JUDICIAL COUNCIL OF CALIFORNIA

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MEMORANDUM

Date
January 18, 2019

To
Members of the Rules and Projects Committee

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

Subject
Civil Jury Instructions: Instructions With Minor Revisions (Release 33A)

Action Requested
Review and Approve Online Posting of Instructions With Minor Revisions

Deadline
January 24, 2019

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends that the Rules and Projects Committee (RUPRO) approve revisions to the *Judicial Council of California Civil Jury Instructions (CACI)* to maintain and update those instructions. The 42 instructions in this release, prepared by the advisory committee, contain only the types of revisions that the Judicial Council has given RUPRO final authority to approve—primarily instructions with only changes to the Directions for Use or additions to the Sources and Authority.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that RUPRO approve for posting online revisions to the 42 civil jury instructions, prepared by the advisory committee, that contain changes that do not require posting for public comment or Judicial Council approval. Effective with RUPRO's approval, these instructions will be posted online on the California Courts website and on Lexis and Westlaw.

The revised instructions are attached at pages 6–151.

Relevant Previous Council Action

The Task Force on Jury Instructions was appointed by the Judicial Council 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.[1]

At the October 20, 2006, Judicial Council meeting, the council approved authority for RUPRO to "review and approve nonsubstantive technical changes and corrections and minor substantive changes unlikely to create controversy to *Judicial Council of California Civil Jury Instructions* (CACI) and *Criminal Jury Instructions* (CALCRIM)."[2]

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;[3]
(c) Additions or changes to the Directions for Use;[4]
(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

Online-only process

This is the committee's third proposed online-only release, which has been designated as Release 33A.[5] On October 24, 2017, RUPRO approved adding four additional annual *CACI* releases in

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

[2] 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.

[3] In light of the committee's 2014 decision to remove verbatim quotes of statutes, rules, and regulations from *CACI*, this category is now mostly moot. It still applies if a statute, rule, or regulation is revoked, or if subdivisions are renumbered.

[4] 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.

[5] The 2019 edition, approved November 24, 2018, was Release 33.

January, March, July, and September.[6] However, it was not possible for the official publisher LexisNexis to process both an online-only release in March and a print release for May and an online-only release in September and a print release in November. Thus, there are only two online-only releases annually (January and July).

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

The online-only instructions that RUPRO approved in July (Release 32A)[7] were included in the new 2019 edition of *CACI*. The instructions in this online-only release will be included in the 2019 midyear print supplement of *CACI*.

Overview of revisions

Of the 42 revised instructions in this release that are presented for final RUPRO approval:

- 34 have revisions under only category (a) above (additional cases added to [or deleted from] Sources and Authority);
- 2 (CACI Nos. 3066 and VF-3035) have revisions under only category (c) above (additions or changes to the Directions for Use);
- 1 (CACI No. 2740) falls under category (d) above (changes to instruction text that are nonsubstantive and unlikely to create controversy);
- 1 (CACI No. 3112) falls under category (e) above (changes to instruction text required by subsequent legislation that, though substantive, are both necessary and unlikely to create controversy);
- 3 (CACI Nos. 2528, 3065, and 4328) fall under both categories (c) and (e); and;
- 1 (CACI No. 2741) falls under (a), (c), and (e).

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.

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[6] Full substantive releases will continue to be presented to RUPRO for recommendation for Judicial Council approval. The next substantive release, Release 34, will be presented in May. These releases will continue to be posted for public comment.

[7] The online-only releases are labeled with the number of the preceding print release and the letter A.

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

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

Nonfinal cases and incomplete citations

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

Sources and Authority format cleanup

CACI format requires that case excerpts in the Sources and Authority be of directly quoted material from the case. In some of the series, this format was not uniformly observed initially, and some excerpts are in the form of a legal statement with a citation rather than a direct quotation. Where found in instructions otherwise included, these out-of-format excerpts have been converted to direct quotations.

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

Policy implications

Rule 2.1050 of the California Rules of Court requires the committee to regularly update, revise, and add topics to CACI and to submit its recommendations to the council for approval. This proposal fulfills that requirement.

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 revisions and additions meet this responsibility. There are no alternatives to be considered.

Comments

Because the changes to these instructions mostly do not change the legal effect of the instructions in any way, and those that do are compelled by new legislation, they were not circulated for public comment.

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

1. Full text of instructions, at pages 6–151

201. Highly Probable—Clear and Convincing Proof

Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true. I will tell you specifically which facts must be proved by clear and convincing evidence.

New September 2003; Revised October 2004, June 2015

Directions for Use

Evidence Code section 502 requires the court to instruct the jury regarding which party bears the burden of proof on each issue and the requisite degree of proof.

This instruction should be read immediately after CACI No. 200, *Obligation to Prove—More Likely True Than Not True*, if the jury will have to decide an issue by means of the clear-and-convincing evidence standard.

Sources and Authority

- Burden of Proof. Evidence Code section 115.
- Party With Burden of Proof. Evidence Code section 500.
- "Proof by clear and convincing evidence is required 'where particularly important individual interests or rights are at stake,' such as the termination of parental rights, involuntary commitment, and deportation. However, 'imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487 [286 Cal.Rptr. 40, 816 P.2d 892] (quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389-390).)
- " 'Clear and convincing' evidence requires a finding of high probability." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919 [171 Cal.Rptr. 637, 623 P.2d 198].)
- "Under the clear and convincing standard, the evidence must be ' " ' "so clear as to leave no substantial doubt" ' " ' and ' " ' "sufficiently strong to command the unhesitating assent of every reasonable mind." ' " ' " (*Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1158 [235 Cal.Rptr.3d 228].)
- "We decline to hold that CACI No. 201 should be augmented to require that 'the evidence must be "so clear as to leave no substantial doubt" and "sufficiently strong as to command the unhesitating assent of every reasonable mind." ' Neither *In re Angelia P., supra,* 28 Cal.3d 908, nor any more recent authority mandates that augmentation, and the proposed additional language is dangerously similar to that describing the burden of proof in criminal cases." (*Nevarrez v. San Marino Skilled Nursing & Wellness Center* (2013) 221 Cal.App.4th 102, 114 [163 Cal.Rptr.3d 874].)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Burden of Proof and Presumptions, §§ 39, 40

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 45.4, 45.21

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.90, 551.92 (Matthew Bender)

1 Cathcart et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 9, *Burdens of Proof and Persuasion*, 9.16

219. Expert Witness Testimony

During the trial you heard testimony from expert witnesses. The law allows an expert to state opinions about matters in his or her field of expertise even if he or she has not witnessed any of the events involved in the trial.

You do not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision. You may believe all, part, or none of an expert's testimony. In deciding whether to believe an expert's testimony, you should consider:

a. The expert's training and experience;

b. The facts the expert relied on; and

c. The reasons for the expert's opinion.

New September 2003

Directions for Use

This instruction should not be given for expert witness testimony on the standard of care in professional malpractice cases if the testimony is uncontradicted. Uncontradicted testimony of an expert witness on the standard of care in a professional malpractice case is conclusive. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632-633 [85 Cal.Rptr.2d 386]; *Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 509 [30 Cal.Rptr.2d 542]; *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156 [65 Cal.Rptr. 406].) In all other cases, the jury may reject expert testimony, provided that the jury does not act arbitrarily. (*McKeown, supra,* 25 Cal.App.4th at p. 509.)

Do not use this instruction in eminent domain and inverse condemnation cases. (See *Aetna Life and Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 877 [216 Cal.Rptr. 831]; CACI No. 3515, *Valuation Testimony*.)

For an instruction on hypothetical questions, see CACI No. 220, *Experts—Questions Containing Assumed Facts*. For an instruction on conflicting expert testimony, see CACI No. 221, *Conflicting Expert Testimony*.

Sources and Authority

- Qualification as Expert. Evidence Code section 720(a).
- " 'A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact.' 'However, even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the

area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence. [Citations.] Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an "expert opinion is worth no more than the reasons upon which it rests." ' 'An expert who gives only a conclusory opinion does not assist the jury to determine what occurred, but instead supplants the jury by declaring what occurred.' " (*Property California SCJLW One Corp. v. Leamy* (2018) 25 Cal.App.5th 1155, 1163 [236 Cal.Rptr.3d 500], internal citation omitted.)

- "Under Evidence Code section 720, subdivision (a), a person is qualified to testify as an expert if he or she 'has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' '[T]he determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth … . [Citation.] Where a witness has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility. [Citation.]' " (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 969 [191 Cal.Rptr.3d 766].)

- The "credibility of expert witnesses is a matter for the jury after proper instructions from the court." (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1265 [226 Cal.Rptr. 306].)

- "[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. Other provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony. [¶] But courts must also be cautious in excluding expert testimony. The trial court's gatekeeping role does not involve choosing between competing expert opinions." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771−772 [149 Cal.Rptr.3d 614, 288 P.3d 1237], footnote omitted.)

- " 'Generally, the opinion of an expert is admissible when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact … ." [Citations.] Also, "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." [Citation.] However, " 'Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates.' " ' Expert testimony will be excluded ' " 'when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." ' " ' " (*Burton v. Sanner* (2012) 207 Cal.App.4th 12, 19 [142 Cal.Rptr.3d 782], internal citations omitted.)

- Under Evidence Code section 801(a), expert witness testimony "must relate to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 692 [217 Cal.Rptr. 522].)

- Expert witnesses are qualified by special knowledge to form opinions on facts that they have not personally witnessed. (*Manney v. Housing Authority of The City of Richmond* (1947) 79 Cal.App.2d 453, 460 [180 P.2d 69].)

- "Although a jury may not arbitrarily or unreasonably disregard the testimony of an expert, it is not bound by the expert's opinion. Instead, it must give to each opinion the weight which it finds the opinion deserves. So long as it does not do so arbitrarily, a jury may entirely reject the testimony of a plaintiff's expert, even where the defendant does not call any opposing expert and the expert testimony is not contradicted." (*Howard, supra,* 72 Cal.App.4th at p. 633, citations omitted.)

- "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." (*People v. Sanchez* (2016) 63 Cal.4th 665, 686 [204 Cal.Rptr.3d 102, 374 P.3d 320].)

- "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. A jury may repose greater confidence in an expert who relies upon well-established scientific principles. It may accord less weight to the views of an expert who relies on a single article from an obscure journal or on a lone experiment whose results cannot be replicated. There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*People v. Sanchez, supra,* 63 Cal.4th at pp. 685–686, original italics.)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, §§ 26–44

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 29.18–29.55

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.04 (Matthew Bender)

3A California Trial Guide, Unit 60, *Opinion Testimony*, § 60.05 (Matthew Bender)

California Products Liability Actions, Ch. 4, *The Role of the Expert*, § 4.03 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.70, 551.113 (Matthew Bender)

302. Contract Formation—Essential Factual Elements

[*Name of plaintiff***] claims that the parties entered into a contract. To prove that a contract was created, [***name of plaintiff***] must prove all of the following:**

1. **That the contract terms were clear enough that the parties could understand what each was required to do;**

2. **That the parties agreed to give each other something of value [a promise to do something or not to do something may have value]; and**

3. **That the parties agreed to the terms of the contract.**

[When you examine whether the parties agreed to the terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. You may not consider the parties' hidden intentions.]

If [*name of plaintiff***] did not prove all of the above, then a contract was not created.**

New September 2003; Revised October 2004, June 2011, June 2014

Directions for Use

This instruction should only be given if the existence of a contract is contested. At other times, the parties may be contesting only a limited number of contract formation issues. Also, some of these issues may be decided by the judge as a matter of law. Read the bracketed paragraph only if element 3 is read.

The elements regarding legal capacity and legal purpose are omitted from this instruction because these issues are not likely to be before the jury. If legal capacity or legal purpose is factually disputed then this instruction should be amended to add that issue as an element. Regarding legal capacity, the element could be stated as follows: "That the parties were legally capable of entering into a contract." Regarding legal purpose, the element could be stated as follows: "That the contract had a legal purpose."

The final element of this instruction would be given before instructions on offer and acceptance. If neither offer nor acceptance is contested, then this element of the instruction will not need to be given to the jury.

Sources and Authority

- Essential Elements of Contract. Civil Code section 1550.
- Who May Contract. Civil Code section 1556.
- Consent. Civil Code section 1565.

