốn được giải tỏa tư cách nương tựa, và bạn tự nuôi thân như thế nào. Nếu bạn có con, hãy cho biết bạn nuôi con bằng cách nào. Bạn cũng có thể kèm thêm thư của sở làm và chủ nhà.
- Nếu bạn không biết cha mẹ hoặc người giám hộ bạn sống ở đâu, bạn phải cho tòa biết lần sau cùng bạn gặp cha mẹ bạn là khi nào và bạn đã có các nỗ lực gì để tìm xem cha mẹ bạn ở đâu.
- Nếu bạn biết cha mẹ bạn sống ở đâu, nhưng họ không chịu ký giấy ưng thuận, bạn phải xin lục sự hẹn ngày xử, và giao thông báo phiên xử cho cha mẹ.
- Nếu bạn biết cha mẹ bạn sống ở đâu, nhưng không muốn thông báo cho một hoặc cả hai người về đơn xin này, bạn phải ghi TẤT CẢ các lý do của mình và xin tòa miễn điều kiện thông báo cho cha mẹ.

Điền đơn và những mẫu khác

Sau khi bạn đã điền các mẫu đơn và tất cả những phụ đính cần thiết, và có chữ ký của cha mẹ (nếu có thể được), hãy đem những mẫu đơn và phụ đính này đến nộp tại văn phòng lục sự. (Khi bạn lấy những mẫu đơn trống, hãy hỏi lục sự xem bạn cần đem theo bao nhiêu bản của mỗi mẫu. Nhớ giữ lại một bản cho chính mình.) Khi đến tòa, hãy cho lục sự biết là bạn muốn nộp đơn xin giải tỏa tư cách nương tựa và đưa cho lục sự giấy tờ của bạn. Lục sự sẽ giữ ít nhất là một bản đơn của bạn. Lục sự sẽ nộp hoặc bảo bạn nộp đơn cho thẩm phán. Trong vòng 30 ngày sau khi nộp đơn, tòa sẽ

- chấp thuận đơn xin của bạn; hoặc
- bác đơn xin của bạn; hoặc

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
IN THE MATTER OF *(NAME):* Petitioner, a minor		
NOTICE OF HEARING—EMANCIPATION OF MINOR ☐ **CONSENT AND WAIVER OF NOTICE**		CASE NUMBER:

1. The minor *(name)*: has filed a petition asking the court to declare the minor an **EMANCIPATED MINOR**. If the petition is granted, the minor will be considered to be over the age of majority for purposes set forth in California Family Code section 7050.
2. A HEARING for the court to consider the petition will be held:
   on *(date)*: at *(time)*: in Dept.: Room:

TO PARENTS:
IF THE PETITION IS GRANTED, THE MINOR, THE MINOR'S REPRESENTATIVE, OR THE DISTRICT ATTORNEY MAY LATER PETITION THE COURT TO RESCIND THE DECLARATION OF EMANCIPATION AND YOU MAY BE LIABLE FOR SUPPORT AND MEDICAL COVERAGE FOR THE MINOR.

Date:

(TYPE OR PRINT NAME) ▶ ☐ PETITIONER ☐ CLERK

CONSENT AND WAIVER OF NOTICE

The undersigned give up the right to notice of a hearing on the Petition for Declaration of Emancipation, and consent to a declaration of emancipation without a hearing.

a. ☐ Mother: Signature: _____ Dated:
   Address:
   Telephone number:
b. ☐ Father: Signature: _____ Dated:
   Address:
   Telephone number:
c. ☐ Legal guardian: Signature: _____ Dated:
   Address:
   Telephone number:
d. ☐ Social worker:
   ☐ Probation officer: Signature: _____ Dated:
   Address:
   Telephone number:
e. ☐ District attorney: Signature: _____ Dated:
   Address:
   Telephone number:

EM-115

ATTORNEY OR PARTY WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):		
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
IN THE MATTER OF *(NAME):* Petitioner, a minor		
EMANCIPATION OF MINOR INCOME AND EXPENSE DECLARATION		CASE NUMBER:

1. My name and address are:

   My telephone number is:

   I have been living at this address since:

   I live there with *(name and relationship of all persons, including children):*

2. My date of birth is:

3. a. ☐ I am attending school *(name of school and grade):*

   b. ☐ I am not attending school. The highest year of education I have completed is:

4. My occupation is:

5. a. ☐ I am employed. My place of employment is *(name and address):*
   I started work there on *(date):*

   b. ☐ I am not employed at the present time. I last worked from *(starting month and year):*
   to *(ending month and year):* My gross monthly earnings were: $

6. a. ☐ I am not receiving welfare or AFDC and I do not intend to apply for welfare or AFDC.

   b. ☐ I am receiving welfare or AFDC. Monthly amount received: $

   c. ☐ I have applied for welfare or AFDC.

   d. ☐ I intend to apply for welfare or AFDC.

IN THE MATTER OF *(name):*	CASE NUMBER:

7. The average of my gross monthly earnings is: Amount
   a. ☐ Salary and wages, including bonuses and overtime $
   b. ☐ Money received from parents or other adults assisting me $
      (name and relationship):
   c. ☐ Other *(specify source and amount)*: $

8. I have the following assets: Value
   a. ☐ Cash $
   b. ☐ Checking account $
   c. ☐ Savings account $
   d. ☐ Stocks, bonds $
   e. ☐ Vehicle *(year, make, model)* $
   f. ☐ Other *(specify):* $

9. My monthly expenses are: Amount
   a. ☐ Rent or ☐ Mortgage $
   b. ☐ Food $
   c. ☐ Clothing $
   d. ☐ Phone and utilities $
   e. ☐ Vehicle $
      (1) Loan payments $
      (2) Maintenance $

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

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PETITIONER)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: TELEPHONE NO.:	***FOR COURT USE ONLY***
ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
IN THE MATTER OF *(NAME)*: Petitioner, a minor	
DECLARATION OF EMANCIPATION OF MINOR AFTER HEARING	CASE NUMBER:

1. This proceeding came on for hearing as follows:
   a. Date: Time: ☐ Dept.: ☐ Div.: ☐ Room:
   b. Judge *(name)*:
   c. Present in court:
      - ☐ Petitioner
      - ☐ Father
      - ☐ Mother
      - ☐ Probation officer *(name)*:
      - ☐ Social worker *(name)*:
      - ☐ County counsel *(name)*:
      - ☐ District attorney *(name)*:
      - ☐ Other *(name and relationship to minor)*:
      - ☐ Attorney *(name)*:
      - ☐ Attorney *(name)*:
      - ☐ Attorney *(name)*:
2. **THE COURT FINDS THAT:**
   a. ☐ Notice was given as prescribed by the court.
   b. ☐ Warning has been given to the petitioner's ☐ mother ☐ father that a court may rescind the declaration of emancipation and the parents may become liable for the minor's support and medical coverage.
   c. The petitioner is a person described by Family Code section 7120.
   d. Emancipation is not contrary to the best interests of the petitioner.
3. **THE PETITION IS GRANTED. THE PETITIONER IS DECLARED TO BE EMANCIPATED FOR THE PURPOSES SET FORTH IN FAMILY CODE SECTION 7050 ET SEQ**.

Date:

_____
(JUDGE OF THE SUPERIOR COURT)

[SEAL]

CLERK'S CERTIFICATE

I certify that the foregoing is a true and correct copy of the original on file in my office.

Date: Clerk, by _____, Deputy

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. : E-MAIL ADDRESS: ATTORNEY FOR (*name*):	***FOR COURT USE ONLY***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
IN THE MATTER OF *(NAME)*:	
EMANCIPATED MINOR'S APPLICATION TO CALIFORNIA DEPARTMENT OF MOTOR VEHICLES	CASE NUMBER:

On _____ I was declared to be emancipated for the purposes set forth in Family Code
(DATE OF EMANCIPATION ORDER)

section 7050 et seq. by order of the Honorable _____,
(NAME OF JUDICIAL OFFICER)

Judge of the Superior Court of _____ County.
(NAME OF COUNTY)

I apply to the California Department of Motor Vehicles for entry of identifying information in its law enforcement computer network and for inclusion of the fact of my emancipation on any identification card issued to me by the Department. I have attached a certified copy of the Declaration of Emancipation.

Date: ▶ _____
(SIGNATURE OF EMANCIPATED MINOR)

HC-001

Name: _____

Address: _____

_____

_____

_____

_____

CDC or ID Number: _____

_____

_____

_____

_____

(Court)

_____

Petitioner

vs.

_____

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

No. _____

(To be supplied by the Clerk of the Court)

INSTRUCTIONS—READ CAREFULLY

- **If you are challenging an order of commitment or a criminal conviction and are filing this petition in the superior court, you should file it in the county that made the order.**
- **If you are challenging the conditions of your confinement and are filing this petition in the superior court, you should file it in the county in which you are confined.**

- Read the entire form *before* answering any questions.
- This petition must be clearly handwritten in ink or typed. You should exercise care to make sure all answers are true and correct. Because the petition includes a verification, the making of a statement that you know is false may result in a conviction for perjury.
- Answer all applicable questions in the proper spaces. If you need additional space, add an extra page and indicate that your answer is "continued on additional page."
- If you are filing this petition in the superior court, you only need to file the original unless local rules require additional copies. Many courts require more copies.
- If you are filing this petition in the Court of Appeal in paper form and you are an attorney, file the original and 4 copies of the petition and, if separately bound, 1 set of any supporting documents (unless the court orders otherwise by local rule or in a specific case). If you are filing this petition in the Court of Appeal electronically and you are an attorney, follow the requirements of the local rules of court for electronically filed documents. If you are filing this petition in the Court of Appeal and you are *not* represented by an attorney, file the original and one set of any supporting documents.
- If you are filing this petition in the California Supreme Court, file the original and 10 copies of the petition and, if separately bound, an original and 2 copies of any supporting documents.
- Notify the Clerk of the Court in writing if you change your address after filing your petition.

Approved by the Judicial Council of California for use under rule 8.380 of the California Rules of Court (as amended effective January 1, 2007). Subsequent amendments to rule 8.380 may change the number of copies to be furnished to the Supreme Court and Court of Appeal.

This petition concerns:

☐ A conviction ☐ Parole

☐ A sentence ☐ Credits

☐ Jail or prison conditions ☐ Prison discipline

☐ Other *(specify):* _____

1. Your name: _____

2. Where are you incarcerated? _____

3. Why are you in custody? ☐ Criminal conviction ☐ Civil commitment

Answer items a through i to the best of your ability.

a. State reason for civil commitment or, if criminal conviction, state nature of offense and enhancements (for example, "robbery with use of a deadly weapon").