- Mutual Consent. Civil Code section 1580.
- Good Consideration. Civil Code section 1605.
- Writing Is Presumption of Consideration. Civil Code section 1614.
- Burden of Proof on Consideration. Civil Code section 1615.
- "Whether parties have reached a contractual agreement and on what terms are questions for the fact finder when conflicting versions of the parties' negotiations require a determination of credibility." (*Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc.* (2013) 218 Cal.App.4th 272, 283 [159 Cal.Rptr.3d 869].)
- "Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case." (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 349−350 [258 Cal.Rptr. 454].)
- "In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.' [Citation.]" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 [71 Cal.Rptr.2d 265].)
- "Whether a contract is sufficiently definite to be enforceable is a question of law for the court." (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770, fn. 2 [23 Cal.Rptr.2d 810].)
- "Consideration is present when the promisee confers a benefit or suffers a prejudice. Although 'either alone is sufficient to constitute consideration,' the benefit or prejudice ' " ' must actually be bargained for as the exchange for the promise.' " ' 'Put another way, the benefit or prejudice must have induced the promisor's promise.' It is established that 'the compromise of disputes or claims asserted in good faith constitutes consideration for a new promise.' " (*Property California SCJLW One Corp. v. Leamy* (2018) 25 Cal.App.5th 1155, 1165 [236 Cal.Rptr.3d 500], internal citations omitted.)
- "[T]he presumption of consideration under [Civil Code] section 1614 affects the burden of producing evidence and not the burden of proof." (*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884 [268 Cal.Rptr. 505].)
- "Being an affirmative defense, lack of consideration must be alleged in answer to the complaint." (*National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 808 [194 Cal.Rptr. 617].)
- "~~Consideration consists not only of benefit received by the promisor, but of detriment to the promisee. ...~~ 'It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.' " (*Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719 [6 Cal.Rptr.2d 99], internal citation omitted.)

- "The failure to specify the amount or a formula for determining the amount of the bonus does not render the agreement too indefinite for enforcement. It is not essential that the contract specify the amount of the consideration or the means of ascertaining it." (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 778 [164 Cal.Rptr.3d 601].)

- "Contract formation is governed by objective manifestations, not subjective intent of any individual involved. The test is 'what the outward manifestations of consent would lead a reasonable person to believe.' " (*Roth v. Malson* (1998) 67 Cal.App.4th 552, 557 [79 Cal.Rptr.2d 226], internal citations omitted.)

- "The manifestation of assent to a contractual provision may be 'wholly or partly by written or spoken words or by other acts or by failure to act.' " (*Merced County Sheriff's Employees' Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 670 [233 Cal.Rptr. 519] (quoting Rest. 2d Contracts, § 19).)

- "A letter of intent can constitute a binding contract, depending on the expectations of the parties. These expectations may be inferred from the conduct of the parties and surrounding circumstances." (*California Food Service Corp., Inc. v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897 [182 Cal.Rptr. 67], internal citations omitted.)

- "If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract." (*Fowler v. Security-First National Bank* (1956) 146 Cal.App.2d 37, 47 [303 P.2d 565].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 116 et seq.

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.10, 140.20–140.25 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts,* § 50.350 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, §§ 75.10, 75.11 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.03–13.17

303. Breach of Contract—Essential Factual Elements

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

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

[2. That [*name of plaintiff***] did all, or substantially all, of the significant things that the contract required [him/her/it] to do;]**

[or]

[2. That [*name of plaintiff***] was excused from having to [***specify things that plaintiff did not do, e.g., obtain a guarantor on the contract***];]**

[3. That [*specify occurrence of all conditions required by the contract for [name of defendant]'s performance, e.g., the property was rezoned for residential use***];]**

[or]

[3. That [*specify condition(s) that did not occur***] [was/were] [waived/excused];]**

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

[*or***]**

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

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

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

New September 2003; Revised April 2004, June 2006, December 2010, June 2011, June 2013, June 2015, December 2016

Directions for Use

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

Optional elements 2 and 3 both involve conditions precedent. A "condition precedent" is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues

or the contractual duty arises. (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1147 [180 Cal.Rptr.3d 683].) Element 2 involves the first kind of condition precedent; an act that must be performed by one party before the other is required to perform. Include the second option if the plaintiff alleges that he or she was excused from having to perform some or all of the contractual conditions.

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

Element 3 involves the second kind of condition precedent; an uncertain event that must happen before contractual duties are triggered. Include the second option if the plaintiff alleges that the defendant agreed to perform even though a condition did not occur. For reasons that the occurrence of a condition may have been excused, see the Restatement Second of Contracts, section 225, Comment b. See also CACI No. 321, *Existence of Condition Precedent Disputed,* CACI No. 322, *Occurrence of Agreed Condition Precedent,* and CACI No. 323, *Waiver of Condition Precedent*.

Element 6 states the test for causation in a breach of contract action: whether the breach was a substantial factor in causing the damages. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 909 [28 Cal.Rptr.3d 894].) In the context of breach of contract, it has been said that the term "substantial factor" has no precise definition, but is something that is more than a slight, trivial, negligible, or theoretical factor in producing a particular result. (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 871−872 [63 Cal.Rptr.3d 514]; see CACI No. 430, *Causation—Substantial Factor*, applicable to negligence actions.)

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

Sources and Authority

- Contract Defined. Civil Code section 1549.

- "A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing." (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)

- "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186 [169 Cal.Rptr.3d 475].)

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

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

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

- "The obligations of the parties to a contract are either dependent or independent. The parties' obligations are dependent when the performance by one party is a condition precedent to the other party's performance. In that event, one party is excused from its obligation to perform if the other party fails to perform. If the parties' obligations are independent, the breach by one party does not excuse the other party's performance. Instead, the nonbreaching party still must perform and its remedy is to seek damages from the other party based on its breach of the contract." (*Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1182–1183 [236 Cal.Rptr.3d 542], internal citations omitted~~Whether breach of the agreement not to molest bars [plaintiff]'s recovery of agreed support payments raises the question whether the two covenants are dependent or independent. If the covenants are independent, breach of one does not excuse performance of the other. (*Verdier, supra,* 133 Cal.App.2d at p. 334~~.)

- "Whether specific contractual obligations are independent or dependent is a matter of contract interpretation based on the contract's plain language and the parties' intent. Dependent covenants or '[c]onditions precedent are not favored in the law [citations], and courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that effect.' " (*Colaco, supra,* 25 Cal.App.5th at p. 1183, internal citations omitted.~~The determination of whether a promise is an independent covenant, so that breach of that promise by one party does not excuse performance by the other party, is based on the intention of the parties as deduced from the agreement. The trial court relied upon parol evidence to determine the content and~~

~~interpretation of the fee-sharing agreement between the parties. Accordingly, that determination is a question of fact that must be upheld if based on substantial evidence." (*Brown, supra,* 192 Cal.App.4th at p. 279, internal citation omitted.~~)

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

- ~~"b. *Excuse*. The non-occurrence of a condition of a duty is said to be 'excused' when the condition need no longer occur in order for performance of the duty to become due. The non-occurrence of a condition may be excused on a variety of grounds. It may be excused by a subsequent promise, even without consideration, to perform the duty in spite of the non-occurrence of the condition. See the treatment of 'waiver' in § 84, and the treatment of discharge in §§ 273-85. It may be excused by acceptance of performance in spite of the non-occurrence of the condition, or by rejection following its non-occurrence accompanied by an inadequate statement of reasons. See §§ 246-48. It may be excused by a repudiation of the conditional duty or by a manifestation of an inability to perform it. See § 255; §§ 250-51. It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing (§ 205). See § 239. And it may be excused by impracticability. See § 271. These and other grounds for excuse are dealt with in other chapters of this Restatement. This Chapter deals only with one general ground, excuse to avoid forfeiture. See § 229." (Rest.2d of Contracts, § 225.)~~

- " ' "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." [Citation.]' " (*Stephens & Stephens XII, LLC, supra,* 231 Cal. App. 4th at p. 1144.)

- " 'Causation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the defendant's breach, and that their causal occurrence be at least reasonably certain.' A proximate cause of loss or damage is something that is a substantial factor in bringing about that loss or damage." (*U.S. Ecology, Inc., supra,* 129 Cal.App.4th at p. 909, internal citations omitted.)

- "An essential element of [breach of contract] claims is that a defendant's alleged misconduct was the cause in fact of the plaintiff's damage. [¶] The causation analysis involves two elements. ' "One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event." [Citation.]' The second element is proximate cause. ' "[P]roximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.' " ' " (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102−1103 [192 Cal.Rptr.3d 354], footnote and internal citation omitted.)

- "Determining whether a defendant's misconduct was the cause in fact of a plaintiff's injury involves essentially the same inquiry in both contract and tort cases." (*Tribeca Companies, LLC, supra,* 239 Cal.App.4th at p. 1103.)

- "b. *Excuse*. The non-occurrence of a condition of a duty is said to be 'excused' when the condition need no longer occur in order for performance of the duty to become due. The non-occurrence of a condition may be excused on a variety of grounds. It may be excused by a subsequent promise, even without consideration, to perform the duty in spite of the non-occurrence of the condition. See the treatment of 'waiver' in § 84, and the treatment of discharge in §§ 273-85. It may be excused by acceptance of performance in spite of the non-occurrence of the condition, or by rejection following its non-occurrence accompanied by an inadequate statement of reasons. See §§ 246-48. It may be excused by a repudiation of the conditional duty or by a manifestation of an inability to perform it. See § 255; §§ 250-51. It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing (§ 205). See § 239. And it may be excused by impracticability. See § 271. These and other grounds for excuse are dealt with in other chapters of this Restatement. This Chapter deals only with one general ground, excuse to avoid forfeiture. See § 229." (Rest.2d of Contracts, § 225, comment b.)

Secondary Sources

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

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

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

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

321. Existence of Condition Precedent Disputed

[*Name of defendant***] claims that the contract with [***name of plaintiff***] provides that [he/she/it] was not required to [***insert duty***] unless [***insert condition precedent***].**

[*Name of defendant***] must prove that the parties agreed to this condition. If [***name of defendant***] proves this, then [***name of plaintiff***] must prove that [***insert condition precedent***].**

If [*name of plaintiff***] does not prove that [***insert condition precedent***], then [***name of defendant***] was not required to [***insert duty***].**

New September 2003

Directions for Use

This instruction should only be given if both the existence and the occurrence of a condition precedent are contested. If only the occurrence of a condition precedent is contested, use CACI No. 322, *Occurrence of Agreed Condition Precedent*.

Sources and Authority

- Conditional Obligation. Civil Code section 1434.
- Condition Precedent. Civil Code section 1436.
- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 [24 Cal.Rptr.2d 597, 862 P.2d 158].)
- "A conditional obligation is one in which 'the rights or duties of any party thereto depend upon the occurrence of an uncertain event.' '[P]arties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event.' A condition in a contract may be a condition precedent, concurrent, or subsequent. '[A] condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.' " (*JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 593 [198 Cal.Rptr.3d 47].)
- "The existence of a condition precedent normally depends upon the intent of the parties as determined from the words they have employed in the contract." (*Karpinski v. Smitty's Bar, Inc.* (2016) 246 Cal.App.4th 456, 464 [201 Cal.Rptr.3d 148].)
- "Dependent covenants or '[c]onditions precedent are not favored in the law [citations], and courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that effect.' " (*Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172,

1183 [236 Cal.Rptr.3d 542], internal citations omitted.)

- "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)

- "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [117 Cal.Rptr. 601], internal citations omitted.)

- "[T]he parol evidence rule does not apply to conditions precedent." (*Karpinski, supra,* 246 Cal.App.4th at p. 464, fn 6.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 780–791

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.44, 140.101 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.20–50.22 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.19, 22.66

338. 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 two or four years before date of filing*].

New December 2007

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable four-year period for breach of a written contract (see Code Civ. Proc., § 337(1)) or two-year period for breach of an oral contract. (See Code Civ. Proc., § 339(1).) Do not use this instruction for breach of a California Uniform Commercial Code sales contract. (See Com. Code, § 2725.)

If the contract either shortens or extends the limitation period, use the applicable period from the contract instead of two years or four years.

If the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense, CACI No. 455, *Statute of Limitations—Delayed Discovery,* may be adapted for use.

Sources and Authority

- Four-Year Statute of Limitations: Contract. Code of Civil Procedure section 337(~~1~~a).
- Two-Year Statute of Limitations: Contract. Code of Civil Procedure section 339(1).
- "In general, California courts have permitted contracting parties to modify the length of the otherwise applicable California statute of limitations, whether the contract has extended or shortened the limitations period." (*Hambrecht & Quist Venture Partners v. Am. Medical Internat.* (1995) 38 Cal.App.4th 1532, 1547 [46 Cal.Rptr.2d 33].)
- "A contract cause of action does not accrue until the contract has been breached." (*Spear v. Cal. State Automobile Assn.* (1992) 2 Cal.4th 1035, 1042 [9 Cal.Rptr.2d 381, 831 P.2d 821].)
- "The claim accrues when the plaintiff discovers, or could have discovered through reasonable diligence, the injury and its cause." (*Angeles Chem. Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119 [51 Cal.Rptr.2d 594].)
- "[T]he discovery rule may be applied to breaches [of contract] which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." (*Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 4–5 [131 Cal.Rptr.2d 680].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 508–548

5 Witkin, California Procedure (5th ed. 2008) Pleading, § 1072

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 344

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.42[2] (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.120 et seq. (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.03 et seq.