_____

_____

_____

_____

b. Penal or other code sections: _____

c. Name and location of sentencing or committing court:

_____

_____

_____

d. Case number: _____

e. Date convicted or committed: _____

f. Date sentenced: _____

g. Length of sentence: _____

h. When do you expect to be released? _____

i. Were you represented by counsel in the trial court? ☐ Yes ☐ No *If yes, state the attorney's name and address:*

_____

_____

_____

4. What was the LAST plea you entered? *(Check one):*

☐ Not guilty ☐ Guilty ☐ Nolo contendere ☐ Other: _____

5. If you pleaded not guilty, what kind of trial did you have?

☐ Jury ☐ Judge without a jury ☐ Submitted on transcript ☐ Awaiting trial

6. GROUNDS FOR RELIEF

Ground 1: State briefly the ground on which you base your claim for relief. For example, "The trial court imposed an illegal enhancement." *(If you have additional grounds for relief, use a separate page for each ground. State ground 2 on page 4. For additional grounds, make copies of page 4 and number the additional grounds in order.)*

a. Supporting facts:

Tell your story briefly without citing cases or law. If you are challenging the legality of your conviction, describe the facts on which your conviction is based. *If necessary, attach additional pages.* CAUTION: You must state facts, not conclusions. For example, if you are claiming incompetence of counsel, you must state facts specifically setting forth what your attorney did or failed to do and how that affected your trial. Failure to allege sufficient facts will result in the denial of your petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.) A rule of thumb to follow is, *who* did exactly *what* to violate your rights at what time *(when)* or place *(where). (If available, attach declarations, relevant records, transcripts, or other documents supporting your claim.)*

b. Supporting cases, rules, or other authority *(optional)*:

(Briefly discuss, or list by name and citation, the cases or other authorities that you think are relevant to your claim. If necessary, attach an extra page.)

7. **Ground 2 or Ground** _____ *(if applicable):*

a. Supporting facts:

b. Supporting cases, rules, or other authority:

8. Did you appeal from the conviction, sentence, or commitment? ☐ Yes ☐ No If yes, give the following information:
   a. Name of court ("Court of Appeal" or "Appellate Division of Superior Court"):
   b. Result: c. Date of decision:
   d. Case number or citation of opinion, if known:
   e. Issues raised: (1)
      (2)
      (3)
   f. Were you represented by counsel on appeal? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

9. Did you seek review in the California Supreme Court? ☐ Yes ☐ No If yes, give the following information:
   a. Result: b. Date of decision:
   c. Case number or citation of opinion, if known:
   d. Issues raised: (1)
      (2)
      (3)

10. If your petition makes a claim regarding your conviction, sentence, or commitment that you or your attorney did not make on appeal, explain why the claim was not made on appeal:

11. Administrative review:
   a. If your petition concerns conditions of confinement or other claims for which there are administrative remedies, failure to exhaust administrative remedies may result in the denial of your petition, even if it is otherwise meritorious. (See *In re Muszalski* (1975) 52 Cal.App.3d 500.) Explain what administrative review you sought or explain why you did not seek such review:

   b. Did you seek the highest level of administrative review available? ☐ Yes ☐ No
   Attach documents that show you have exhausted your administrative remedies.

12. Other than direct appeal, have you filed any other petitions, applications, or motions with respect to this conviction, commitment, or issue in any court? ☐ Yes If yes, continue with number 13. ☐ No If no, skip to number 15.

13 a. (1) Name of court: _____

(2) Nature of proceeding (for example, "habeas corpus petition"): _____

(3) Issues raised: (a) _____

(b) _____

(4) Result (attach order or explain why unavailable): _____

(5) Date of decision: _____

b. (1) Name of court: _____

(2) Nature of proceeding: _____

(3) Issues raised: (a) _____

(b) _____

(4) Result *(attach order or explain why unavailable):* _____

(5) Date of decision: _____

c. *For additional prior petitions, applications, or motions, provide the same information on a separate page.*

14. If any of the courts listed in number 13 held a hearing, state name of court, date of hearing, nature of hearing, and result:

15. Explain any delay in the discovery of the claimed grounds for relief and in raising the claims in this petition. (See *In re Swain* (1949) 34 Cal.2d 300, 304.)

16. Are you presently represented by counsel? ☐ Yes ☐ No If yes, state the attorney's name and address, if known:

17. Do you have any petition, appeal, or other matter pending in any court? ☐ Yes ☐ No If yes, explain:

18. If this petition might lawfully have been made to a lower court, state the circumstances justifying an application to this court:

I, the undersigned, say: I am the petitioner in this action. I declare under penalty of perjury under the laws of the State of California that the foregoing allegations and statements are true and correct, except as to matters that are stated on my information and belief, and as to those matters, I believe them to be true.

Date: _____

▶ _____
(SIGNATURE OF PETITIONER)

ATTORNEY OR PARTY WITHOUT ATTORNEY NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*): STATE BAR NUMBER:	***FOR COURT USE ONLY***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
IN THE MATTER OF *(NAME)* : Petitioner	
PETITION FOR WRIT OF HABEAS CORPUS—LPS ACT	CASE NUMBER:

1. Petitioner is being unlawfully restrained of liberty at *(specify name of treatment facility)*:
   by *(specify name of agency and treating psychiatrist)*:
2. Petitioner was admitted to the treatment facility on *(date)*: _____ and is currently being held pursuant to
   - ☐ W & I, § 5150 (72-hour hold)
   - ☐ W & I, § 5250 (14-day certification)
   - ☐ W & I, § 5260 (2d 14-day certification)
   - ☐ W & I, § 5270.15 (30-day cert.)
   - ☐ W & I, § 5300 (180-day post certification)
   - ☐ W & I, § 5350 (conservatorship)
   - ☐ W & I, § 5352.1 (temporary conservatorship)
   - ☐ Other *(specify)*:
3. **Check at least one box:**
   a. ☐ Petitioner is illegally confined for the following reason:

   b. ☐ Petitioner has been denied the following rights without good cause (Welf. & Inst. Code, §§ 5325, 5325.1, and 5326):

4. ☐ Petitioner requests that this court *(check all that apply)*:
   a. ☐ Issue a Writ of Habeas Corpus to the director of the facility named in item 1, commanding that the petitioner be brought before this court at a specified time and place.
   b. ☐ Order the facility to release petitioner from restraint.
   c. ☐ Order that all rights to which petitioner is entitled as a patient be observed.
   d. ☐ Grant such other relief as this court deems appropriate.

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

Date: _____

(TYPE OR PRINT NAME)

(SIGNATURE OF PETITIONER OR PERSON REQUESTING WRIT ON PETITIONER'S BEHALF)

Form Approved for Optional Use
Judicial Council of California
HC-002 [Rev. September 1, 2018]

PETITION FOR WRIT OF HABEAS CORPUS—LPS ACT
(Mental Health)

www.courts.ca.gov

HC-003

ATTORNEY OR PETITIONER WITHOUT ATTORNEY	STATE BAR NUMBER:	*FOR COURT USE ONLY*
NAME:		
FIRM NAME:		
STREET ADDRESS:		
CITY:	STATE: ZIP CODE:	
TELEPHONE NO.:	FAX NO.:	
E-MAIL ADDRESS:		
ATTORNEY FOR (*name*):	PETITIONER'S BIRTHDATE:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF		
STREET ADDRESS:		
MAILING ADDRESS:		
CITY AND ZIP CODE:		
BRANCH NAME:		
IN THE MATTER OF *(NAME):* Petitioner		
PETITION FOR WRIT OF HABEAS CORPUS—Penal Commitment		CASE NUMBER:

1. Petitioner is being unlawfully restrained of liberty at *(specify name of treatment facility):*
   by *(specify name of persons having custody, if known):*

2. Petitioner was admitted to the treatment facility on *(date)*: _____ and is currently being held pursuant to:
   - ☐ Penal Code, § 1026 (not guilty by reason of insanity)
   - ☐ Penal Code, § 1370 (incompetent to stand trial)
   - ☐ Penal Code, § 2962 (mentally disordered offender)
   - ☐ Other *(specify):* _____
   - ☐ Penal Code, § 1026.5(b) (extended commitment)
   - ☐ Penal Code, § 2684 (prisoners transferred to state hospital)
   - ☐ Former W & I, § 6300 (MDSO)

3. **Check at least one box:**
   a. ☐ Petitioner is illegally confined for the following reason:

   b. ☐ Petitioner has been denied the following rights without good cause (Pen. Code, § 2600):

4. Petitioner has no adequate and speedy remedy at law.
5. Have you made any previous requests for relief from this confinement? _____
   If your answer is yes, state the nature and grounds for your request, the date it was made, and the result:

6. Petitioner requests that this court *(check all that apply):*
   a. ☐ Issue a Writ of Habeas Corpus to the director of the facility named in item 1, commanding that the petitioner be brought before this court at a specified time and place.
   b. ☐ Order the facility personnel to release petitioner from said restraint.
   c. ☐ Order that all rights to which petitioner is entitled as a patient be observed.
   d. ☐ Grant such other relief as this court deems appropriate.

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

Date: _____

_____
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PETITIONER OR PERSON REQUESTING WRIT ON PETITIONER'S BEHALF)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS *(optional):* ATTORNEY FOR *(Name):*	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF	
In re DEFENDANT: , on habeas corpus Date of birth: California Dept. of Corrections No. *(if applicable):*	
NOTICE AND REQUEST FOR RULING **(Cal. Rules of Court, rule 4.551(a)(3)(B))**	CASE NUMBER(S):

I, , filed a petition for writ of habeas corpus in the above entitled case in the Superior Court of California, County of *(name):* on *(date):* .

As of this date, I have not received a ruling on the petition within 60 days of filing as required by rule 4.551(a)(3)(A) of the California Rules of Court. Therefore, I request that the court rule on the petition. (Cal. Rules of Court, rule 4.551(a)(3)(B).) A copy of the original petition for writ of habeas corpus is attached to this *Notice and Request for Ruling*.

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

Date:

(TYPE OR PRINT NAME) (SIGNATURE)

JUROR QUESTIONNAIRE FOR CIVIL CASES

Code of Civil Procedure Section 205(c)-(d)

Sec. 1. Statutory Authority

This Juror Questionnaire has been drafted under the authority of Code of Civil Procedure section 205(c)-(d) and is intended to expedite jury selection. It is not intended to alter statutes or rules governing the authority of the court or the role of counsel during voir dire.

Sec. 2. Use Notes for Courts

A. General

This Juror Questionnaire is intended for use in the court's discretion in appropriate civil cases. Its use in cases of brief duration may not be appropriate. Particular kinds of cases may require that this questionnaire be altered or augmented. The Personal Injury Supplement is intended to be used along with the General Questions in personal injury actions. Judges, in their own discretion, must determine what additional kinds of inquiry are appropriate in any given case.