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].)

- "Breach is the failure to meet the standard of care." (*Coyle v. Historic Mission Inn Corp.* (2018) 24 Cal.App.5th 627, 643 [234 Cal.Rptr.3d 330].)

- "The element of causation requires there to be a connection between the defendant's breach and the plaintiff's injury." (*Coyle, supra,* 24 Cal.App.5th at p. 645.)

- " 'In most cases, courts have fixed no standard of care for tort liability more precise than that of a

reasonably prudent person under like circumstances.' This is because '[e]ach case presents different conditions and situations. What would be ordinary care in one case might be negligence in another.' " (*Coyle, supra,* 24 Cal.App.5th at pp. 639–640, internal citation omitted.)

- "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 analysis of foreseeability for purposes of assessing the existence or scope of a duty is different, and more general, than it is for assessing whether any such duty was breached or whether a breach caused a plaintiff's injuries. '[I]n analyzing duty, the court's task ' " '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.' " ' " 'The jury, by contrast, considers "foreseeability" in two more focused, fact-specific settings. First, 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. Second, foreseeability may be relevant to the jury's determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.' " (*Staats v. Vintner's Golf Club, LLC* (2018) 25 Cal.App.5th 826, 837 [236 Cal.Rptr.3d 236], original italics, internal citation 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.)

- " 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* 4 Cal.5th 607, 624-625 [230 Cal.Rptr.3d 415, 413 P.3d 656], original italics.)

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)

425. "Gross Negligence" Explained

Gross negligence is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others.

A person can be grossly negligent by acting or by failing to act.

New April 2008; Revised December 2015

Directions for Use

Give this instruction if a particular statute that is at issue in the case creates a distinction based on a standard of gross negligence. (See, e.g., Gov. Code, § 831.7(c)(1)(E) [immunity for public entity or employee to liability to participant in or spectator to hazardous recreational activity does not apply if act of gross negligence is proximate cause of injury].) Courts generally resort to this definition if gross negligence is at issue under a statute. (See, e.g., *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 971 [4 Cal.Rptr.3d 340].)

Give this instruction with CACI No. 400, *Negligence—Essential Factual Elements,* but modify that instruction to refer to gross negligence.

This instruction may also be given if case law has created a distinction between gross and ordinary negligence. For example, under the doctrine of express assumption of risk, a signed waiver of liability may release liability for ordinary negligence only, not for gross negligence. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095]; see also CACI No. 451, *Affirmative Defense—Contractual Assumption of Risk*.) Once the defendant establishes the validity and applicability of the release, the plaintiff must prove gross negligence by a preponderance of the evidence. (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 732, 734 [183 Cal.Rptr.3d 234].) A lack of gross negligence can be found as a matter of law if the plaintiff's showing is insufficient to suggest a triable issue of fact. (See *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 638−639 [184 Cal.Rptr.3d 155]; cf. *Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 555 [188 Cal.Rptr.3d 228] [whether conduct constitutes gross negligence is generally a question of fact, depending on the nature of the act and the surrounding circumstances shown by the evidence].)

Sources and Authority

- " 'Gross negligence' long has been defined in California and other jurisdictions as either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' " (*City of Santa Barbara, supra,* 41 Cal.4th at p. 754, internal citations omitted.)

- "By contrast, 'wanton' or 'reckless' misconduct (or ' "willful and wanton negligence" ') describes conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result." (*City of Santa Barbara, supra,* 41 Cal.4th at p. 754, fn. 4, internal citations omitted.)

- "California does not recognize a distinct cause of action for 'gross negligence' independent of a statutory basis." (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856 [120 Cal.Rptr.3d 90].)

- "Gross negligence is pleaded by alleging the traditional elements of negligence: duty, breach, causation, and damages. However, to set forth a claim for 'gross negligence' the plaintiff must allege extreme conduct on the part of the defendant." (*Rosencrans v. Dover Images, Ltd*. (2011) 192 Cal.App.4th 1072, 1082 [122 Cal.Rptr.3d 22], internal citation omitted.)

- "The theory that there are degrees of negligence has been generally criticized by legal writers, but a distinction has been made in this state between ordinary and gross negligence. Gross negligence has been said to mean the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Constr. Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644], internal citation omitted.)

- "Numerous California cases have discussed the doctrine of gross negligence. Invariably these cases have turned upon an interpretation of a statute which has used the words 'gross negligence' in the text." (*Cont'l Ins. Co. v. Am. Prot. Indus.* (1987) 197 Cal.App.3d 322, 329 [242 Cal.Rptr. 784].)

- "[I]n cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement. Evidence of conduct that evinces an extreme departure from manufacturer's safety directions or an industry standard also could demonstrate gross negligence. Conversely, conduct demonstrating the failure to guard against, or warn of, a dangerous condition typically does not rise to the level of gross negligence." (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 881 [208 Cal.Rptr.3d 792], internal citations omitted.)

- "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara, supra,* 41 Cal.4th at p. 777, original italics.)

- " 'Prosser on Torts (1941) page 260, also cited by the *Van Meter* court for its definition of gross negligence, reads as follows: "Gross Negligence. This is very great negligence, or the want of even scant care. It has been described as a failure to exercise even that care which a careless person would use. Many courts, dissatisfied with a term so devoid of all real content, have interpreted it as requiring wilful misconduct, or recklessness, or such utter lack of all care as will be evidence of either -- sometimes on the ground that this must have been the purpose of the legislature. But most courts have considered that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind. *So far as it has any accepted meaning, it is merely an extreme departure from the ordinary standard of care.*" ' " (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358 [257

Cal.Rptr. 356], original italics, internal citations omitted.)

- "In assessing where on the spectrum a particular negligent act falls, ' "[t]he amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it." ' " (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 32 [236 Cal.Rptr.3d 682].)

- "Generally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence [citation] but not always." (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640 [189 Cal.Rptr.3d 449].)

- "The Legislature has enacted numerous statutes … which provide immunity to persons providing emergency assistance except when there is gross negligence. (See Bus. & Prof. Code, § 2727.5 [immunity for licensed nurse who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of nurse's employment unless the nurse is grossly negligent]; Bus. & Prof. Code, § 2395.5 [immunity for a licensed physician who serves on-call in a hospital emergency room who in good faith renders emergency obstetrical services unless the physician was grossly negligent, reckless, or committed willful misconduct]; Bus. & Prof. Code, § 2398 [immunity for licensed physician who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a community college or high school athletic event for an injury suffered in the course of that event unless the physician was grossly negligent]; Bus. & Prof. Code, § 3706 [immunity for certified respiratory therapist who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of employment unless the respiratory therapist was grossly negligent]; Bus. & Prof. Code, § 4840.6 [immunity for a registered animal health technician who in good faith renders emergency animal health care at the scene of an emergency unless the animal health technician was grossly negligent]; Civ. Code, § 1714.2 [immunity to a person who has completed a basic cardiopulmonary resuscitation course for cardiopulmonary resuscitation and emergency cardiac care who in good faith renders emergency cardiopulmonary resuscitation at the scene of an emergency unless the individual was grossly negligent]; Health & Saf. Code, § 1799.105 [immunity for poison control center personnel who in good faith provide emergency information and advice unless they are grossly negligent]; Health & Saf. Code, § 1799.106 [immunity for a firefighter, police officer or other law enforcement officer who in good faith renders emergency medical services at the scene of an emergency unless the officer was grossly negligent]; Health & Saf. Code, § 1799.107 [immunity for public entity and emergency rescue personnel acting in good faith within the scope of their employment unless they were grossly negligent].)" (*Decker, supra,* 209 Cal.App.3d at pp. 356–357.)

- "The jury here was instructed: 'It is the duty of one who undertakes to perform the services of a police officer or paramedic to have the knowledge and skills ordinarily possessed and to exercise the care and skill ordinarily used in like cases by police officers or paramedics in the same or similar locality and under similar circumstances. A failure to perform such duty is negligence. [para.] The standard to be applied in this case is gross negligence. The term gross negligence means the failure to provide even scant care or an extreme departure from the ordinary standard of conduct.' " (*Wright v. City of L.A.* (1990) 219 Cal.App.3d 318, 343 [268 Cal.Rptr. 309] [construing "gross negligence" under Health & Saf. Code, § 1799.106, which provides that a

police officer or paramedic who renders emergency medical services at the scene of an emergency shall only be liable in civil damages for acts or omissions performed in a grossly negligent manner or not performed in good faith].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 278

Advising and Defending Corporate Directors and Officers (Cont.Ed.Bar) § 3.13

1 Levy et al., California Torts, Ch. 1, *General Principles of Liability,* § 1.01 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, §§ 380.10, 380.171 (Matthew Bender)

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, *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 or she 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, supra,* 21 Cal.4th at p. 79*,* 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 309, 349 P.3d 1013], original italics, footnote omitted.)

- "On the issue … of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. 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." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1104 [231 Cal.Rptr.3d 814].)

- " '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.)

- "As a general matter, juries may decide issues of causation without hearing expert testimony. But

"'[w]here the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation.' " (*Webster v. Claremont Yoga* (2018) 26 Cal.App.5th 284, 290 [236 Cal.Rptr.3d 802], internal citation omitted.)

- "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.)

- "[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 (11th ed. 2017) Torts, §§ 1334–1341

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)

451. Affirmative Defense—Contractual Assumption of Risk

[*Name of defendant***] claims that [***name of plaintiff***] may not recover any damages because [he/she] agreed before the incident that [he/she] would not hold [***name of defendant***] responsible for any damages.**

If [*name of defendant***] proves that there was such an agreement and that it applies to [***name of plaintiff***]'s claim, then [***name of defendant***] is not responsible for [***name of plaintiff***]'s harm[, unless you find that [***name of defendant***] was grossly negligent or intentionally harmed [***name of plaintiff***]].**

[If you find that [*name of defendant***] was grossly negligent or intentionally harmed [***name of plaintiff***], then the agreement does not apply. You must then determine whether [he/she/it] is responsible for [***name of plaintiff***]'s harm based on the other instructions that I have given you.]**

New September 2003; Revised December 2011

Directions for Use

This instruction sets forth the affirmative defense of express or contractual assumption of risk. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856 [120 Cal.Rptr.3d 90].) It will be given in very limited circumstances. Both the interpretation of a waiver agreement and application of its legal effect are generally resolved by the judge before trial. The existence of a duty is a question of law for the court (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 719 [183 Cal.Rptr.3d 234]), as is the interpretation of a written instrument if the interpretation does not turn on the credibility of extrinsic evidence. (*Allabach v. Santa Clara County Fair Assn., Inc.* (1996) 46 Cal.App.4th 1007, 1011 [54 Cal.Rptr.2d 330].)

However, there may be contract law defenses (such as fraud, lack of consideration, duress, unconscionability) that could be asserted by the plaintiff to contest the validity of a waiver. If these defenses depend on disputed facts that must be considered by a jury, then this instruction should also be given.

Express assumption of risk does not relieve the defendant of liability if there was gross negligence or willful injury. (See Civ. Code, § 1668.) However, the doctrine of primary assumption of risk may then become relevant if an inherently dangerous sport or activity is involved. (See *Rosencrans v. Dover Images, Ltd*. (2011) 192 Cal.App.4th 1072, 1081 [122 Cal.Rptr.3d 22].)

If there are jury issues with regard to gross negligence, include the bracketed language on gross negligence. Also give CACI No. 425, *"Gross Negligence" Explained.* If the jury finds no gross negligence, then the action is barred by express assumption of risk unless there are issues of fact with regard to contract formation.

Sources and Authority

- Contract Releasing Party From Liability for Fraud or Willful Injury is Against Public Policy. Civil

Code section 1668.

- "[P]arties may contract for the release of liability for future ordinary negligence so long as such contracts do not violate public policy. 'A valid release precludes liability for risks of injury within the scope of the release.' " (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 877 [208 Cal.Rptr.3d 792], internal citations omitted.)

- "With respect to the question of express waiver, the legal issue is *not* whether the particular risk of injury appellant suffered is inherent in the recreational activity to which the Release applies [citations], but simply *the scope of the Release*." (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 27 [236 Cal.Rptr.3d 682], original italics.)

- "Express assumption occurs when the plaintiff, in advance, expressly consents ... to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. ... The result is that ... being under no duty, [the defendant] cannot be charged with negligence." (*Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 764 [276 Cal.Rptr. 672], internal citations omitted.)