B. Pre–Voir Dire Conference

The court should confer with counsel about voir dire before a jury panel is called. At this conference, the court may establish (1) guidelines for the use of the Juror Questionnaire, (2) any supplemental questions to be propounded to the panel by questionnaire, (3) the extent of the court's oral inquiry of the panel, and (4) the extent of oral questioning by counsel. Proposed supplemental questions drafted by counsel should be filed and served at least three court days before the pre–voir dire conference. Arrangements for duplication of completed questionnaires should be confirmed. The parties should share the cost of duplication.

C. Introduction of Questionnaire to Prospective Jurors

It is suggested that the Juror Questionnaire be used after the court has given its customary introductory remarks and any additional instructions that the court deems appropriate. The court also may wish to tell the panel members that a questionnaire will be used, to encourage complete answers, and to remind them that their answers will be given under penalty of perjury. In introducing the questionnaire, the court should instruct prospective jurors how to proceed if they have difficulty reading or filling out the form.

The court could direct that the Juror Questionnaire be given to prospective jurors by the jury commissioner in the jury assembly room. However, this procedure ordinarily will mean that jurors are not given complete instructions about the type of case they will hear or the identity of participants and witnesses. In addition, jurors who fill out the form before appearing in the trial court may not clearly understand that their answers are given under penalty of perjury. For these reasons, and to avoid the need to have jurors fill out supplemental questionnaires once they have been sent to the trial court, it is strongly recommended that the Juror Questionnaire be used in the trial court setting.

JUROR QUESTIONNAIRE FOR CIVIL CASES

Introduction and Instructions

Thank you for coming to court as a potential juror. Before the case can start, a jury must be selected. The judge and the people involved in the case need to know something about you in order to select jurors who can be fair to both sides.

Everyone has attitudes and opinions that are shaped by their life experiences. Sometimes these experiences can make it difficult to look at a certain issue in an unbiased and unemotional way. As a juror, you must return a verdict based on the law and on the facts proved in court, not on emotion or on other views not supported by the evidence. The judge will give you instructions on the law and on how you should go about deciding the case. You must listen to and follow the judge's instructions.

The questions on this form are designed to help the court and the lawyers learn something about your background and your views on issues that may be related to this case. The questions are asked not to invade your privacy, but to make sure that you can be a fair and impartial juror. If there is any reason why you might not be able to give both sides a fair trial in this case, it is important that you say so.

The judge has decided to use this form to save time and to give you a chance to tell the court and the lawyers about yourself.

In portions of this form, you will see the term "significant personal relationship." That term means a former spouse, domestic partner, life partner, or anyone with whom you have an influential or intimate relationship that you would characterize as important.

If there is anything you do not want to talk about in open court, please circle the question number. After you have finished the questionnaire, let the clerk know that you have circled one or more question numbers.

Do not write on the back of any page. Use an additional sheet of paper.

If you are called to the jury box, your answers to this questionnaire become a matter of public record, just as if you had answered the questions aloud in the courtroom.

If you have trouble reading, understanding, or filling out this form, please let the court clerk know.

PLEASE REMEMBER THAT YOU ARE ANSWERING THESE QUESTIONS UNDER PENALTY OF PERJURY. YOUR ANSWERS MUST BE TRUE AND COMPLETE. THANK YOU FOR YOUR HELP IN SELECTING A FAIR JURY.

JUROR QUESTIONNAIRE FOR CIVIL CASES

General Questions

PLEASE PRINT ALL ANSWERS LEGIBLY

FULL NAME: _____

1.1 DATE AND PLACE OF BIRTH: _____

1.2 AREA, NEIGHBORHOOD, OR COMMUNITY IN THIS COUNTY WHERE YOU CURRENTLY LIVE (DO NOT GIVE YOUR ADDRESS):

_____

☐ HOUSE ☐ APARTMENT ☐ OWN ☐ RENT

1.3 AREA, NEIGHBORHOOD, OR COMMUNITY WHERE YOU HAVE LIVED IN THE PAST 10 YEARS (AND DATES):

_____

_____

_____

_____

1.4 WHAT IS THE HIGHEST LEVEL OF EDUCATION YOU COMPLETED?

☐ GRADE SCHOOL OR LESS
☐ SOME HIGH SCHOOL
☐ HIGH SCHOOL GRADUATE
☐ OTHER *(PLEASE EXPLAIN):*

_____
_____
_____

☐ SOME COLLEGE
(MAJOR): _____
☐ COLLEGE GRADUATE
(MAJOR): _____
☐ POSTGRADUATE STUDY
(MAJOR): _____
☐ TECHNICAL, VOCATIONAL, OR BUSINESS SCHOOL
(MAJOR): _____

1.5 IF YOU PLAN TO ATTEND OR ARE CURRENTLY ATTENDING SCHOOL, DESCRIBE:

_____

_____

_____

_____

1.6 IF YOU HAVE TAKEN ANY COURSES OR HAD ANY TRAINING IN MEDICINE OR OTHER HEALTH CARE FIELD, DESCRIBE:

_____

_____

_____

_____

1.7 IF YOU HAVE TAKEN ANY COURSES OR HAD ANY TRAINING IN LAW OR A RELATED SUBJECT, DESCRIBE:

1.8 EDUCATIONAL BACKGROUND OF ANY OTHER ADULT WHO LIVES IN YOUR HOME, INCLUDING ANY DEGREES OR CERTIFICATES EARNED:

1.9 YOUR PRESENT EMPLOYMENT STATUS *(CHECK ALL THAT APPLY):*

☐ EMPLOYED FULL-TIME ☐ RETIRED ☐ UNEMPLOYED, LOOKING FOR WORK
☐ EMPLOYED PART-TIME ☐ STUDENT ☐ UNEMPLOYED, NOT LOOKING FOR WORK
☐ HOMEMAKER

1.10 YOUR CURRENT OR MOST RECENT OCCUPATION:

1.11 NAME OF YOUR CURRENT OR MOST RECENT EMPLOYER OR, IF A STUDENT, YOUR SCHOOL:

1.12 WHAT ARE YOUR SPECIFIC DUTIES AND RESPONSIBILITIES ON THE JOB?

1.13 DOES YOUR JOB INVOLVE SUPERVISING OTHER PEOPLE? ☐ YES ☐ NO
IF YES, APPROXIMATELY HOW MANY? _____

1.14 ARE YOU INVOLVED IN THE HIRING OR FIRING OF OTHER EMPLOYEES? ☐ YES ☐ NO

1.15 ARE YOU INVOLVED IN EVALUATING THE JOB PERFORMANCE OF OTHER EMPLOYEES? ☐ YES ☐ NO

1.16 ALL OTHER EMPLOYMENT YOU HAVE HAD (AND FOR HOW LONG):

1.17 ALL FULL-TIME EMPLOYMENT OF YOUR SPOUSE OR ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP (AND FOR HOW LONG):

1.18 WHAT ARE/WERE THE OCCUPATIONS OF YOUR PARENTS? (IF RETIRED, WHAT DID THEY DO BEFORE?)

MOTHER:

FATHER:

1.19 IF YOU HAVE CHILDREN, PLEASE LIST (INCLUDING ANY CHILDREN WHO DO NOT CURRENTLY LIVE WITH YOU):

SEX	AGE	DOES CHILD LIVE WITH YOU?	EDUCATION	OCCUPATION

1.20 IF YOU OR YOUR CURRENT SPOUSE OR PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP HAS EVER SERVED IN THE MILITARY, PLEASE LIST FOR EACH THE BRANCH OF SERVICE AND DATES OF SERVICE:

1.21 WHAT SOCIAL, CIVIC, PROFESSIONAL, TRADE, OR OTHER ORGANIZATIONS ARE YOU AFFILIATED WITH?

1.22 DESCRIBE ANY OFFICES YOU HAVE HELD IN ORGANIZATIONS LISTED ABOVE:

1.23 DO YOU KNOW ANYONE ON THIS JURY PANEL?

1.24 ON HOW MANY CASES HAVE YOU SERVED ON A JURY? _____

WHERE DID YOU SERVE ON A JURY?

WHAT KINDS OF CASES DID YOU HEAR WHILE SERVING ON A JURY?

IN HOW MANY OF THOSE CASES DID THE JURY REACH A VERDICT?

IN HOW MANY OF THOSE CASES DID YOU SERVE AS THE JURY FOREPERSON?

WAS YOUR JURY SERVICE A POSITIVE OR NEGATIVE EXPERIENCE?

1.25 IF YOU HAVE EVER BEEN TO COURT FOR ANY OTHER REASON (EXCLUDING DIVORCE), EXPLAIN:

1.26 IF YOU PERSONALLY KNOW ANY JUDGES OR ATTORNEYS OR COURT PERSONNEL, WHAT ARE THEIR NAMES AND RELATIONSHIP TO YOU?

1.27 DESCRIBE ANY PROBLEMS (VISION, HEARING, OR OTHER MEDICAL PROBLEMS) THAT MAY AFFECT YOUR JURY SERVICE:

1.28 IF YOU OR ANYONE CLOSE TO YOU HAS EVER MADE ANY TYPE OF CLAIM FOR DAMAGES, EXPLAIN:

1.29 IF A CLAIM FOR MONEY DAMAGES HAS EVER BEEN MADE AGAINST YOU OR ANYONE CLOSE TO YOU, EXPLAIN THE CIRCUMSTANCES:

1.30 IF YOU OR ANYONE CLOSE TO YOU HAS EVER SUED OR BEEN SUED IN ANY TYPE OF LAWSUIT, EXPLAIN:

1.31 DO YOU FEEL THAT MONEY DAMAGES AWARDED IN LAWSUITS ARE *(CHECK ONE):*

- ☐ EXCESSIVE
- ☐ OFTEN TOO LARGE
- ☐ ABOUT RIGHT
- ☐ OCCASIONALLY TOO LOW
- ☐ OFTEN TOO LOW
- ☐ OTHER *(SPECIFY):* _____

1.32 IF YOU HAVE ANY ETHICAL, RELIGIOUS, POLITICAL, OR OTHER BELIEFS THAT MAY PREVENT YOU FROM SERVING AS A JUROR, EXPLAIN:

1.33 IF THERE IS ANY MATTER NOT COVERED BY THIS QUESTIONNAIRE THAT COULD AFFECT YOUR ABILITY TO BE A FAIR AND IMPARTIAL JUROR, EXPLAIN:

JUROR QUESTIONNAIRE FOR CIVIL CASES

Personal Injury Supplement

FULL NAME: _____

2.1 IF YOU OR ANYONE CLOSE TO YOU HAS EVER BEEN INVOLVED IN AN ACCIDENT IN WHICH SOMEONE WAS INJURED, EXPLAIN:

_____

_____

_____

2.2 PLACE A CHECK MARK ON THE APPROPRIATE LINE(S) IF YOU OR ANYONE CLOSE TO YOU HAS EVER BEEN EMPLOYED IN ANY CAPACITY BY ANY OF THE FOLLOWING TYPES OF BUSINESSES:

YOURSELF	OTHER PERSON	
☐	☐	ANY COURT IN THE STATE OF CALIFORNIA
☐	☐	ATTORNEY, LAW FIRM, OR LAW OFFICE
☐	☐	CLAIMS ADJUSTMENT, EVALUATION, REVIEW, SETTLEMENT, OR INVESTIGATION
☐	☐	ACCIDENT INVESTIGATION OR LAW ENFORCEMENT
☐	☐	DISABILITY, HEALTH, LIFE, CASUALTY, OR ACCIDENTAL INJURY BENEFITS OR PROGRAMS
☐	☐	ECONOMICS, ACTUARIAL, OR INVESTMENTS
☐	☐	HEALTH CARE DOCTOR, NURSING, HOSPITAL, DENTAL, PHYSICAL THERAPY, PHARMACY, OR ANY RELATED FIELD

2.3 IF YOU CHECKED ANY LINE IN THE PREVIOUS QUESTION (2.2), PLEASE STATE THE RELATIONSHIP OF THAT PERSON TO YOU, THE TYPE AND DETAILS OF THAT EMPLOYMENT, AND THE YEARS OF THAT EMPLOYMENT:

_____

_____

_____

2.4 DO YOU HAVE ANY BELIEFS AGAINST AWARDING DAMAGES FOR PERSONAL INJURY, PAIN, OR SUFFERING?

☐ YES ☐ NO

IF YES, EXPLAIN:

_____

_____

_____

2.5 DO YOU OR ANY MEMBERS OF YOUR IMMEDIATE FAMILY OR HOUSEHOLD SEE A DOCTOR OR OTHER MEDICAL PRACTITIONER REGULARLY FOR ANY CONTINUING MEDICAL PROBLEM?

☐ YES ☐ NO

IF YES, EXPLAIN:

_____

_____

_____

JUROR QUESTIONNAIRE FOR CIVIL CASES

Verification

I, _____, DECLARE UNDER PENALTY OF PERJURY UNDER THE
(TYPE OR PRINT NAME)
LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING RESPONSES I HAVE GIVEN ON THIS JUROR QUESTIONNAIRE, AND ON ANY ATTACHED SHEETS, ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Date:

▶ _____
(SIGNATURE OF DECLARANT)

JUROR QUESTIONNAIRE FOR CRIMINAL CASES

Form MC-002 (Optional Form)

Code of Civil Procedure Section 205(c)–(d)

Sec. 1. Statutory Authority

This Juror Questionnaire has been drafted under the authority of Code of Civil Procedure section 205(c)–(d) and is intended to expedite jury selection. It is not intended to alter statutes or rules governing the authority of the court or the role of counsel during voir dire.

Sec. 2. Use Notes for Courts

A. General

This Juror Questionnaire is an **optional form** and is **NOT** intended to constitute the complete examination of prospective jurors. **The utility and appropriateness of this questionnaire to a particular case is at the discretion of the judge.** Particular kinds of cases may require that this questionnaire be altered or augmented with the participation of counsel.

B. Pre-Voir Dire Conference

Rule of Court 4.200 requires that the court confer with counsel about voir dire before a jury panel is called. At this conference, the court may establish (1) guidelines for the use of the Juror Questionnaire, (2) any supplemental questions to be propounded to the panel by questionnaire, (3) the extent of the court's oral inquiry of the panel, and (4) the extent of oral questioning by counsel. Arrangements for duplication of completed questionnaires should be confirmed.

C. Introduction of Questionnaire to Prospective Jurors

It is suggested that the Juror Questionnaire be used after the court has given its customary introductory remarks and any additional instructions that the court deems appropriate. The court also may wish to tell the panel members that a questionnaire will be used, to encourage complete answers, and to remind them that their answers will be given under penalty of perjury. In introducing the questionnaire, the court should instruct prospective jurors how to proceed if they have difficulty reading or filling out the form.

It is not recommended that the court direct the jury commissioner to give the Juror Questionnaire to prospective jurors in the jury assembly room. This procedure ordinarily will mean that jurors are not given complete instructions about the type of case they will hear or the identity of participants and witnesses. In addition, jurors who fill out the form before appearing in the trial court may not clearly understand that their answers are given under penalty of perjury. For these reasons, and to avoid the need to have jurors fill out supplemental questionnaires once they have been sent to the trial court, it is strongly recommended that the Juror Questionnaire be used in the trial court setting.

JUROR QUESTIONNAIRE FOR CRIMINAL CASES

Introduction and Instructions

Thank you for coming to court as a potential juror. Before the case can start, a jury must be selected. The judge and the parties need to know information about you and people you know in order to select jurors who can be fair to both sides.

Everyone has attitudes and opinions that are shaped by their life experiences. Sometimes these experiences can make it difficult to look at a certain issue in an unbiased and unemotional way. As a juror, you must return a verdict based on the law and on the facts proved in court. The judge will give you instructions on the law and on how you should go about deciding the case. You must listen to and follow the judge's instructions.

The questions on this form are designed to help the court and the lawyers learn something about your background and your views on issues that may be related to this case. The questions are asked not to invade your privacy, but to make sure that you can be a fair and impartial juror.

In portions of this form, you will see the term “person with whom you share a significant personal relationship.” That term means a former spouse, domestic partner, life partner, or anyone with whom you have an influential or intimate relationship that you would characterize as important.

As you answer the questions that follow, please keep in mind that there are no “right” or “wrong” answers. The only right answer is one that reflects how you honestly feel. Please make sure your answers are as complete as possible. Complete answers are far more helpful and may help shorten the time it takes to select a jury. If you have trouble reading, understanding, or filling out this form, please let the court staff know. If a question does not apply to you please write in “N/A” for “not applicable” rather than leave the question blank.

The information you provide will become part of the court record in this case and will be a public document that is accessible to anyone. Some of the questions may require information that is personal and sensitive to you, and you may be reluctant to talk about this information with the other prospective jurors and the public present. If this is so, write “private” next to the question and the court **may** then give you an opportunity to share your information on the record with only the judge, counsel, the defendant, and the court reporter present. The answers you provide will, under most circumstances, be included as part of the public record but you may not have to share the information in open court.

PLEASE PUT THE LAST FOUR DIGITS OF YOUR JUROR IDENTIFICATION NUMBER FOUND ON YOUR JUROR BADGE ON THE TOP OF EACH PAGE.

REMEMBER THAT YOU ARE ANSWERING THESE QUESTIONS UNDER PENALTY OF PERJURY. YOUR ANSWERS MUST BE TRUE AND COMPLETE. THANK YOU FOR YOUR HELP IN SELECTING A FAIR JURY.

Juror ID number _____
Case number _____

JUROR QUESTIONNAIRE FOR CRIMINAL CASES

General Questions

PLEASE PRINT ALL ANSWERS LEGIBLY

1.1 AGE: ____

1.2 THIS (THESE) CRIME(S) ALLEGEDLY TOOK PLACE (*SPECIFY LOCATION OF CRIME(S)*):

_____

DO YOU RESIDE IN THE VICINITY OF THIS LOCATION OR DO YOU FREQUENT THIS LOCATION? ☐ YES ☐ NO

IF YES, PLEASE EXPLAIN:

_____
_____
_____
_____

1.3 DESCRIBE ANY DIFFICULTIES (VISION, HEARING, OR MEDICAL PROBLEMS) THAT MAY AFFECT YOUR JURY SERVICE:

_____
_____
_____
_____

1.4 IF YOU HAVE ANY ETHICAL, RELIGIOUS, POLITICAL, OR OTHER BELIEFS THAT MAY PREVENT YOU FROM SERVING AS A JUROR, EXPLAIN:

_____
_____
_____
_____

Juror ID number _____
Case number _____

1.5 WHAT IS THE HIGHEST LEVEL OF EDUCATION YOU COMPLETED?

- ☐ GRADE SCHOOL OR LESS
- ☐ SOME HIGH SCHOOL
- ☐ HIGH SCHOOL GRADUATE
- ☐ OTHER *(PLEASE EXPLAIN):*

_____
_____
_____

- ☐ SOME COLLEGE
  (MAJOR): _____
- ☐ COLLEGE GRADUATE
  (MAJOR): _____
- ☐ POSTGRADUATE STUDY
  (MAJOR): _____
- ☐ TECHNICAL, VOCATIONAL, OR BUSINESS SCHOOL
  (MAJOR): _____

1.6 IF YOU PLAN TO ATTEND OR ARE CURRENTLY ATTENDING SCHOOL, DESCRIBE:

_____
_____

1.7 IF YOU, YOUR SPOUSE, ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP, OR A RELATIVE HAVE TAKEN ANY COURSES OR HAD ANY TRAINING IN LAW OR A RELATED SUBJECT, DESCRIBE:

_____
_____
_____
_____

1.8 EDUCATIONAL BACKGROUND OF ANY OTHER ADULT WHO LIVES IN YOUR HOME, INCLUDING ANY DEGREES OR CERTIFICATES EARNED:

_____
_____
_____

1.9 YOUR PRESENT EMPLOYMENT STATUS *(CHECK ALL THAT APPLY):*

- ☐ EMPLOYED FULL-TIME
- ☐ EMPLOYED PART-TIME
- ☐ HOMEMAKER
- ☐ RETIRED
- ☐ STUDENT
- ☐ UNEMPLOYED, LOOKING FOR WORK
- ☐ UNEMPLOYED, NOT LOOKING FOR WORK

1.10 YOUR CURRENT OR MOST RECENT OCCUPATION (AND FOR HOW LONG):

_____
_____
_____

Juror ID number _____
Case number _____

1.11 NAME OF YOUR CURRENT OR MOST RECENT EMPLOYER OR, IF A STUDENT, YOUR SCHOOL:

_____

_____

1.12 WHAT ARE YOUR SPECIFIC JOB DUTIES AND RESPONSIBILITIES?

_____

_____

_____

_____

1.13 DOES YOUR JOB INVOLVE SUPERVISING OTHER PEOPLE? ☐ YES ☐ NO

IF YES, APPROXIMATELY HOW MANY? _____

1.14 ARE YOU INVOLVED IN THE HIRING OR FIRING OF OTHER EMPLOYEES? ☐ YES ☐ NO

1.15 ARE YOU INVOLVED IN EVALUATING THE JOB PERFORMANCE OF OTHER EMPLOYEES? ☐ YES ☐ NO

1.16 ALL OTHER EMPLOYMENT YOU HAVE HAD IN THE PAST 10 YEARS (AND FOR HOW LONG):

_____

_____

_____

_____

_____

_____

_____

1.17 THE PRESENT EMPLOYMENT STATUS OF YOUR SPOUSE OR ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP (CHECK ALL THAT APPLY):

☐ EMPLOYED FULL-TIME
☐ EMPLOYED PART-TIME
☐ HOMEMAKER
☐ RETIRED
☐ STUDENT
☐ UNEMPLOYED, LOOKING FOR WORK
☐ UNEMPLOYED, NOT LOOKING FOR WORK

1.18 THE CURRENT OR MOST RECENT OCCUPATION OF YOUR SPOUSE OR ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP (AND FOR HOW LONG):

_____

_____

1.19 THE NAME OF THE CURRENT OR MOST RECENT EMPLOYER OF YOUR SPOUSE OR ANY OTHER PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP OR, IF A STUDENT, HIS OR HER SCHOOL:

_____

_____

Juror ID number _____
Case number _____

1.20 WHAT ARE THE SPECIFIC JOB DUTIES AND RESPONSIBILITIES OF YOUR SPOUSE OR ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP?