- "While often referred to as a defense, a release of future liability is more appropriately characterized as an express assumption of the risk that negates the defendant's duty of care, an element of the plaintiff's case." (*Eriksson, supra,* 233 Cal.App.4th at p. 719.)

- "[C]ases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing risk. Thus in this respect express assumption of risk properly can be viewed as analogous to primary assumption of risk." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308-309, fn. 4 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

- " ' "It is only necessary that the act of negligence, which results in injury to the releaser, be reasonably related to the object or purpose for which the release is given." ' … 'An act of negligence is reasonably related to the object or purpose for which the release was given if it is included within the express scope of the release.' " (*Eriksson, supra,* 233 Cal.App.4th at p. 722.)

- "Although [decedent] could not release or waive her parents' subsequent wrongful death claims, it is well settled that a release of future liability or express assumption of the risk by the decedent may be asserted as a defense to such claims." (*Eriksson, supra,* 233 Cal.App.4th at p. 725.)

- "[E]xculpatory clause which affects the public interest cannot stand." (*Tunkl v. Regents of Univ. of California* (1963) 60 Cal.2d 92, 98 [32 Cal.Rptr. 33, 383 P.2d 441].)

- "In *Tunkl,* our high court identified six characteristics typical of contracts affecting the public interest: ' "[1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least any member coming within certain established standards. [4] As a result of the essential nature of the service, in

the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." ' Not all of these factors need to be present for an exculpatory contract to be voided as affecting the public interest." (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 29 [236 Cal.Rptr.3d 682], internal citations omitted.)

- "The issue [of whether something is in the public interest] is tested *objectively*, by the activity's importance to the *general public*, not by its subjective importance to the particular plaintiff." (*Booth v. Santa Barbara Biplane Tours, LLC* (2008) 158 Cal.App.4th 1173, 1179–1180 [70 Cal.Rptr.3d 660], original italics.)

- "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095], original italics.)

- " ' ' "[A] purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage." ' " Thus, in cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement." (*Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 359 [235 Cal.Rptr.3d 716].)

- " ' ' "A written release may exculpate a tortfeasor from future negligence or misconduct. [Citation.] To be effective, such a release '*must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties*.' [Citation.] The release need not achieve perfection. [Citation.] Exculpatory agreements in the recreational sports context do not implicate the public interest and therefore are not void as against public policy. [Citations.]" ' ' "An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. [Citations.]" ' " (*Huverserian v. Catalina Scuba Luv, Inc.* (2010) 184 Cal.App.4th 1462, 1467 [110 Cal.Rptr.3d 112], original italics, internal citations omitted.)

- "Unlike claims for ordinary negligence, products liability claims cannot be waived." (*Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 640 [184 Cal.Rptr.3d 155].)

- "Since there is no disputed issue of material fact concerning gross negligence, the release also bars [plaintiff]'s cause of action for breach of warranty." (*Grebing, supra,* 234 Cal.App.4th at p. 640.)

- "Generally, a person who signs an instrument may not avoid the impact of its terms on the ground that she failed to read it before signing. However, a release is invalid when it is procured by

misrepresentation, overreaching, deception, or fraud. 'It has often been held that if the releaser was under a misapprehension, not due to his own neglect, as to the nature or scope of the release, and if this misapprehension was induced by the misconduct of the releasee, then the release, regardless of how comprehensively worded, is binding only to the extent actually intended by the releaser.' 'In cases providing the opportunity for overreaching, the releasee has a duty to act in good faith and the releaser must have a full understanding of his legal rights. [Citations.] Furthermore, it is the province of the jury to determine whether the circumstances afforded the opportunity for overreaching, whether the releasee engaged in overreaching and whether the releaser was misled. [Citation.]' A 'strong showing of misconduct' by the plaintiff is not necessary to demonstrate the existence of a triable issue of fact here; only a 'slight showing' is required." (*Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 563−564 [188 Cal.Rptr.3d 228], internal citations omitted.)

- "Plaintiffs assert that Jerid did not 'freely and knowingly' enter into the Release because (1) the [defendant's] employee represented the Release was a sign-in sheet; (2) the metal clip of the clipboard obscured the title of the document; (3) the Release was written in a small font; (4) [defendant] did not inform Jerid he was releasing his rights by signing the Release; (5) Jerid did not know he was signing a release; (6) Jerid did not receive a copy of the Release; and (7) Jerid was not given adequate time to read or understand the Release. [¶] We do not find plaintiffs' argument persuasive because … there was nothing preventing Jerid from reading the Release. There is nothing indicating that Jerid was prevented from (1) reading the Release while he sat at the booth, or (2) taking the Release, moving his truck out of the line, and reading the Release. In sum, plaintiffs' arguments do not persuade us that Jerid was denied a reasonable opportunity to discover the true terms of the contract." (*Rosencrans, supra,* 192 Cal.App.4th at pp. 1080–1081.)

- "Whether a contract provision is clear and unambiguous is a question of law, not of fact." (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598 [250 Cal.Rptr. 299].)

- "By signing as [decedent]'s parent, [plaintiff] approved of the terms of the release and understood that her signature made the release 'irrevocable and binding.' Under these circumstances, the release could not be disaffirmed. [¶] Although [plaintiff]'s signature prevented the agreement from being disaffirmed, it does not make her a party to the release." (*Eriksson, supra,* 233 Cal.App.4th at p. 721.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1282, 1292–1294

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.44

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

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.171 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.402 (Matthew Bender)

452. Sudden Emergency

[*Name of plaintiff/defendant*] claims that [he/she] was not negligent because [he/she] acted with reasonable care in an emergency situation. [*Name of plaintiff/defendant*] was not negligent if [he/she] proves all of the following:

1. **That there was a sudden and unexpected emergency situation in which someone was in actual or apparent danger of immediate injury;**

2. **That [*name of plaintiff/defendant*] did not cause the emergency; and**

3. **That [*name of plaintiff/defendant*] acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer.**

New September 2003

Directions for Use

The instruction should not be given unless at least two courses of action are available to the party after the danger is perceived. (*Anderson v. Latimer* (1985) 166 Cal.App.3d 667, 675 [212 Cal.Rptr. 544].)

Additional instructions should be given if there are alternate theories of negligence.

Sources and Authority

- "The doctrine of imminent peril ~~may be used by~~is available to either ~~the~~ plaintiff or ~~the~~ defendant, or, in a proper case, to both." (*Smith v. Johe* (1957) 154 Cal.App.2d 508, 511~~-512~~ [316 P.2d 688].)

- "Whether the conditions for application of the imminent peril doctrine exist is itself a question of fact to be submitted to the jury." (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 37 [267 Cal.Rptr. 197]; see also *Leo v. Dunham* (1953) 41 Cal.2d 712, 715 [264 P.2d 1].)

- "[A] person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." (*Leo, supra,* 41 Cal.2d at p. 714.)

- "The doctrine of imminent peril is properly applied only in cases where an unexpected physical danger is presented so suddenly as to deprive the driver of his power of using reasonable judgment. [Citations.] A party will be denied the benefit of the doctrine of imminent peril where that party's negligence causes or contributes to the creation of the perilous situation. [Citations.]" (*Shiver v. Laramee* (2018) 24 Cal.App.5th 395, 399, 234 Cal.Rptr.3d 256].)~~The "doctrine is properly applied only in cases where an unexpected physical danger is so suddenly presented as to deprive the injured~~

~~party [or the defendant] of his power of using reasonable judgment." (*Sadoian v. Modesto Refrigerating Co.* (1958) 157 Cal.App.2d 266, 274 [320 P.2d 583].)~~

- ~~The exigent nature of the circumstances effectively lowers the standard of care: "~~ 'The test is whether the actor took one of the courses of action which a standard man in that emergency might have taken, and such a course is not negligent even though it led to an injury which might have been prevented by adopting an alternative course of action.' [Citation.]" (*Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 912-913 [83 Cal.Rptr. 888].)

- ~~The doctrine of imminent peril does not apply to a person whose conduct causes or contributes to the imminent peril. (*Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 216 [57 Cal.Rptr. 319].)~~

- "The doctrine of imminent peril applies not only when a person perceives danger to himself, but also when he perceives an imminent danger to others."~~The doctrine applies when a person perceives danger to himself or herself as well as when he or she perceives a danger to others.~~ (*Damele, supra,* 219 Cal.App.3d at p. 36.)

- "[T]he mere appearance of an imminent peril to others-not an actual imminent peril-is all that is required." (*Damele, supra,* 219 Cal.App.3d at p. 37.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1282, 1292–1294

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.7

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.03, 1.11, 1.30 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.250 (Matthew Bender)

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

[*Name of plaintiff***] claims that even if [his/her/its] lawsuit was not filed by [***insert date from applicable statute of limitations***], [he/she/it] may still proceed because the deadline for filing the lawsuit was extended by the time during which [***specify prior proceeding that qualifies as the tolling event, e.g., she was seeking workers' compensation benefits***]. In order to establish the right to proceed, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] received timely notice that [***name of plaintiff***] was [***e.g., seeking workers' compensation***] instead of filing a lawsuit;**

2. **That the facts of the two claims were so similar that an investigation of the [***e.g., workers' compensation claim***] gave or would have given [***name of defendant***] the information needed to defend the lawsuit; and**

3. **That [***name of plaintiff***] was acting reasonably and in good faith by [***e.g., seeking workers' compensation***].**

For [*name of defendant***] to have received timely notice, [***name of plaintiff***] must have filed the [***e.g., workers' compensation claim***] by [***insert date from applicable statute of limitations***] and the [***e.g., claim***] notified [***name of defendant***] of the need to begin investigating the facts that form the basis for the lawsuit.**

In considering whether [*name of plaintiff***] acted reasonably and in good faith, you may consider the amount of time after the [***e.g., workers' compensation claim***] was [resolved/abandoned] before [he/she/it] filed the lawsuit.**

New December 2009; Revised December 2014

Directions for Use

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

Equitable tolling is not available for legal malpractice (see *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [statutory tolling provisions of Code Civ Proc., § 340.6 are exclusive for both one-year and four-year limitation periods]; see also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit,* and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*) nor for medical malpractice with regard to the three-year limitation period of Code of Civil Procedure section 340.5. (See *Belton v. Bowers Ambulance Serv.* (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [statutory tolling provisions of Code Civ. Proc., § 340.5 are exclusive only for three-year period; one-year period may be tolled on other grounds]; see also CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—*

One-Year Limit, and CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*.)

Sources and Authority

- Tolling for Equal Employment Opportunity Commission Investigation. Government Code section 12965(d)(1).

- "The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' " (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 [84 Cal.Rptr.3d 734, 194 P.3d 1026], internal citations omitted.)

- "While the case law is not entirely clear, it appears that the weight of authority supports our conclusion that whether a plaintiff has demonstrated the elements of equitable tolling presents a question of fact." (*Hopkins, supra,* 225 Cal.App.4th at p. 755.)

- "[E]quitable tolling, '[a]s the name suggests … is an equitable issue for court resolution.' " (*Hopkins, supra,* 225 Cal.App.4th at p. 745.)

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

- "[CACI No. 457 is] appropriate for use when a trial court 'empanel[s] an advisory jury to make preliminary factual findings,' with respect to equitable … tolling." (*Hopkins, supra,* 225 Cal.App.4th at p. 745.)

- "The equitable tolling doctrine rests on the concept that a plaintiff should not be barred by a statute of limitations unless the defendant would be unfairly prejudiced if the plaintiff were allowed to proceed. '[T]he primary purpose of the statute of limitations is normally satisfied when the defendant receives timely notification of the first of two proceedings.'" (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 598 [95 Cal.Rptr.3d 18], internal citations omitted.)

- "Broadly speaking, the doctrine applies ' "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." ' [Citation.] Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason." (*Wassmann v. South Orange County*

Community College Dist. (2018) 24 Cal.App.5th 825, 853 [234 Cal.Rptr.3d 712].)

- "[T]he effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370–371 [2 Cal.Rptr.3d 655, 73 P.3d 517].)

- "A major reason for applying the doctrine is to avoid 'the hardship of compelling plaintiffs to pursue several duplicative actions simultaneously on the same set of facts.' '[D]isposition of a case filed in one forum may render proceedings in the second unnecessary or easier and less expensive to resolve.' " (*Guevara v. Ventura County Community College Dist.* (2008) 169 Cal.App.4th 167, 174 [87 Cal.Rptr.3d 50], internal citations omitted.)

- "[A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff. These elements seemingly are present here. As noted, the federal court, without prejudice, declined to assert jurisdiction over a timely filed state law cause of action and plaintiffs thereafter promptly asserted that cause in the proper state court. Unquestionably, the same set of facts may be the basis for claims under both federal and state law. We discern no reason of policy which would require plaintiffs to file simultaneously two separate actions based upon the same facts in both state and federal courts since 'duplicative proceedings are surely inefficient, awkward and laborious.' " (*Addison v. State* (1978) 21 Cal.3d 313, 319 [146 Cal.Rptr. 224, 578 P.2d 941], internal citations omitted.)

- " ' "The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore[,] the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this means that the defendant in the first claim is the same one being sued in the second." "The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him in a position to fairly defend the second." "The third prerequisite of good faith and reasonable conduct on the part of the plaintiff is less clearly defined in the cases. But in *Addison v. State of California, supra,* 21 Cal.3d 313[,] the Supreme Court did stress that the plaintiff filed his second claim a short time after tolling ended." ' " (*McDonald, supra,* 45 Cal.4th at p. 102, fn. 2, internal citations omitted.)

- "The third requirement of good faith and reasonable conduct may turn on whether 'a plaintiff delayed filing the second claim until the statute on that claim had nearly run …' or 'whether the plaintiff [took] affirmative actions which … misle[d] the defendant into believing the plaintiff was foregoing his second claim.' " (*Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1505 [92 Cal.Rptr.3d 131].)

- "Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic: 'It has long been settled in this and other jurisdictions that whenever the exhaustion

of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding.' This rule prevents administrative exhaustion requirements from rendering illusory nonadministrative remedies contingent on exhaustion." (*McDonald, supra,* 45 Cal.4th at p. 101, internal citation omitted.)

- "The trial court rejected equitable tolling on the apparent ground that tolling was unavailable where, as here, the plaintiff was advised the alternate administrative procedure he or she was pursuing was voluntary and need not be exhausted. In reversing summary judgment, the Court of Appeal implicitly concluded equitable tolling is in fact available in such circumstances and explicitly concluded equitable tolling is not foreclosed as a matter of law under the FEHA. The Court of Appeal was correct on each count." (*McDonald, supra,* 45 Cal.4th at p. 114.)

- "Equitable tolling and equitable estoppel [see CACI No. 456] are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. … Equitable estoppel, however, … comes into play only after the limitations period has run and addresses … the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life … from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' " (*Lantzy, supra,* 31 Cal.4th at pp. 383–384.)

- "[V]oluntary abandonment [of the first proceeding] does not categorically bar application of equitable tolling, but it may be relevant to whether a plaintiff can satisfy the three criteria for equitable tolling." (*McDonald, supra,* 45 Cal.4th at p. 111.)

- "The equitable tolling doctrine generally requires a showing that the plaintiff is seeking an alternate remedy in an established procedural context. Informal negotiations or discussions between an employer and employee do not toll a statute of limitations under the equitable tolling doctrine." (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1416 [159 Cal.Rptr.3d 749], internal citation omitted.)

- "Tolling the FEHA limitation period while the employee awaits the outcome of an EEOC investigation furthers several policy objectives: (1) the defendant receives timely notice of the claim; (2) the plaintiff is relieved of the obligation of pursuing simultaneous actions on the same set of facts; and (3) the costs of duplicate proceedings often are avoided or reduced." (*Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1008 [205 Cal.Rptr.3d 261].)

- " '[P]utative class members would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations.' A trial court may, nonetheless, apply tolling to save untimely claims. But in doing so, the court must address 'two major policy considerations.' The first is 'protection of the class action device,' which requires the court to determine whether the denial of class certification was 'unforeseeable by class members,' or whether potential members, in anticipation of a negative ruling, had already filed ' "protective

> motions to intervene or to join in the event that a class was later found unsuitable," depriving class actions "of the efficiency and economy of litigation which is a principal purpose of the procedure." ' The second consideration is 'effectuation of the purposes of the statute of limitations,' and requires the court to determine whether commencement of the class suit ' "notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." [Citation.] In these circumstances, … the purposes of the statute of limitations would not be violated by a decision to toll.' " (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 482-483 [216 Cal.Rptr.3d 390], internal citations omitted.)

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

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

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

- "Plaintiffs cite no authority, and we are aware of none, that would allow a plaintiff in one case to equitably toll the limitation period based on the filing of a stranger's lawsuit." (*Reid v. City of San Diego* (2018) 23 Cal.App.5th 901, 916 [234 Cal.Rptr.3d 636].)

- "Equitable tolling applies to claims under FEHA during the period in which the plaintiff exhausts administrative remedies or when the plaintiff voluntarily pursues an administrative remedy or nonmandatory grievance procedure, even if exhaustion of that remedy is not mandatory." (*Wassmann, supra,* 24 Cal.App.5th at pp. 853–854.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Actions, § 760 et seq.

Turner et al., California Practice Guide: Civil Procedure Before Trial—Statutes of Limitations, Ch. 1-A, *Definitions And Distinctions* ¶ 1:57.2 (The Rutter Group)

3 California Torts, Ch. 32, *Liability of Attorneys,* § 32.60[1][g.1] (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions*, § 345.21 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions,* § 143.46 (Matthew Bender)

500. Medical Negligence—Essential Factual Elements

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

New September 2003; Revised December 2011, December 2015

Directions for Use

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. From a theoretical standpoint, medical negligence is still considered negligence. (See *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997–998 [35 Cal.Rptr.2d 685, 884 P.2d 142].)

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

It is not necessary to instruct that causation must be proven within a reasonable medical probability based upon competent expert testimony. The reference to "medical probability" in medical malpractice cases is no more than a recognition that the case involves the use of medical evidence. (*Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 735, 746 [184 Cal.Rptr.3d 79].)

Sources and Authority

- "Professional Negligence" of Health Care Provider Defined. Code of Civil Procedure section 340.5, Civil Code sections 3333.1 and 3333.2.

- "The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766].)

- "The court's use of standard jury instructions for the essential elements of negligence, including causation, was appropriate because medical negligence is fundamentally negligence." (*Uriell, supra,* 234 Cal.App.4th at p. 744 [citing Directions for Use to this instruction].)

- "Section 340.5 defines 'professional negligence' as 'a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are *within the scope of services for which the provider is licensed* and which are not within any restriction imposed by the licensing agency or licensed hospital.' The term 'professional negligence' encompasses actions in which 'the injury for which damages are sought is directly related to the professional services provided by the

health care provider' or directly related to 'a matter that is an ordinary and usual part of medical professional services.' '[C]ourts have broadly construed "professional negligence" to mean negligence occurring during the rendering of services for which the health care provider is licensed.' " (*Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 297 [170 Cal.Rptr.3d 125], original italics, internal citations omitted.)

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

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

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

- "On causation, the plaintiff must establish 'it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury.' ' "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." ' '[C]ausation in actions arising from medical negligence must be proven within a reasonable medical probability based on competent expert testimony, i.e., something more than a "50-50 possibility." ' '[T]he evidence must be sufficient to allow the jury to infer that in the absence of the defendant's negligence, there was a reasonable medical probability the plaintiff would have obtained a better result.' " (*Belfiore-Braman v. Rotenberg* (2018) 25 Cal.App.5th 234, 247 [235 Cal.Rptr.3d 629], internal citations omitted.)

- ~~"[I]n a personal injury action causation must be proven within a reasonable medical probability based upon competent expert testimony. Mere possibility alone is insufficient to establish a prima facie case." (*Lattimore, supra,* 239 Cal.App.4th at p. 970.)~~

- "That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, *it becomes more likely than not that the injury was a result of its action*. This is the outer limit of inference upon which an issue may be submitted to the jury." (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th

1108, 1118 [8 Cal.Rptr.3d 363], original italics, internal citations omitted.)

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

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

Secondary Sources

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

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

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

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

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

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

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

600. Standard of Care

[A/An] [*insert type of professional*] is negligent if [he/she] fails to use the skill and care that a reasonably careful [*insert type of professional*] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."

[You must determine the level of skill and care that a reasonably careful [*insert type of professional*] would use in similar circumstances based only on the testimony of the expert witnesses[, including [*name of defendant*],] who have testified in this case.]

New September 2003; Revised October 2004, December 2007

Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence, for which CACI No. 501, *Standard of Care for Health Care Professionals,* should be used. See CACI No. 400, *Negligence—Essential Factual Elements,* for an instruction on the plaintiff's burden of proof. The word "legal" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. (See *Sources and Authority* following CACI No. 500, *Medical Negligence—Essential Factual Elements*.)

Read the second paragraph if the standard of care must be established by expert testimony.

See CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

If the defendant is a specialist in his or her field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810 [121 Cal.Rptr. 194].) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id*. at pp. 810–811.)

Whether an attorney-client relationship exists is a question of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756].) If the evidence bearing upon this decision is in conflict, preliminary factual determinations are necessary. (*Ibid*.) Special instructions may need to be crafted for that purpose.

Sources and Authority

- "The elements of a cause of action in tort for professional negligence are (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433].)

- "Plaintiffs' argument that CACI No. 600 altered their burden of proof is misguided in that it assumes that a 'professional' standard of care is inherently different than the standard in ordinary negligence cases. It is not. 'With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional "circumstances' relevant to an overall assessment of what constitutes "ordinary prudence" in a particular situation.' 'Since the standard of care remains constant in terms of "ordinary prudence," it is clear that denominating a cause of action as one for "professional negligence" does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which "ordinary prudence" will be calculated and the defendant's conduct evaluated.' " (*LAOSD Asbestos Cases* (2016) 5 Cal.App.5th 1022, 1050 [211 Cal.Rptr.3d 261], internal citation omitted.)

- " 'In addressing breach of duty, "the crucial inquiry is whether [the attorney's] advice was so legally deficient when it was given that he [or she] may be found to have failed to use 'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' …" … ' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710].)

- "[I]f the allegedly negligent conduct does not cause damage, it generates no cause of action in tort." (*Moua v. Pittullo, Howington, Barker, Abernathy, LLP* (2014) 228 Cal.App.4th 107, 112−113 [174 Cal.Rptr.3d 662].)

- "[T]he issue of negligence in a legal malpractice case is ordinarily an issue of fact." (*Blanks, supra,* 171 Cal.App.4th at p. 376.)

- " '[T]he requirement that the plaintiff prove causation should not be confused with the method or means of doing so. Phrases such as "trial within a trial," "case within a case," … and "better deal" scenario describe methods of proving causation, not the causation requirement itself or the test for determining whether causation has been established.' " (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1091 [236 Cal.Rptr.3d 473].)

- "Plaintiffs argue that 'laying pipe is not a "profession." ' However, case law, statutes, and secondary sources suggest that the scope of those held to a 'professional' standard of care—a standard of care similar to others in their profession, as opposed to that of a 'reasonable person'—is broad enough to encompass a wide range of specialized skills. As a general matter, '[t]hose undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances, and failure to do so subjects them to liability for negligence.' " (*LAOSD Asbestos Cases, supra,* 5 Cal.App.5th at p. 1050.)

- "It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313, 705 P.2d 886].)

- "[A] lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra,* 47 Cal.App.3d at p. 810.)

- "To establish a [professional] malpractice claim, a plaintiff is required to present expert testimony establishing the appropriate standard of care in the relevant community. 'Standard of care " 'is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations] … .' " [Citation.]' " (*Quigley v. McClellan* (2013) 214 Cal.App.4th 1276, 1283 [154 Cal.Rptr.3d 719], internal citations omitted.)

- " ' … "[W]here the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony, then expert testimony is not required." In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary.' " (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093 [41 Cal.Rptr.2d 768], internal citations omitted.)

- "Where … the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met." (*Wright, supra,* 47 Cal.App.3d at pp. 810−811, footnote and internal citations omitted.)

- "The standard is that of members of the profession 'in the same or a similar locality under similar circumstances' … . The duty encompasses both a knowledge of law and an obligation of diligent research and informed judgment." (*Wright, supra,* 47 Cal.App.3d at p. 809, internal citations omitted; but see *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470–471 [71 Cal.Rptr.3d 707] [geographical location may be a factor to be considered, but by itself, does not provide a practical basis for measuring similar circumstances].)

- Failing to Act Competently. Rules of Professional Conduct, rule 3-110.