_____
_____
_____
_____

1.21 IF YOU, YOUR SPOUSE, A PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP, OR A RELATIVE ARE CURRENTLY WORKING OR HAVE EVER WORKED IN LAW ENFORCEMENT, PLEASE LIST THE AGENCY, POSITION, AND THE PERSON'S RELATIONSHIP TO YOU:

_____
_____
_____
_____
_____

1.22 IF YOU HAVE CHILDREN, PLEASE LIST (INCLUDING ANY CHILDREN WHO DO NOT CURRENTLY LIVE WITH YOU):

SEX	AGE	DOES CHILD LIVE WITH YOU?	EDUCATION	OCCUPATION

1.23 IF YOU, YOUR SPOUSE, OR A PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP HAS EVER SERVED IN THE MILITARY, PLEASE LIST FOR EACH THE BRANCH OF SERVICE AND DATES OF SERVICE:

_____
_____
_____

1.24 IF YOU, YOUR SPOUSE, OR A PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP EVER HAD INVOLVEMENT WITH THE MILITARY POLICE OR THE MILITARY JUSTICE SYSTEM, PLEASE DESCRIBE:

_____
_____
_____

1.25 SOCIAL, CIVIC, PROFESSIONAL, TRADE, OR OTHER ORGANIZATIONS WITH WHICH YOU ARE AFFILIATED:

_____
_____

Juror ID number _____
Case number _____

1.26 DESCRIBE ANY OFFICES YOU HAVE HELD IN ORGANIZATIONS LISTED ABOVE:

_____

_____

1.27 DO YOU KNOW ANYONE ON THIS JURY PANEL? ☐ YES ☐ NO

1.28 IF YOU PERSONALLY KNOW ANY JUDGES OR ATTORNEYS OR COURT PERSONNEL, WHAT ARE THEIR NAMES AND RELATIONSHIPS TO YOU?

_____

_____

_____

1.29 HAVE YOU PREVIOUSLY SERVED ON A CRIMINAL OR CIVIL TRIAL JURY? ☐ YES ☐ NO

ON HOW MANY CASES DID YOU SERVE? _____

APPROXIMATE YEAR(S)? _____

WHERE DID YOU SERVE ON A JURY? _____

WERE YOU A JUROR OR AN ALTERNATE? _____

WHAT KINDS OF CASES DID YOU HEAR WHILE SERVING ON A JURY?

_____

_____

_____

WAS THERE ANYTHING ABOUT YOUR JURY SERVICE THAT WOULD MAKE YOU QUESTION YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE? IF SO, PLEASE EXPLAIN:

_____

_____

_____

_____

1.30 HAVE YOU EVER SERVED ON A GRAND JURY PANEL? ☐ YES ☐ NO

CRIMINAL OR CIVIL GRAND JURY? _____

APPROXIMATE YEAR(S)? _____

WHERE DID YOU SERVE ON A GRAND JURY? _____

HOW LONG DID YOU SERVE ON A GRAND JURY? _____

WHAT KIND OF MATTER DID YOU HEAR WHILE SERVING ON A GRAND JURY?

_____

_____

WAS THERE ANYTHING ABOUT YOUR JURY SERVICE THAT WOULD MAKE YOU QUESTION YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE? IF SO, PLEASE EXPLAIN:

_____

_____

_____

_____

Juror ID number _____
Case number _____

1.31 HAVE YOU, YOUR SPOUSE, ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP, OR A RELATIVE EVER BEEN A VICTIM OF A CRIME? ☐ YES ☐ NO

IF YES, WHO? _____

WHAT CRIME(S)? _____

WHEN? _____

WHAT HAPPENED?

_____

_____

WAS ANYONE ARRESTED? ☐ YES ☐ NO

WAS THERE A TRIAL? ☐ YES ☐ NO

IF YES, DID YOU ATTEND THE TRIAL? ☐ YES ☐ NO

DID THE PERSON WHO IS THE SUBJECT OF THIS QUESTION TESTIFY? ☐ YES ☐ NO

DID THE POLICE INTERVIEW THE PERSON WHO IS THE SUBJECT OF THIS QUESTION? ☐ YES ☐ NO

DID ANYONE WORKING FOR THE DEFENDANT INTERVIEW THE PERSON WHO IS THE SUBJECT OF THIS QUESTION? ☐ YES ☐ NO

AS A RESULT OF THAT EXPERIENCE IS THERE ANYTHING THAT WOULD MAKE YOU QUESTION YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE? IF SO, PLEASE EXPLAIN:

_____

_____

_____

_____

1.32 HAVE YOU, YOUR SPOUSE, ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP, OR A RELATIVE EVER BEEN A WITNESS TO A CRIME? ☐ YES ☐ NO

IF YES, WHO? _____

WHAT CRIME(S)? _____

WHEN? _____

WHAT HAPPENED?

_____

_____

WAS ANYONE ARRESTED? ☐ YES ☐ NO

WAS THERE A TRIAL? ☐ YES ☐ NO

IF YES, DID YOU ATTEND THE TRIAL? ☐ YES ☐ NO

DID THE PERSON WHO IS THE SUBJECT OF THIS QUESTION TESTIFY? ☐ YES ☐ NO

Juror ID number _____
Case number _____

DID THE POLICE INTERVIEW THE PERSON WHO IS THE SUBJECT OF THIS QUESTION? ☐ YES ☐ NO

DID ANYONE WORKING FOR THE DEFENDANT INTERVIEW THE PERSON WHO IS THE SUBJECT OF THIS QUESTION? ☐ YES ☐ NO

AS A RESULT OF THAT EXPERIENCE IS THERE ANYTHING THAT WOULD MAKE YOU QUESTION YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE? IF SO, PLEASE EXPLAIN:

_____

_____

_____

_____

1.33 HAVE YOU, YOUR SPOUSE, ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP, OR A RELATIVE EVER HAD ANY CONTACT WITH LAW ENFORCEMENT, INCLUDING, BUT NOT LIMITED TO, BEING: (A) STOPPED BY THE POLICE? (B) ACCUSED OF MISCONDUCT, WHETHER OR NOT IT WAS A CRIME? (C) INVESTIGATED AS A SUSPECT IN A CRIMINAL CASE? (D) CHARGED WITH A CRIME? (E) A CRIMINAL DEFENDANT? ☐ YES ☐ NO

IF YES, WHO? _____

WHAT CRIME(S)? _____

WHEN? _____

WHAT HAPPENED?

_____

_____

WAS ANYONE ARRESTED? ☐ YES ☐ NO

WAS THERE A TRIAL? ☐ YES ☐ NO

IF YES, DID YOU ATTEND THE TRIAL? ☐ YES ☐ NO

DID THE PERSON WHO IS THE SUBJECT OF THIS QUESTION TESTIFY? ☐ YES ☐ NO

DID THE POLICE INTERVIEW THE PERSON WHO IS THE SUBJECT OF THIS QUESTION? ☐ YES ☐ NO

DID ANYONE WORKING FOR THE DEFENDANT INTERVIEW THE PERSON WHO IS THE SUBJECT OF THIS QUESTION? ☐ YES ☐ NO

AS A RESULT OF THAT EXPERIENCE IS THERE ANYTHING THAT WOULD MAKE YOU QUESTION YOUR ABILITY TO BE FAIR AND IMPARTIAL IN THIS CASE? IF SO, PLEASE EXPLAIN:

_____

_____

_____

_____

Juror ID number _____
Case number _____

1.34 HAVE YOU EVER BEEN TO COURT FOR ANY OTHER REASON? EXPLAIN:

_____

_____

1.35 THE FOLLOWING IS A PRINCIPLE OF LAW THAT APPLIES TO ALL CRIMINAL CASES:

A defendant in a criminal action is presumed to be innocent. This presumption requires that the People prove each element of a crime [and special allegation] beyond a reasonable doubt. Whenever the judge tells you the People must prove something, the judge means they must prove it beyond a reasonable doubt [unless the judge specifically tells you otherwise].

Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.

In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/they) not guilty. (CALCRIM No. 130)

DO YOU UNDERSTAND THIS PRINCIPLE OF LAW? ☐ YES ☐ NO

DO YOU AGREE WITH THIS PRINCIPLE OF LAW? ☐ YES ☐ NO

WILL YOU FOLLOW THIS PRINCIPLE OF LAW? ☐ YES ☐ NO

IF YOU ANSWERED NO TO ANY QUESTION, PLEASE EXPLAIN:

_____

_____

1.36 IN GENERAL, WHAT ARE YOUR OPINIONS, IF ANY, ABOUT LAW ENFORCEMENT OFFICERS?

_____

_____

1.37 HAVE YOU, YOUR SPOUSE, ANY PERSON WITH WHOM YOU HAVE A SIGNIFICANT PERSONAL RELATIONSHIP, OR A RELATIVE EVER HAD A PARTICULARLY PLEASANT OR UNPLEASANT EXPERIENCE WITH LAW ENFORCEMENT OR THE DISTRICT ATTORNEY'S OFFICE? ☐ YES ☐ NO

IF YES, PLEASE EXPLAIN:

_____

_____

1.38 WOULD THE FACT THAT A WITNESS IS A MEMBER OF LAW ENFORCEMENT CAUSE YOU TO AUTOMATICALLY BELIEVE OR DISBELIEVE HIS OR HER TESTIMONY? ☐ YES ☐ NO

IF YES, PLEASE EXPLAIN:

_____

_____

Juror ID number _____
Case number _____

JUROR QUESTIONNAIRE FOR CRIMINAL CASES

Capital Case Supplement

By asking the following questions regarding your feelings or opinions about capital punishment, the court is not suggesting in any way that you will ever need to decide this question. The court does not know in advance what the evidence in this case will be or whether you will find a defendant guilty or not guilty of any charge at all. The court is asking the following questions because *if* a defendant is found guilty of murder in the first degree as well as what we call "special circumstances" that have been charged, the possible sentences to be decided in a separate penalty trial are the sentence of death or the sentence of life imprisonment without the possibility of parole. A defendant may also be acquitted or found guilty of lesser charges, which means there never will be a penalty trial. Since we do not know in advance what your decisions may be, the court must know whether you could be fair to all sides on the issue of punishment if and only if a penalty trial is necessary.