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, §§ 290–293

4 Witkin, California Procedure (5th ed. 2008) Pleadings, § 593

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 990, 991, 994–997

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 1-A, *Sources Of Regulation Of Practice Of Law In California-Overview*, ¶ 1:39 (The Rutter Group)

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 6-D, *Professional Liability*, ¶¶ 6:230–6:234 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.31 (Matthew Bender)

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals,* §§ 30.12, 30.13, Ch. 32, *Liability of Attorneys*, § 32.13 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability,* §§ 76.50, 76.51 (Matthew Bender)

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

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice,* § 24A.20 et seq. (Matthew Bender)

1001. Basic Duty of Care

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

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

(a) The location of the property;

(b) The likelihood that someone would come on to the property in the same manner as [*name of plaintiff***] did;**

(c) The likelihood of harm;

(d) The probable seriousness of such harm;

(e) Whether [*name of defendant***] knew or should have known of the condition that created the risk of harm;**

(f) The difficulty of protecting against the risk of such harm; [and]

(g) The extent of [*name of defendant***]'s control over the condition that created the risk of harm; [and]**

(h) [*Other relevant factor(s)***.]**

New September 2003; Revised June 2010

Directions for Use

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

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

Sources and Authority

- "Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties." (*Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406, fn. 1 [85 Cal.Rptr.2d 838], internal citation omitted.)

- "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], internal citations omitted.)

- "To comply with this duty, a person who controls property must ' " ' "inspect [the premises] or take other proper means to ascertain their condition" ' " ' and, if a dangerous condition exists that would have been discovered by the exercise of reasonable care, has a duty to give adequate warning of or remedy it." (*Staats v. Vintner's Golf Club, LLC* (2018) 25 Cal.App.5th 826, 833 [236 Cal.Rptr.3d 236].)

- "[T]he measures an operator must take to comply with the duty to keep the premises in a reasonably safe condition depend on the circumstances, and the issue is a question for the jury unless the facts of the case are not reasonably in dispute." (*Staats, supra,* 25 Cal.App.5th at p. 840.)

- "An owner of real property is 'not the insurer of [a] visitor's personal safety … .' However, an owner is responsible ' "for an injury occasioned to another by [the owner's] want of ordinary care or skill in the management of his or her property . …" ' Accordingly, landowners are required 'to maintain land in their possession and control in a reasonably safe condition', and to use due care to eliminate dangerous conditions on their property." (*Taylor v. Trimble* (2017) 13 Cal.App.5th 934, 943-944 [220 Cal.Rptr.3d 741], internal citations omitted.)

- "[T]he issue concerning a landlord's duty is not the *existence* of the duty, but rather the *scope* of the duty under the particular facts of the case. Reference to the *scope* of the landlord's duty 'is intended to describe the specific steps a landlord must take in a given specific circumstance to maintain the property's safety to protect a tenant from a specific class of risk.' " (*Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 23 [179 Cal.Rptr.3d 758], original italics, internal citation omitted.)

- "The proper test to be applied to the liability of the possessor of land ... is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others ... ." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561].)

- "It is well settled that a property owner is not liable for damages caused by a minor, trivial, or insignificant defect in his property. This principle is sometimes referred to as the 'trivial defect defense,' although it is not an affirmative defense but rather an aspect of duty that a plaintiff must plead and prove. … Moreover, what constitutes a minor defect may be a question of law." (*Cadam v. Somerset Gardens Townhouse HOA* (2011) 200 Cal.App.4th 383, 388–389 [132 Cal.Rptr.3d 617], internal citations omitted.)

- In this state, duties are no longer imposed on an occupier of land solely on the basis of rigid classifications of trespasser, licensee, and invitee. The purpose of plaintiff's presence on the land is

not determinative. We have recognized, however, that this purpose may have some bearing upon the liability issue. This purpose therefore must be considered along with other factors weighing for and against the imposition of a duty on the landowner." (*Ann M., supra,* 6 Cal.4th at pp. 674-675, internal citations omitted.)

- "As stated in *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 25 [77 Cal.Rptr. 914], '[t]he term "invitee" has not been abandoned, nor have "trespasser" and "licensee." In the minds of the jury, whether a possessor of the premises has acted as a reasonable man toward a plaintiff, in view of the probability of injury to him, will tend to involve the circumstances under which he came upon defendant's land; and the probability of exposure of plaintiff and others of his class to the risk of injury; as well as whether the condition itself presented an unreasonable risk of harm, in view of the foreseeable use of the property.' Thus, the court concluded, and we agree, *Rowland* 'does not generally abrogate the decisions declaring the substantive duties of the possessor of land to invitees nor those establishing the correlative rights and duties of invitees.' (*Id*., at p. 27.)" (*Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 486-487 [227 Cal.Rptr. 465], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "The distinction between artificial and natural conditions [has been] rejected." (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371 [178 Cal.Rptr. 783, 636 P.2d 1121].)

- "It must also be emphasized that the liability imposed is for negligence. The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition are among the factors to be considered by the trier of fact in evaluating the reasonableness of a defendant's conduct." (*Sprecher, supra,* 30 Cal.3d at p. 372.)

- "[A] landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 38 [180 Cal.Rptr.3d 474].)

- "The duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespective of whether the contractor's negligence lies in his incompetence, carelessness, inattention or delay." (*Brown, supra,* 23 Cal.2d at p. 260.)

- "[A] defendant property owner's compliance with a law or safety regulation, in and of itself, does not establish that the owner has utilized due care. The owner's compliance with applicable safety regulations, while relevant to show due care, is not dispositive, if there are other circumstances requiring a higher degree of care." (*Lawrence, supra,* 231 Cal.App.4th at p. 31.)

Secondary Sources

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

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

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

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

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

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

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

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

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

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

1011. Constructive Notice Regarding Dangerous Conditions on Property

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In determining whether [*name of defendant***] should have known of the condition that created the risk of harm, you must decide whether, under all the circumstances, the condition was of such a nature and existed long enough that [***name of defendant***] had sufficient time to discover it and, using reasonable care:**

1. Repair the condition; or

2. Protect against harm from the condition; or

3. Adequately warn of the condition.

[[*Name of defendant***] must make reasonable inspections of the property to discover unsafe conditions. If an inspection was not made within a reasonable time before the accident, this may show that the condition existed long enough so that [a store/[a/an] [***insert other commercial enterprise***]] owner using reasonable care would have discovered it.]**

New September 2003; Revised February 2007, October 2008

Directions for Use

This instruction is intended for use if there is an issue concerning the owner's constructive knowledge of a dangerous condition. It should be given with CACI No. 1003, *Unsafe Conditions*.

The bracketed second paragraph of this instruction is based on *Ortega v. Kmart* (2001) 26 Cal.4th 1200 [114 Cal.Rptr.2d 470, 36 P.3d 11]. *Ortega* involved a store. The court should determine whether the bracketed portion of this instruction applies to other types of property.

Sources and Authority

- "It is well established in California that although a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe." (*Ortega*, *supra*, 26 Cal.4th at p. 1205, internal citation omitted.)

- "We conclude that a plaintiff may prove a dangerous condition existed for an unreasonable time with circumstantial evidence, and that ... 'evidence that an inspection had not been made within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough so that a person exercising reasonable care would have discovered it.' " (*Ortega, supra,* 26 Cal.4th at p. 1210, internal citation omitted.)

- "A store owner exercises ordinary care by making reasonable inspections of the portions of the premises open to customers, and the care required is commensurate with the risks involved." (*Ortega, supra,* 26 Cal.4th at p. 1205, internal citation omitted.)

- "Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)

- "Courts have also held that where the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)

- "The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)

- "We emphasize that allowing the inference does not change the rule that if a store owner has taken care in the discharge of its duty, by inspecting its premises in a reasonable manner, then no breach will be found even if a plaintiff does suffer injury." (*Ortega, supra,* 26 Cal.4th at p. 1211, internal citations omitted.)

- "We conclude that plaintiffs still have the burden of producing evidence that the dangerous condition existed for at least a sufficient time to support a finding that the defendant had constructive notice of the hazardous condition. We also conclude, however, that plaintiffs may demonstrate the storekeeper had constructive notice of the dangerous condition if they can show that the site had not been inspected within a reasonable period of time so that a person exercising due care would have discovered and corrected the hazard. In other words, if the plaintiffs can show an inspection was not made within a particular period of time prior to an accident, they may raise an inference the condition did exist long enough for the owner to have discovered it. It remains a question of fact for the jury whether, under all the circumstances, the defective condition existed long enough so that it would have been discovered and remedied by an owner in the exercise of reasonable care." (*Ortega, supra,* at pp. 1212–1213, internal citations omitted.)

- "To comply with this duty, a person who controls property must ' " ' "inspect [the premises] or take other proper means to ascertain their condition" ' " ' and, if a dangerous condition exists that would have been discovered by the exercise of reasonable care, has a duty to give adequate warning of or remedy it." (*Staats v. Vintner's Golf Club, LLC* (2018) 25 Cal.App.5th 826, 833 [236 Cal.Rptr.3d 236].)

- "Generally speaking, a property owner must have actual or constructive knowledge of a dangerous condition before liability will be imposed. In the ordinary slip and fall case, … the cause of the dangerous condition is not necessarily linked to an employee.

Consequently, there is no issue of respondeat superior. Where, however, 'the evidence is such that a reasonable inference can be drawn that the condition was created by employees of the [defendant], then [the defendant] is charged with notice of the dangerous condition.' " (*Getchell v. Rogers Jewelry* (2012) 203 Cal.App.4th 381, 385 [136 Cal.Rptr.3d 641], internal citation omitted.)

- "Although no two accidents happen in the same way, to be admissible for showing notice to a landowner of a dangerous condition, evidence of another similar accident must have occurred under substantially the same circumstances." (*Howard v. Omni Hotels Mgmt. Corp.* (2012) 203 Cal.App.4th 403, 432 [136 Cal.Rptr.3d 739].)

Secondary Sources

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

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

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

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.20 (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*, § 178.23 et seq. (Matthew Bender)

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]];**

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

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

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

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

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

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 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,* 162 Cal.App.2d at p. 42.)

- "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.)

- "A finding of an actionable nuisance does not require a showing that the defendant acted unreasonably. As one treatise noted, '[c]onfusion has resulted from the fact that the intentional interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. This is simply because a reasonable person could conclude that the plaintiff's loss resulting from the intentional interference ought to be allocated to the defendant.' " (*Wilson v. Southern California Edison Co.* (2018) 21 Cal.App.5th 786, 804 [230 Cal.Rptr.3d 595], quoting Prosser & Keeton (5th ed. 1984) Torts § 88.)

- "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, supra,* 228 Cal.App.4th at p. 1236, 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.)

- " 'Occupancy goes to the holding, possessing or residing in or on something.' 'The rights which attend occupancy may be, arguably, many.' ' "Invasion of the right of private occupancy" resembles the definition of nuisance, an " 'interference with the interest in the private use and enjoyment of the land.' " [Citations.] 'The typical and familiar nuisance claim involves an activity or condition which causes damage or other interference with the enjoyment of adjoining or neighboring land." ' " (*Albert v. Truck Ins. Exchange* (2018) 23 Cal.App.5th 367, 380 [232 Cal.Rptr.3d 774, internal citations omitted.)

- "An invasion of the right of private occupancy does not have to be a physical invasion of the land; a nonphysical invasion of real property rights can interfere with the use and enjoyment of real property." (*Albert, supra,* 23 Cal.App.5th at p. 380.)

- "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 (11th ed. 2017) Equity, § 174

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)

2336. Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements

[*Name of plaintiff*] claims [he/she/it] was harmed by [*name of defendant*]'s breach of the obligation of good faith and fair dealing because [*name of defendant*] failed to defend [*name of plaintiff*] in a lawsuit that was brought against [him/her/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was insured under an insurance policy with [*name of defendant*];**

2. **That a lawsuit was brought against [*name of plaintiff*];**

3. **That [*name of plaintiff*] gave [*name of defendant*] timely notice that [he/she/it] had been sued;**

4. **That [*name of defendant*], unreasonably, that is, without proper cause, failed to defend [*name of plaintiff*] against the lawsuit;**

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

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

New October 2004; Revised December 2007, December 2014, December 2015

Directions for Use

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

The court will decide the issue of whether the claim was potentially covered by the policy. (See *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 52 [221 Cal.Rptr. 171].) If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute establishes a possibility of coverage and thus a duty to defend. (*North Counties Engineering, Inc. v. State Farm General Ins. Co.* (2014) 224 Cal.App.4th 902, 922 [169 Cal.Rptr.3d 726].) Therefore, the jury does not resolve factual disputes that determine coverage.

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

Sources and Authority

- "A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken

without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364], internal citations omitted.)

- "To prevail in an action seeking declaratory relief on the question of the duty to defend, 'the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.' The duty to defend exists if the insurer 'becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.' " (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 [97 Cal.Rptr.3d 298, 211 P.3d 1083], original italics, internal citation omitted.)

- " ' [A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. … This duty … is separate from and broader than the insurer's duty to indemnify. … ' ' "[F]or an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. … Hence, the duty 'may exist even where coverage is in doubt and ultimately does not develop.' … " … ' " (*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323 [78 Cal.Rptr.3d 828], internal citations omitted.)

- "If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1506 [86 Cal.Rptr.3d 515].)

- " 'The proper focus is on the facts alleged in the complaint, rather than the alleged theories for recovery. … "The ultimate question is whether the facts alleged 'fairly apprise' the insurer that the suit is upon a covered claim." ' " (*Albert v. Truck Ins. Exchange* (2018) 23 Cal. App. 5th 367, 378 [232 Cal.Rptr.3d 774].)

- "A duty to defend can be extinguished only prospectively and not retrospectively." (*Navigators Specialty Ins. Co. v. Moorefield Construction, Inc.* (2016) 6 Cal.App.5th 1258, 1284 [212 Cal.Rptr.3d 231].)

"[F]acts known to the insurer and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy. [Citation.] This is so because current pleading rules liberally allow amendment; the third party plaintiff cannot be the arbiter of coverage." (*Tidwell Enterprises, Inc. v. Financial Pacific Ins. Co., Inc.* (2016) 6 Cal.App.5th 100, 106 [210 Cal.Rptr.3d 634].)

- "An insurer does not have a continuing duty to investigate the potential for coverage if it has made an informed decision on coverage at the time of tender. However, where the information available at the

time of tender shows no coverage, but information available later shows otherwise, a duty to defend may then arise." (*American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 26 [102 Cal.Rptr.3d 591], internal citations omitted.)

- "The duty does not depend on the labels given to the causes of action in the underlying claims against the insured; 'instead it rests on whether the *alleged facts or known extrinsic facts* reveal a *possibility* that the claim may be covered by the policy.' " (*Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969, 976 [144 Cal.Rptr.3d 12], original italics, disapproved on other grounds in *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

- "The obligation of the insurer to defend is of vital importance to the insured. 'In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.' 'The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.' " (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831–832 [61 Cal.Rptr.2d 909], internal citations omitted.)

- "An anomalous situation would be created if, on the one hand, an insured can sue for the tort of breach of the implied covenant if the insurer accepts the defense and later refuses a reasonable settlement offer, but, on the other hand, an insured is denied tort recovery if the insurer simply refuses to defend. ... This dichotomy could have the effect of encouraging an insurer to stonewall the insured at the outset by simply refusing to defend." (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319–1320 [52 Cal.Rptr.2d 385].)

- "[T]he mere existence of a legal dispute does not create a potential for coverage: 'However, we have made clear that where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance, and the insurer may properly deny a defense. *Moreover, the law governing the insurer's duty to defend need not be settled at the time the insurer makes its decision*.' " (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 209 [97 Cal.Rptr.3d 568], original italics.)

- "The trial court erroneously thought that because the case law was 'unsettled' when the insurer first turned down the claim, that unsettledness created a potential for a covered claim. … [I]f an insurance company's denial of coverage is reasonable, as shown by substantial case law in favor of its position, there can be no bad faith even though the insurance company's position is *later* rejected by our state Supreme Court." (*Griffin Dewatering Corp., supra,* 176 Cal.App.4th at p. 179, original italics.)

- "Unresolved factual disputes impacting insurance coverage do not absolve the insurer of its duty to defend. 'If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend.' " (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 520 [115 Cal.Rptr.3d 42].)

- " 'If the insurer is obliged to take up the defense of its insured, it must do so as soon as possible, both to protect the interests of the insured, and to limit its own exposure to loss. . . . [T]he duty to defend must be assessed at the outset of the case.' It follows that a belated offer to pay the costs of defense may mitigate damages but will not cure the initial breach of duty." (*Shade Foods, Inc., supra,* 78 Cal.App.4th at p. 881, internal citations omitted.)

- "When a complaint states multiple claims, some of which are potentially covered by the insurance policy and some of which are not, it is a mixed action. In these cases, 'the insurer has a duty to defend as to the claims that are at least potentially covered, having been paid premiums by the insured therefor, but does not have a duty to defend as to those that are not, not having been paid therefor.' However, in a " "mixed" action, the insurer has a duty to defend the action in its entirety.' Thereafter, the insurance company is entitled to seek reimbursement for the cost of defending the claims that are not potentially covered by the policy." (*Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, 1231 [184 Cal.Rptr.3d 394], internal citations omitted.)

- "No tender of defense is required if the insurer has already denied coverage of the claim. In such cases, notice of suit and tender of the defense are excused because other insurer has already expressed its unwillingness to undertake the defense." (Croskey et al., California Practice Guide: Insurance Litigation, ¶ 7:614 (The Rutter Group).)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 427, 428

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, Third Party Cases—Refusal To Defend Cases, ¶¶ 12:598–12:650.5 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Defend, §§ 25.1–26.38

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.10–82.16 (Matthew Bender)

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

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

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [or]

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

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**

4. **That [***name of plaintiff***]'s [***protected status-for example, race, gender, or age***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

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

New September 2003; Revised April 2009, June 2011, June 2012, June 2013

Directions for Use

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

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment

agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Read the first option for element 3 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 3 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 4 if either the second or third option is included for element 3.

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

Element 4 requires that discrimination based on a protected classification be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Modify element 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).

- Perception and Association. Government Code section 12926(o).

- "[C]onceptually the theory of 'disparate treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)

- "California has adopted the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. 'This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.' " (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)

- "The *McDonnell Douglas* framework was designed as 'an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the factfinding process.' "

(*Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 737 [233 Cal.Rptr.3d 242].)

- "At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff's prima facie burden is 'not onerous', he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' …." …' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though 'rebuttable,' is 'legally mandatory.' Thus, in a trial, '[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.' [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." *(Guz, supra,* 24 Cal.4th at pp. 355–356, internal citations omitted.)

- "The trial court decides the first two stages of the *McDonnell Douglas* test as questions of law. If the plaintiff and defendant satisfy their respective burdens, the presumption of discrimination disappears and the question whether the defendant unlawfully discriminated against the plaintiff is submitted to the jury to decide whether it believes the defendant's or the plaintiff's explanation." (*Swanson v. Morongo Unified School Dist*. (2014) 232 Cal.App.4th 954, 965 [181 Cal.Rptr.3d 553].)

- "To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action." (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)

- "Although '[t]he specific elements of a prima facie case may vary depending on the particular facts,' the plaintiff in a failure-to-hire case '[g]enerally … must provide evidence that (1) he [or she] was a

member of a protected class, (2) he [or she] was qualified for the position he [or she] sought … , (3) he [or she] suffered an adverse employment action, such as … denial of an available job, and (4) some other circumstance suggests discriminatory motive,' such as that the position remained open and the employer continued to solicit applications for it." (*Abed, supra,* 23 Cal.App.5th at p. 736.)

- "Although we recognize that in most cases, a plaintiff who did not apply for a position will be unable to prove a claim of discriminatory failure to hire, a job application is not an *element* of the claim." (*Abed, supra,* 23 Cal.App.5th at p. 740, original italics.)

- "Employers who lie about the existence of open positions are not immune from liability under the FEHA simply because they are effective in keeping protected persons from applying." (*Abed, supra,* 23 Cal.App.5th at p. 741.)

- "[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. 'It is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.' … '[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. … While the objective soundness of an employer's proffered reasons supports their credibility … , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, "legitimate" reasons … in this context are reasons that are *facially unrelated to prohibited bias,* and which, if true, would thus preclude a finding *of discrimination*. …' " (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)

- "The burden therefore shifted to [plaintiff] to present evidence showing the [defendant] engaged in intentional discrimination. To meet her burden, [plaintiff] had to present evidence showing (1) the [defendant]'s stated reason for not renewing her contract was untrue or pretextual; (2) the [defendant] acted with a discriminatory animus in not renewing her contract; or (3) a combination of the two." (*Swanson, supra,* 232 Cal.App.4th at p. 966.)

- "Evidence that an employer's proffered reasons were pretextual does not necessarily establish that the employer intentionally discriminated: ' " '[I]t is not enough … to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.' " ' However, evidence of pretext is important: ' "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." ' " (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 350–351 [223 Cal.Rptr.3d 173], internal citations omitted.)

- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon, supra,* 192 Cal.App.3d at p. 1319.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At

the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a "but for" cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "In cases involving a comparison of the plaintiff's qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer's decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer's assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture." (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)

- "While not all cases hold that 'the disparity in candidates' qualifications "must be so apparent as to jump off the page and slap us in the face to support a finding of pretext" ' the precedents do consistently require that the disparity be substantial to support an inference of discrimination." (*Reeves, supra,* 186 Cal.App.4th at p. 675, internal citation omitted.)

- "[Defendant] contends that a trial court must assess the relative strength and nature of the evidence presented on summary judgment in determining if the plaintiff has 'created only a weak issue of fact.' However, [defendant] overlooks that a review of all of the evidence is essential to that assessment. The stray remarks doctrine, as advocated by [defendant], goes further. It allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by 'nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.' [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, 'the task of disambiguating ambiguous utterances is for trial, not for summary judgment.' Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury. The stray remarks doctrine allows the trial court to remove this role from the jury." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted; see also Gov. Code, § 12923(c) [Legislature affirms the decision in *Reid v. Google, Inc.* in its rejection of the "stray remarks doctrine"].)

- "[D]iscriminatory remarks can be relevant in determining whether intentional discrimination occurred: 'Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other

circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered." (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1190–1191 [220 Cal.Rptr.3d 42].)

- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra,* 24 Cal.4th at p. 354.)

- "We have held 'that, in a civil action under the FEHA, all relief generally available in noncontractual actions ... may be obtained.' This includes injunctive relief." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "The FEHA does not itself authorize punitive damages. It is, however, settled that California's punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA ... ." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1017–1021

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

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

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

2528. Failure to Prevent ~~Sexual~~ Harassment by Nonemployee (Gov. Code, § 12940(j))

[*Name of plaintiff*] claims that [*name of defendant*] failed to take reasonable steps to prevent ~~sexual~~ harassment based on [his/her] [*describe protected status, e.g., race, gender, or age*] by a nonemployee. 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 an unpaid [intern/volunteer] for [*name of defendant*]/was a person providing services under a contract with [*name of defendant*]];**

2. **That while in the course of employment, [*name of plaintiff*] was subjected to ~~sexual~~ harassment based on [his/her] [*e.g., race*] by [*name*], who was not an employee of [*name of defendant*];**

3. **That [*name of defendant*] knew or should have known that the nonemployee's conduct placed employees at risk of ~~sexual~~ harassment;**

4. **That [*name of defendant*] failed to take immediate and appropriate [preventive/corrective] action;**

5. **That the ability to take [preventive/corrective] action was within the control of [*name of defendant*];**

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

7. **That [*name of defendant*]'s failure to take immediate and appropriate steps to [prevent/put an end to] the ~~sexual~~ harassment was a substantial factor in causing [*name of plaintiff*]'s harm.**

New November 2018; Revised May 2019

Directions for Use

Give this instruction on a claim against the employer for failure to prevent ~~sexual~~ harassment by a nonemployee. The FEHA protects not only employees, but also applicants, unpaid interns or volunteers, and persons providing services under a contract (element 1). (Gov. Code, § 12940(j)(1).) Modify references to employment in elements 2 and 3 as necessary if the plaintiff's status is other than an employee. Note that unlike claims for failure to prevent acts of a coemployee (see Gov. Code, § 12940(k)), only ~~sexual~~ harassment is covered. (Gov. Code, § 12940(j)(1). If there is such a thing as discrimination or retaliation by a nonemployee, there is no employer duty to prevent it under the FEHA.

The employer's duty is to "take immediate and appropriate corrective action." (Gov. Code § 12940(j)(1).) In contrast, for the employer's failure to prevent acts of an employee, the duty is to "take *all* reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940(k).)

Whether the employer must prevent or later correct the harassing situation would seem to depend on the facts of the case. If the issue is to stop harassment from recurring after becoming aware of it, the employer's duty would be to "correct" the problem. If the issue is to address a developing problem before the harassment occurs, the duty would be to "prevent" it. Choose the appropriate words in elements 4, 5, and 7 depending on the facts.

Sources and Authority

- Prevention of Harassment by a Nonemployee. Government Code section 12940(j)(1).

- Prevention of Discrimination and Harassment. Government Code section 12940(k).

- "The FEHA provides: 'An employer may … be responsible for the acts of nonemployees, with respect to sexual harassment of employees … , where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered.' … ' A plaintiff cannot state a claim for failure to prevent harassment unless the plaintiff first states a claim for harassment." (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 700-701 [224 Cal.Rptr.3d 542].)

- "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., supra,* 16 Cal.App.5th at p. 701.)

- "[T]he language of section 12940, subdivision (j)(1), does not limit its application to a particular fact pattern. Rather, the language of the statute provides for liability whenever an employer (1) knows or should know of sexual harassment by a nonemployee and (2) fails to take immediate and appropriate remedial action (3) within its control. (*M.F., supra,* 16 Cal.App.5th at p. 702.)