To clarify, you will only make a sentence decision between life without the possibility of parole and death in a separate penalty trial if you find a defendant guilty of murder in the first degree beyond a reasonable doubt and you find a "special circumstance" (to be defined for you later) true.

If the penalty trial is necessary you will first hear evidence and arguments from counsel. The law also provides very specific guidelines as to what a jury can consider in deciding the sentence in this separate penalty trial. These guidelines are called "aggravating factors" and "mitigating factors" and are explained in *Judicial Council of California Criminal Jury Instructions* number 763:*

> In reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence.
>
> An aggravating circumstance or factor is any fact, condition, or event relating to the commission of a crime, above and beyond the elements of the crime itself, that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime. An aggravating circumstance may support a decision to impose the death penalty.
>
> A mitigating circumstance or factor is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime. A mitigating circumstance is something that reduces the defendant's blameworthiness or otherwise supports a less severe punishment. A mitigating circumstance may support a decision not to impose the death penalty.

* Note to users: *California Jury Instructions, Criminal (CALJIC)* and *Judicial Council of California Criminal Jury Instructions (CALCRIM)* are not intended to be used together. While the legal principles are obviously the same, the organization of concepts is approached differently. Trying to mix the two sets of instructions into a unified whole may result in omissions or confusion that could compromise clarity and accuracy.

Juror ID number _____
Case number _____

2.1 WHICH DO YOU THINK IS THE MORE SEVERE PUNISHMENT?

☐ THE DEATH PENALTY OR ☐ LIFE IN PRISON WITHOUT PAROLE

WHY?

_____

_____

_____

_____

2.2 WHICH WOULD YOU SAY ACCURATELY STATES YOUR GENERAL BELIEF REGARDING THE DEATH PENALTY?

☐ STRONGLY IN FAVOR ☐ STRONGLY OPPOSED ☐ NEUTRAL

☐ MODERATELY IN FAVOR ☐ MODERATELY OPPOSED

PLEASE EXPLAIN IN MORE DETAIL YOUR BELIEFS ABOUT THE SENTENCE OF DEATH:

_____

_____

_____

_____

2.3 WHICH WOULD YOU SAY ACCURATELY STATES YOUR GENERAL BELIEF REGARDING LIFE WITHOUT THE POSSIBILITY OF PAROLE?

☐ STRONGLY IN FAVOR ☐ STRONGLY OPPOSED ☐ NEUTRAL

☐ MODERATELY IN FAVOR ☐ MODERATELY OPPOSED

PLEASE EXPLAIN IN MORE DETAIL YOUR BELIEFS ABOUT THE SENTENCE OF LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE:

_____

_____

_____

_____

2.4 WHAT PURPOSES, IF ANY, DO YOU BELIEVE THAT LIFE IMPRISONMENT WITHOUT THE POSSIBILITY OF PAROLE SERVES?

_____

_____

_____

_____

Juror ID number _____
Case number _____

2.5 WHAT PURPOSES, IF ANY, DO YOU BELIEVE THE DEATH PENALTY SERVES?

_____
_____
_____
_____

2.6 DO YOU BELIEVE THE DEATH PENALTY IS IMPOSED:

☐ TOO OFTEN ☐ ENOUGH ☐ DO NOT KNOW

☐ NOT ENOUGH ☐ RANDOMLY

2.7 HAVE YOUR VIEWS ABOUT THE DEATH PENALTY CHANGED SUBSTANTIALLY IN EITHER INTENSITY OR NATURE IN THE LAST FEW YEARS? ☐ YES ☐ NO

IF YES, HOW HAVE YOUR VIEWS ABOUT THE DEATH PENALTY CHANGED?

_____
_____
_____
_____

2.8 CAN YOU SET ASIDE ANY OPINIONS YOU MAY HAVE ABOUT THE DEATH PENALTY, AND MAKE A DECISION IN THIS CASE BASED ON THE EVIDENCE AND THE LAW AS IT IS GIVEN BY THE JUDGE? ☐ YES ☐ NO

IF NO, WHY NOT?

_____
_____
_____
_____

2.9 DO YOU HAVE ANY RELIGIOUS OR PERSONAL BELIEFS THAT MAY INFLUENCE YOU IN YOUR DETERMINATION OF WHETHER TO VOTE TO IMPOSE EITHER THE PENALTY OF DEATH OR LIFE IN PRISON WITHOUT THE POSSIBILITY OF PAROLE? ☐ YES ☐ NO

IF YES, PLEASE EXPLAIN:

_____
_____
_____
_____

Juror ID number _____
Case number _____

2.10 ARE YOU A MEMBER OF, OR HAVE YOU CONTRIBUTED TO OR OTHERWISE SUPPORTED A CHURCH, RELIGIOUS ORGANIZATION, POLITICAL OR SOCIAL ADVOCACY GROUP, OR ANY OTHER ORGANIZATION THAT TAKES A POSITION FOR OR AGAINST THE IMPOSITION OF THE PENALTY OF DEATH? ☐ YES ☐ NO

a. IF YES, WHAT GROUP(S)?

_____
_____
_____
_____

b. WHAT IS THE GROUP'S POSITION?

_____
_____
_____
_____

c. DO YOU FEEL OBLIGATED TO ACCEPT THIS POSITION? ☐ YES ☐ NO

IF YES, PLEASE EXPLAIN WHY:

_____
_____
_____
_____

2.11 EVEN IF YOU BELIEVED THE PROSECUTOR HAD PROVED GUILT BEYOND A REASONABLE DOUBT, WOULD YOU, BECAUSE OF ANY VIEWS YOU MAY HAVE REGARDING THE DEATH PENALTY, REFUSE TO FIND THE DEFENDANT(S) GUILTY OR FIND A SPECIAL CIRCUMSTANCE TO BE TRUE IN ORDER TO AVOID HAVING TO DECIDE WHETHER TO IMPOSE THE DEATH PENALTY? ☐ YES ☐ NO

2.12 IF YOU FIND THE DEFENDANT(S) GUILTY OF THE CRIME, WOULD YOU AUTOMATICALLY IN ALL CASES VOTE FOR A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE REGARDLESS OF THE EVIDENCE CONCERNING AGGRAVATING AND MITIGATING FACTORS? ☐ YES ☐ NO

2.13 IF YOU FIND THE DEFENDANT(S) GUILTY OF THE CRIME, WOULD YOU AUTOMATICALLY IN ALL CASES VOTE FOR A SENTENCE OF DEATH REGARDLESS OF THE EVIDENCE CONCERNING AGGRAVATING AND MITIGATING FACTORS? ☐ YES ☐ NO

Juror ID number _____
Case number _____

JUROR QUESTIONNAIRE FOR CRIMINAL CASES

Verification

I, _____, DECLARE UNDER PENALTY OF PERJURY UNDER THE
(TYPE OR PRINT NAME)
LAWS OF THE STATE OF CALIFORNIA THAT THE FOREGOING RESPONSES I HAVE GIVEN ON THIS JUROR QUESTIONNAIRE, AND ON ANY ATTACHED SHEETS, ARE TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Date:

PLACE: _____

▶ _____
(SIGNATURE

JUROR QUESTIONNAIRE

PLEASE PRINT ALL ANSWERS LEGIBLY

To facilitate the jury selection process, provide the requested information under penalty of perjury. The completed questionnaire will be reviewed by all parties. The questionnaire is a public record and may be open to public inspection. If you believe that any question requires an answer that is too sensitive (personal or private) to be included in the public record, you have the right to request a private hearing, rather than writing the answer on the form. If you prefer to discuss this outside of the presence of other jurors, circle the question and write "P" (for "private") in the space for the answer.

General Information

1. **FULL NAME:** _____
2. Age: _____
3. Area, neighborhood, or community in this county where you generally live *(do not give your street address)*:

_____

☐ HOUSE ☐ APARTMENT ☐ OWN ☐ RENT

4. Do you have children? ☐ YES ☐ NO

   If yes, how many? _____ Ages: _____

Employment

5. Are you employed? ☐ YES ☐ NO

   If yes, occupation: _____ Current employer: _____

Relationship Information

6. Are there other adults in your household? ☐ YES ☐ NO

   If yes, their occupations: _____

Education

7. High school graduate: ☐ YES ☐ NO

   College graduate: ☐ YES ☐ NO

   Postgraduate degree: ☐ YES ☐ NO

8. If college or postgraduate degrees, degrees obtained: _____

Prior Jury Service

9. Have you served on a jury before? ☐ YES ☐ NO

   If yes: ☐ Civil ☐ Criminal

Other Experience

10. Have you, a relative, or a close friend ever sued anyone or been sued? ☐ YES ☐ NO

    If yes, describe:

_____

11. Do you or does anyone close to you have training or expertise in any of the following areas *(check all that apply):*

☐ Evaluating claims for loss or damage ☐ Law enforcement

☐ Law ☐ Accident reconstruction or biomechanics

☐ Medicine ☐ Specialized training in _____

12. Is there any matter not covered by this questionnaire that could affect your ability to understand the proceedings or to be a fair and impartial juror? ☐ YES ☐ NO

    If yes, describe:

_____

_____

I declare under penalty of perjury under the laws of the State of California that the responses I have given on this questionnaire and on any attached sheets are true and correct to the best of my knowledge and belief.

Date: _____ ▶ _____

(SIGNATURE OF JUROR)

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO. : E-MAIL ADDRESS: ATTORNEY FOR (*name*):	***FOR COURT USE ONLY***
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
Plaintiff: Defendant:	
JUROR'S MOTION TO SET ASIDE SANCTIONS AND ORDER	CASE NUMBER:

Notice: If you wish to contest sanctions imposed against you under Code of Civil Procedure section 209, a motion to set aside sanctions must be filed no later than 60 days after sanctions have been imposed. Provide a separate explanation for each time you were unable to appear for jury duty, unless the reason you were unable to appear for jury duty was the same each time. If the reason was the same each time, state that it was the same. If a court grants the motion and sets aside sanctions, it does not relieve you of the obligation of jury service. Do not use this form if you have been found in contempt of court for failure to appear when summoned for jury duty.

1. a. Prospective juror *(name)*:
   b. Prospective juror's identification number *(specify):*
2. Dates prospective juror was summoned to appear *(specify):*
   Date of order-to-show-cause hearing *(specify):*
3. Prospective juror was unable to attend when summoned for jury duty for the following reasons *(specify):*

   ☐ Continued on Attachment 3.
4. ☐ Attachment 4 contains copies of the following documents in support of motion *(list):*

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

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PROSPECTIVE JUROR)

ORDER ON MOTION TO SET ASIDE SANCTIONS

The motion to set aside sanctions is ☐ denied ☐ granted ☐ set for hearing on *(date):*

(JUDICIAL OFFICER)

☐ Signature follows last attachment.

Form Approved for Optional Use
Judicial Council of California
JURY-010 [Rev. September 1, 2018]

Code of Civil Procedure, § 209;
Cal. Rules of Court, Rule 2.1010
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.:	*FOR COURT USE ONLY*
NAME: FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT:	
PETITION TO DETERMINE IF DOG IS ☐ Potentially Dangerous ☐ Vicious	CASE NUMBER:
	PETITION REFERRED TO ADMINISTRATIVE AGENCY FOR HEARING DATE DEPUTY CLERK

1. Petitioner *(name)*:

   (representative capacity, if any):

   requests a hearing under Food and Agricultural Code section 31601 et seq. to declare a dog to be potentially dangerous or vicious.
2. Respondent *(name)*:

   (address):

   is the owner or keeper of the following dog *(briefly describe dog and give license number, if available)*:

3. An animal control officer or a law enforcement officer has investigated and determined that probable cause exists to believe that the dog is potentially dangerous or vicious.
4. ☐ **Potentially dangerous dog** Petitioner requests that the dog be declared to be "potentially dangerous" for the following reasons:
   a. ☐ The dog, unprovoked, has on two separate occasions within the prior 36-month period engaged in behavior that required a defensive action by a person to prevent bodily injury when the person and the dog were off the property of the owner or keeper of the dog.
   b. ☐ The dog, unprovoked, bit a person causing a less severe injury than described in item 5b.
   c. ☐ The dog, unprovoked, on two separate occasions within the prior 36-month period, killed, seriously bit, inflicted injury, or otherwise caused injury attacking a domestic animal off the property of the owner or keeper of the dog.
5. ☐ **Vicious dog** Petitioner requests that the dog be declared to be "vicious" for the following reasons:
   a. ☐ The dog, unprovoked, in an aggressive manner, inflicted severe injury or killed a human being.
   b. ☐ The dog was previously determined to be and is currently designated as a potentially dangerous dog. After its owner or keeper was notified of this determination, the dog continued the behavior described in Food and Agricultural Code section 31602 or the owner or keeper maintained the dog in violation of Food and Agricultural Code sections 31641, 31642, or 31643.

(Continued on reverse)

Form Approved for Optional Use
Judicial Council of California
MD-100 [Rev. September 1, 2018]

PETITION TO DETERMINE IF DOG IS POTENTIALLY DANGEROUS OR VICIOUS
(Menacing Dog)
105

Food & Agricultural Code, § 31601 et seq.

PETITIONER: RESPONDENT:	CASE NUMBER:

6. **This petition is supported** by the following *(attach a copy of each document checked):*

   a. ☐ Declaration of *(name):* ☐ animal control officer ☐ law enforcement officer.
   The declaration was made after an investigation and determination that probable cause exists to believe that the dog is potentially dangerous or vicious.

   b. ☐ A written and verified complaint signed by a member of the public *(name):*

   c. ☐ An incident report prepared by *(name):*

   d. ☐ Affidavit of a witness to the incident *(name):*

   e. ☐ Other *(specify):*

7. Number of pages attached *(specify):*

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

☐ This declaration is made on **information and belief.**

Date:

(TYPE OR PRINT NAME)

(SIGNATURE OF PETITIONER)

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: TELEPHONE NO.:	***FOR COURT OR AGENCY USE ONLY***
ATTORNEY FOR *{Name)*:	
COURT OR AGENCY: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT:	
NOTICE OF HEARING **On Petition To Determine If Dog Is** ☐ **Potentially Dangerous** ☐ **Vicious**	CASE NUMBER:

1. NOTICE is given that petitioner *(name)*:

   (representative capacity, if any):

   has filed a **Petition to Determine If Dog Is Potentially Dangerous or Vicious.** Copies of the petition and supporting documents are attached to this notice.

2. A HEARING on the matter will be held as follows:

Date:	Time:	Dept.:	Room:
Address of court or agency ☐ shown above ☐ is:			

3. At the hearing, you may present evidence as to why the dog should not be declared potentially dangerous or vicious. **Failure to appear at the hearing may result in an order terminating or restricting your possession of the dog.**

DO NOT BRING THE DOG TO THE HEARING

Date: ☐ Clerk, by _____ , Deputy

..... ☐ Agency _____
(TYPE OR PRINT NAME) (SIGNATURE)

_____
(TITLE)

_____
(TELEPHONE NUMBER)

(Proof of Service on reverse)

PETITIONER: RESPONDENT:	CASE NUMBER:

PROOF OF SERVICE

Petition to Determine If Dog Is Potentially Dangerous or Vicious

☐ **Personal Service** ☐ **Certified Mail**

Service of the notice on the other party may be made by one of the following ways:
(1) Personally delivering these papers to the other party.
OR
(2) Mailing the papers by certified mail return receipt requested, postage prepaid, mailed to the last known address of the other party.

1. At the time of service I was at least 18 years of age and **not a party to this legal proceeding.**

2. I served copies of the following papers in the manner shown below:
   a. Papers served: **Petition to Determine If Dog is Potentially Dangerous or Vicious** with supporting documents and **Notice of Hearing.**
   b. Manner of service *(check and complete either (1) or (2) below)*
      (1) ☐ **Personal service** I personally delivered these papers to the owner or keeper of the dog as follows:
      (a) Name:
      (b) Address where served:
      (c) Date served:
      (d) Time served:

      (2) ☐ **Certified mail return receipt requested** I deposited these papers in the United States mail, in a sealed envelope with postage fully prepaid. I used certified mail and requested a return receipt. The envelope was addressed and mailed to the owner or keeper of the dog as follows:
      (a) Name:
      (b) Address:
      (c) Date of mailing:
      (d) Place of mailing *(city, state)*:
      (e) I am a resident of or employed in the county where the notice was mailed.

3. My residence or business address is *(specify)*:

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

Date:

.....
(TYPE OR PRINT NAME OF PERSON WHO SERVED THE NOTICE)

▶ _____
(SIGNATURE OF PERSON WHO SERVED THE NOTICE)

4. *Telephone number of person who served the notice*:

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: TELEPHONE NO.:	***FOR COURT OR AGENCY USE ONLY***
ATTORNEY FOR *(Name)*:	
COURT OR AGENCY: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT:	
ORDER AFTER HEARING **(Menacing Dog)**	CASE NUMBER:

The proceeding was heard as follows:

1. a. Date: ☐ Dept.: ☐ Room:
   b. ☐ Judge *(name)*: ☐ Hearing officer *(name)*:
   c. ☐ Petitioner present ☐ Attorney present *(name)*:
   d. ☐ Respondent present ☐ Attorney present *(name)*:
2. ☐ Respondent presented evidence as to why the dog should not be declared potentially dangerous or vicious.

THE ☐ COURT ☐ AGENCY FINDS AND ORDERS

3. The **dog** is described as follows *(briefly describe dog and give license number, if available)*:

4. a. ☐ The **owner** of the dog is *(name)*:
   b. ☐ The **keeper** of the dog is *(name)*:

5. The **dog**
   a. ☐ is ☐ is not potentially dangerous.
   b. ☐ is ☐ is not vicious.

6. a. ☐ **Potentially dangerous dog**
   (1) ☐ The dog shall be properly licensed and vaccinated, and the licensing authority shall include the "potentially dangerous" designation in the dog's registration records.
   (2) ☐ The dog, while on the owner's or keeper's property, shall at all times be kept indoors or in a securely fenced yard from which the dog cannot escape, and into which children cannot trespass. The dog may be off the owner's or keeper's property only if it is restrained by a substantial leash, of appropriate length, and only if it is under the control of a responsible adult.
   (3) ☐ If the dog dies, or is sold, transferred, or permanently removed from the city or county where the owner or keeper resides, the owner shall notify the animal control department of the changed condition and new location of the dog within two working days.
   (4) ☐ Other *(specify)*:

   b. ☐ **Vicious dog**
   (1) ☐ Releasing the dog would create a significant threat to the public health, safety, and welfare *(check one)*:
   (i) ☐ The dog shall be destroyed by the animal control officer.
   (ii) ☐ The following conditions are imposed on the ownership of the dog to protect the public health, safety, and welfare *(specify)*:

(Continued on reverse)

PETITIONER: RESPONDENT:	CASE NUMBER:

6. b. (continued)

(2) ☐ (i) Continued ownership or possession of ANY DOG by the dog's owner or keeper would create a significant threat to the public health, safety, and welfare.

(ii) The ☐ owner ☐ keeper named in item 4 is prohibited from owning, controlling, or having custody of any dog for a period of *(specify)*:
from the date this order becomes final.

(3) ☐ The following conditions are imposed on the ownership of the dog *(specify)*:

(4) ☐ Other *(specify)*:

7. **Time to comply** *(Name)*: must comply with this order in accordance with the time schedule, if any, established by the animal control department or local law enforcement agency, BUT NOT more than 30 days from the date of this order (35 days if this order is mailed to you).

8. **Appeal** If you disagree with this determination, you may, within five days after you receive this order, appeal the decision to the ☐ municipal ☐ justice ☐ superior court at *(address)*:

Date:

▶ _____
(SIGNATURE OF JUDGE OR HEARING OFFICER)

CLERK'S CERTIFICATE OF MAILING

I certify that I am not a party to this cause and that a copy of the **Order After Hearing** (Menacing Dog) was mailed first class, postage fully prepaid, in a sealed envelope to each person whose name and address is shown below, and that the order was mailed

at (*place)*: , California,

on *(date)*:

Clerk, by _____, Deputy

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name and Address)*: TELEPHONE NO.:	***FOR COURT USE ONLY***
ATTORNEY FOR *(Name)*:	
COURT NAME: STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PETITIONER: RESPONDENT:	
NOTICE OF APPEAL **(Menacing Dog)**	CASE NUMBER:

1. I am the ☐ petitioner ☐ respondent in this action.

2. I appeal from the order entered by *(court or agency name):*
   on *(date)*:

3. I received a copy of the order on *(date)*:

Date:

. . . . . .
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE)

(Proof of Service on reverse)

PETITIONER: RESPONDENT:	CASE NUMBER:

PROOF OF SERVICE

Notice of Appeal — Menacing Dog

☐ **Personal Service** ☐ **First-Class Mail**

Service of the notice of appeal on the other party may be made by one of the following ways:
(1) Personally delivering these papers to the other party.
OR
(2) Mailing the papers by first-class mail, postage prepaid, mailed to the last known address of the other party.
Anyone at least 18 years of age EXCEPT ANY PARTY may personally serve or mail the notice. Be sure whoever served the notice fills out and signs this proof of service. File this proof of service with the court as soon as the notice is served.

1. At the time of service I was at least 18 years of age and **not a party to this legal proceeding.**

2. I served copies of the following papers in the manner shown:
a. Papers served: **Notice of Appeal (Menacing Dog)**

b. Manner of service *(check and complete either (1) or (2) below)*
(1) ☐ **Personal service** I personally delivered these papers to the other party as follows:
(a) Name:
(b) Address where served:

(c) Date served:
(d) Time served:

(2) ☐ **First-class mail** I deposited these papers in the United States mail, in a sealed envelope with postage fully prepaid. The envelope was addressed and mailed to the owner or keeper of the dog as follows:
(a) Name:
(b) Address:

(c) Date of mailing:
(d) Place of mailing *(city, state)*:
(e) I am a resident of or employed in the county where the notice was mailed.

3. My residence or business address is *(specify)*:

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

Date:

. . . . . .
(TYPE OR PRINT NAME OF PERSON WHO SERVED THE NOTICE)

▶ _____
(SIGNATURE OF PERSON WHO SERVED THE NOTICE)

4. *Telephone number of person who served the notice:*

VL-100

ATTORNEY OR PARTY WITHOUT ATTORNEY: *(To be completed only if a party is making the motion)* NAME: STATE BAR NO.:	*FOR COURT USE ONLY*
FIRM NAME: STREET ADDRESS: CITY: STATE: ZIP CODE: TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR (*name*):	
☐ **COURT OF APPEAL, APPELLATE DISTRICT, DIVISION** ☐ **SUPERIOR COURT OF CALIFORNIA, COUNTY OF** STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CASE NAME:	
PREFILING ORDER—VEXATIOUS LITIGANT	CASE NUMBER:

1. Name and address of each plaintiff or cross-complainant or other party subject to this prefiling order:

2. This prefiling order is entered pursuant to a motion made by ☐ the court ☐ party *(name)*:

3. The person or persons identified in item 1, unless represented by an attorney, are prohibited from filing any new litigation in the courts of California without approval of the presiding justice or presiding judge of the court in which the action is to be filed.

4. The clerk is ordered to provide a copy of this order to the Judicial Council of California by fax at 415-865-4329 or by mail at the address below.

Vexatious Litigant Prefiling Orders
Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102-3688

Date: _____

_____
JUDICIAL OFFICER

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR *(Name)*:	
☐ **COURT OF APPEAL, APPELLATE DISTRICT, DIVISION** ☐ **SUPERIOR COURT OF CALIFORNIA, COUNTY OF** STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/ PETITIONER: DEFENDANT/ RESPONDENT: OTHER:	
REQUEST TO FILE **NEW LITIGATION BY VEXATIOUS LITIGANT** Type of case: ☐ Limited Civil ☐ Unlimited Civil ☐ Small Claims ☐ Family Law ☐ Probate ☐ Other	CASE NUMBER:

1. I have been determined to be a vexatious litigant and must obtain prior court approval to file any new litigation in which I am not represented by an attorney. Filing new litigation means (1) commencing any civil action or proceeding, or (2) filing any petition, application, or motion (except a discovery motion) under the Family or Probate Code.

2. I have attached to this request a copy of the document to be filed and I request approval from the presiding justice or presiding judge of the above court to file this document *(name of document):*

3. The new filing has merit because *(Provide a brief summary of the facts on which your claim is based; the harm you believe you have suffered or will suffer; and the remedy or resolution you are seeking):*

4. The new filing is not being filed to harass or to cause a delay because *(give reasons):*

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

Date:

(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

Form Approved for Optional Use
Judicial Council of California
VL-110 [Rev. September 1, 2018]

Code of Civil Procedure, § 391.7
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO.: E-MAIL ADDRESS: ATTORNEY FOR *(Name)*:	
☐ **COURT OF APPEAL, APPELLATE DISTRICT, DIVISION** ☐ **SUPERIOR COURT OF CALIFORNIA, COUNTY OF** STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/ PETITIONER: DEFENDANT/ RESPONDENT: OTHER:	
ORDER TO FILE **NEW LITIGATION BY VEXATIOUS LITIGANT** Type of case: ☐ Limited Civil ☐ Unlimited Civil ☐ Small Claims ☐ Family Law ☐ Probate ☐ Other	CASE NUMBER:

ORDER

Approval to file the attached document is:

a. ☐ Granted
b. ☐ Denied
c. ☐ Other:

☐ Attachment to order. Number of pages _____.

Date:

(PRESIDING JUSTICE OR JUDGE)

Form Approved for Optional Use
Judicial Council of California
VL-115 [Rev. September 1, 2018]

Code of Civil Procedure, § 391.7
www.courts.ca.gov

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):*	***FOR COURT USE ONLY***
TELEPHONE NO.: FAX NO. : E-MAIL ADDRESS: ATTORNEY FOR (*Name*):	
☐ **COURT OF APPEAL, APPELLATE DISTRICT, DIVISION** ☐ **SUPERIOR COURT OF CALIFORNIA, COUNTY OF** STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER:	
APPLICATION FOR ORDER TO VACATE PREFILING ORDER AND REMOVE PLAINTIFF/PETITIONER FROM JUDICIAL COUNCIL VEXATIOUS LITIGANT LIST	CASE NUMBER:

Important, please read: This application must be filed in the court that entered the prefiling order, either in the action in which the prefiling order was entered or in conjunction with a request to the presiding justice or presiding judge to file new litigation under Code of Civil Procedure section 391.7. If you have made an application to vacate a prefiling order that was denied, you may not make another application to vacate in any California court until at least 12 months after the denial.

1. I have been determined to be a vexatious litigant under the California Code of Civil Procedure section 391. This application requests that the court vacate its prefiling order and order my name removed from the statewide vexatious litigant list.

2. The prefiling order or orders were issued in the following case or cases *(list all)*:

Court: _____ Court: _____

Case Name: _____ Case Name: _____

Case Number: _____ Case Number: _____

Date prefiling order entered: _____ Date prefiling order entered: _____

☐ Continued on *Attachment* (form MC-025).

3. I request that the prefiling order be vacated under Code of Civil Procedure section 391.8. (Describe below the material change in the facts on which the order was granted and how the ends of justice would be served by vacating the order.)

☐ Continued on *Attachment* (form MC-025).

PLAINTIFF/PETITIONER:	CASE NUMBER:

4. ☐ I have not made an application for an order to vacate a prefiling order in the last 12 months.

5. *On Attachment* (form MC-025) is a list of every case filed in the last five years in which I've been a plaintiff, cross-complainant, or defendant, the approximate number of motions I filed in each case, and the number of requests for new litigation that I have filed. *(Include case name, case number, court in which filed, and date filed.)*

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

(DATE) _____ (TYPE OR PRINT NAME OF DECLARANT) _____ ▶ _____ (SIGNATURE OF DECLARANT)

VL-125

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***
☐ **COURT OF APPEAL, APPELLATE DISTRICT, DIVISION** ☐ **SUPERIOR COURT OF CALIFORNIA, COUNTY OF** STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
PLAINTIFF/PETITIONER:	
ORDER ON APPLICATION TO VACATE PREFILING ORDER AND REMOVE PLAINTIFF/PETITIONER FROM JUDICIAL COUNCIL VEXATIOUS LITIGANT LIST	CASE NUMBER:

Plaintiff/Petitioner requests that this court vacate the prefiling order and remove the vexatious litigant's name from the statewide list in the following case or cases *(if more than one, list each separately)*:

Court:

Case Name:

Case Number:

Date prefiling order entered:

Court:

Case Name:

Case Number:

Date prefiling order entered:

☐ Continued on *Attachment* (form MC-025)

☐ Granted

☐ Denied

Date: _____

_____
PRESIDING JUSTICE OR JUDGE

The clerk is ordered to provide this order to the Judicial Council of California by fax at 415-865-4329 or by mail at the address below.

Vexatious Litigant Prefiling Orders
Judicial Council of California
455 Golden Gate Avenue
San Francisco, California 94102-3688

Form Approved for Optional Use
Judicial Council of California
VL-125 [Rev. September 1, 2018]

ORDER ON APPLICATION TO VACATE PREFILING ORDER AND REMOVE PLAINTIFF/PETITIONER FROM JUDICIAL COUNCIL VEXATIOUS LITIGANT LIST

Code of Civil Procedure, § 391.8
www.courts.ca.gov

Rule 3.36. Notice of limited scope representation and application to be relieved as attorney

(a) Notice of limited scope representation

A party and an attorney may provide notice of their agreement to limited scope representation by serving and filing a *Notice of Limited Scope Representation* (form ~~MC-950~~CIV-150).

(b) Notice and service of papers

After the notice in (a) is received and until either a substitution of attorney or an order to be relieved as attorney is filed and served, papers in the case must be served on both the attorney providing the limited scope representation and the client.

(c) Procedures to be relieved as counsel on completion of representation

Notwithstanding rule 3.1362, an attorney who has completed the tasks specified in the *Notice of Limited Scope Representation* (form ~~MC-950~~CIV-150) may use the procedures in this rule to request that he or she be relieved as attorney in cases in which the attorney has appeared before the court as an attorney of record and the client has not signed a *Substitution of Attorney—Civil* (form MC-050).

(d) Application

An application to be relieved as attorney on completion of limited scope representation under Code of Civil Procedure section 284(2) must be directed to the client and made on the *Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form ~~MC-955~~CIV-151).

(e) Filing and service of application

The application to be relieved as attorney must be filed with the court and served on the client and on all other parties or attorneys for parties in the case. The client must also be served with a blank *Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form ~~MC-956~~ CIV-152).

(f) No objection

If no objection is served and filed with the court within 15 days from the date that the *Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form ~~MC-955~~CIV-151) is served on the client, the attorney making

Rule 3.36 of the California Rules of Court is amended, effective September 1, 2018, to read:

the application must file an updated form ~~MC-955~~CIV-151 indicating the lack of objection, along with a proposed *Order on Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form ~~MC-958~~CIV-153). The clerk must then forward the order for judicial signature.

(g) Objection

If an objection to the application is served and filed within 15 days, the clerk must set a hearing date on the *Objection to Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form ~~MC-956~~CIV-152). The hearing must be scheduled no later than 25 days from the date the objection is filed. The clerk must send the notice of the hearing to the parties and the attorney.

(h) Service of the order

If no objection is served and filed and the proposed order is signed under (f), the attorney who filed the *Application to Be Relieved as Attorney on Completion of Limited Scope Representation* (form ~~MC-955~~CIV-151) must serve a copy of the signed order on the client and on all parties or the attorneys for all parties who have appeared in the case. The court may delay the effective date of the order relieving the attorney until proof of service of a copy of the signed order on the client has been filed with the court.