- "[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.)

- "The more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims." (*M.F., supra,* 16 Cal.App.5th at p. 701.)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency, § 363, 370

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 1019, 1028, 1035

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], considering the overall combination of~~with regard to~~ skill, effort, and responsibility required; and

3. That [*name of plaintiff*] was working under similar working conditions as the other person[s].

New May 2018; Revised May 2019

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 No. 2741, *Affirmative Defense—Different Pay Justified,* and CACI No. 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; Revised May 2019

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, 41 L.Ed.2d 1].)~~ ~~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).) Choose the factor or factors that the employer asserts as justification.

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 d of element 1 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)

3000. Violation of Federal Civil Rights—In General—Essential Factual Elements (42 U.S.C. § 1983)

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

1. **That [***name of defendant***] [intentionally/[***other applicable state of mind***]] [***insert wrongful act***];**

2. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

3. **That [***name of defendant***]'s conduct violated [***name of plaintiff***]'s right [***insert right, e.g., "of privacy"***];**

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

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

New September 2003

Directions for Use

In element 1, the standard is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involve conduct carried out with "deliberate indifference," and Fourth Amendment claims do not necessarily involve intentional conduct. The "official duties" referred to in element 2 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be a jury issue, so it has been omitted to shorten the wording of element 2. This instruction is intended for claims not covered by any of the following more specific instructions regarding the elements that the plaintiff must prove.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.

- "A § 1983 claim creates a species of tort liability, with damages determined 'according to principles derived from the common law of torts.' " (*Mendez v. Cty. of L.A.* (9th Cir. 2018) 897 F.3d 1067, 1074.)

- "As we have said many times, § 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " (*Graham v. Connor* (1989) 490 U.S. 386, 393-394 [109 S.Ct. 1865, 104 L.Ed.2d 443], internal citation omitted.)

- "42 U.S.C. § 1983 creates a cause of action against a person who, acting under color of state law, deprives another of rights guaranteed under the Constitution. Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials." (*Jones v. Williams* (9th Cir. 2002) 297 F.3d 930, 934.)

- "By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 890 [104 Cal.Rptr.3d 352].)

- "Section 1983 can also be used to enforce federal statutes. For a statutory provision to be privately enforceable, however, it must create an individual right." (*Henry A. v. Willden* (9th Cir. 2012) 678 F.3d 991, 1005, internal citation omitted.)

- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)

- "The jury was properly instructed on [plaintiff]'s burden of proof and the particular elements of the section 1983 claim. (CACI No. 3000.)" (*King v. State of California* (2015) 242 Cal.App.4th 265, 280 [195 Cal.Rptr.3d 286].)

- " 'State courts look to federal law to determine what conduct will support an action under section 1983. The first inquiry in any section 1983 suit is to identify the precise constitutional violation with which the defendant is charged.' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 203 [73 Cal.Rptr.2d 571], internal citations omitted.)

- " 'Qualified immunity is an affirmative defense against section 1983 claims. Its purpose is to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." The defense provides immunity from suit, not merely from liability. Its purpose is to spare defendants the burden of going forward with trial.' Because it is an immunity from suit, not just a mere defense to liability, it is important to resolve immunity questions at the earliest possible stage in litigation. Immunity should ordinarily be resolved by the court, not a jury." (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 342 [54 Cal.Rptr.2d 772], internal citations omitted.)

- "[D]efendants cannot be held liable for a constitutional violation under 42 U.S.C. § 1983 unless they were integral participants in the unlawful conduct. We have held that defendants can be liable for 'integral participation' even if the actions of each defendant do not 'rise to the level of a constitutional violation.' " (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1241, internal citation omitted.)

- "Constitutional torts employ the same measure of damages as common law torts and are not augmented 'based on the abstract "value" or "importance" of constitutional rights ... .' Plaintiffs have the burden of proving compensatory damages in section 1983 cases, and the amount of damages depends 'largely upon the credibility of the plaintiffs' testimony concerning their injuries.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 321 [103 Cal.Rptr.2d 339], internal citations

omitted.)

- "[E]ntitlement to compensatory damages in a civil rights action is not a matter of discretion: 'Compensatory damages . . . are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.' " (*Hazle v. Crofoot* (9th Cir. 2013) 727 F.3d 983, 992.)

- "[T]he state defendants' explanation of the jury's zero-damages award as allocating all of [plaintiff]'s injury to absent persons reflects the erroneous view that not only could zero damages be awarded to [plaintiff], but that [plaintiff]'s damages were capable of apportionment. [Plaintiff] independently challenges the jury instruction and verdict form that allowed the jury to decide this question, contending that the district judge should have concluded, as a matter of law, that [plaintiff] was entitled to compensatory damages and that defendants were jointly and severally liable for his injuries. He is correct. The district judge erred in putting the question of apportionment to the jury in the first place, because the question of whether an injury is capable of apportionment is a legal one to be decided by the judge, not the jury." (*Hazle, supra,* 727 F.3d at pp. 994−995.)

- "An individual acts under color of state law when he or she exercises power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " (*Naffe v. Frey* (9th Cir. 2015) 789 F.3d 1030, 1036.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "A state employee who is off duty nevertheless acts under color of state law when (1) the employee 'purport[s] to or pretend[s] to act under color of law,' (2) his 'pretense of acting in the performance of his duties . . . had the purpose and effect of influencing the behavior of others,' and (3) the harm inflicted on plaintiff 'related in some meaningful way either to the officer's governmental status or to the performance of his duties,' " (*Naffe, supra,* 789 F.3d at p. 1037, internal citations omitted.)

- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)

- " 'While generally not applicable to private parties, a § 1983 action can lie against a private party

when "he is a willful participant in joint action with the State or its agents." ' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 396 [218 Cal.Rptr.3d 38].)

- "The Ninth Circuit has articulated four tests for determining whether a private person acted under color of law: (1) the public function test, (2) the joint action test, (3) the government nexus test, and (4) the government coercion or compulsion test. 'Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists.' ' "[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." ' " (*Julian, supra,* 11 Cal.App.5th at p. 396.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892 et seq.

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law-General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶¶ 7.05–7.07, Ch. 17, *Deprivation of Rights Under Color of State Law-General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶ 17.02 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes,* § 113.14 (Matthew Bender)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12,* 8.40

3023. Unreasonable Search—Search Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff*] claims that [*name of defendant*] carried out an unreasonable search of [his/her] [person/home/automobile/office/[*insert other*]] because [he/she] did not have a warrant. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] searched [*name of plaintiff*]'s [person/home/automobile/office/[*insert other*]];**

2. **That [*name of defendant*] did not have a warrant;**

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 search was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003; Renumbered from CACI No. 3003 December 2012

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

Sources and Authority

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)

- "A Fourth Amendment 'search' occurs when a government agent 'obtains information by physically intruding on a constitutionally protected area,' or infringes upon a 'reasonable expectation of privacy,' As we have explained, … 'when the government "physically occupie[s] private property for the purpose of obtaining information," a Fourth Amendment search occurs, regardless whether the intrusion violated any reasonable expectation of privacy. Only where the search *did not* involve a physical trespass do courts need to consult *Katz*'s reasonable-expectation-of-privacy test.' " (*Whalen v. McMullen* (9th Cir. 2018) 907 F.3d 1139, 1146–1147, original italics, internal citations omitted.)

- "[F]or the purposes of § 1983, a properly issued warrant makes an officer's otherwise unreasonable entry non-tortious—that is, not a trespass. Absent a warrant or consent or exigent circumstances, an officer must not enter; it is the entry that constitutes the breach of duty under the Fourth Amendment. As a result, the relevant counterfactual for the causation analysis is not what would have happened had the officers procured a warrant, but rather, what would have happened had the officers not unlawfully entered the residence." (*Mendez v. Cty. of L.A.* (9th Cir. 2018) 897 F.3d 1067, 1076.)

- "[T]here is no talismanic distinction, for Fourth Amendment purposes, between a warrantless 'entry' and a warrantless 'search.' 'The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home.' " (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 874.)

- " 'The Fourth Amendment prohibits only unreasonable searches ... . [¶] The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.'" (*Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834], internal citation omitted.)

- " '[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' 'And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?' An officer's good faith is not enough." (*King v. State of California* (2015) 242 Cal.App.4th 265, 283 [195 Cal.Rptr.3d 286], internal citations omitted.)

- "Thus, the fact that the officers' reasonable suspicion of wrongdoing is not particularized to each member of a group of individuals present at the same location does not automatically mean that a search of the people in the group is unlawful. Rather, the trier of fact must decide whether the search was reasonable in light of the circumstances." (*Lyall v. City of Los Angeles* (9th Cir. 2015) 807 F.3d 1178, 1194.)

- " 'It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant.' Thus, a warrantless entry into a residence is presumptively unreasonable and therefore unlawful. Government officials 'bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.' " (*Conway, supra,* 45 Cal.App.4th at p. 172, internal citations omitted.)

- " '[I]t is a "basic principle of Fourth Amendment law" ' that warrantless searches of the home or the curtilage surrounding the home 'are presumptively unreasonable.' " (*Bonivert, supra,* 883 F.3d at p. 873.)

- "The Fourth Amendment shields not only actual owners, but also anyone with sufficient possessory rights over the property searched. … To be shielded by the Fourth Amendment, a person needs 'some

joint control and supervision of the place searched,' not merely permission to be there." (*Lyall, supra,* 807 F.3d at pp. 1186–1187.)

- "[T]he Fourth Amendment's 'prohibition on unreasonable searches and seizures applies to searches conducted by public school officials.' " (*Scott v. Cty. of San Bernardino* (9th Cir. 2018) 903 F.3d 943, 948.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)

- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

3025. Affirmative Defense—Consent to Search

[*Name of defendant***] claims that the search was reasonable and that a search warrant was not required because [***name of plaintiff/third person***] consented to the search. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [[***name of plaintiff***]/[***name of third person***], who controlled or reasonably appeared to have control of the area,] knowingly and voluntarily consented to the search; and**

2. **That the search was reasonable under all of the circumstances.**

[[*Name of third person***]'s consent is insufficient if [***name of plaintiff***] was physically present and expressly refused to consent to the search.]**

In deciding whether the search was reasonable, you should consider, among other factors, the following:

(a) The extent of the particular intrusion;

(b) The place in which the search was conducted; [and]

(c) The manner in which the search was conducted; [and]

(d) [*insert other applicable factor(s)***].**

New September 2003; Revised April 2009; Renumbered from CACI No. 3005 December 2012

Directions for Use

Give the optional paragraph after element 2 if the defendant relied on the consent of someone other than the plaintiff to initiate the search. (See *Georgia v. Randolph* (2006) 547 U.S. 103, 106 [126 S.Ct. 1515, 164 L.Ed.2d 208].)

Sources and Authority

- "The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses common authority over the premises." (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 181 [110 S.Ct. 2793, 111 L.Ed.2d 148], internal citations omitted.)

- " '[C]ommon authority' rests 'on mutual use of the property by persons generally having joint access or control for most purposes ... .' The burden of establishing that common authority rests upon the

State." (*Illinois v. Rodriguez, supra,* 497 U.S. at p. 181, internal citation omitted.)

- "The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." (*Georgia, supra,* 547 U.S. at p. 106, internal citations omitted.)

- "Where consent is relied upon to justify the lawfulness of a search, the government 'has the burden of proving that the consent was, in fact, freely and voluntarily given.' 'The issue of whether or not consent to search was freely and voluntarily given is one of fact to be determined on the basis of the totality of the circumstances.' " (*U.S. v. Henry* (9th Cir. 1980) 615 F.2d 1223, 1230, internal citations omitted.)

- "Whether consent was voluntarily given 'is to be determined from the totality of all the circumstances.' We consider the following factors to assess whether the consent was voluntary: (1) whether the person was in custody; (2) whether the officers had their guns drawn; (3) whether a Miranda warning had been given; (4) whether the person was told that he had the right not to consent; and (5) whether the person was told that a search warrant could be obtained. Although no one factor is determinative in the equation, 'many of this court's decisions upholding consent as voluntary are supported by at least several of the factors.' " (*U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1026–1027, internal citations omitted.)

- "According to [defendant], 'express refusal means verbal refusal.' We disagree, as this interpretation finds no support in either common sense or the case law." (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 875.)

- "In determining whether a person consented to an intrusion into her home, we distinguish between 'undercover' entries, where a person invites a government agent who is concealing that he is a government agent into her home, and 'ruse' entries, where a known government agent misrepresents his purpose in seeking entry. The former does not violate the Fourth Amendment, as long as the undercover agent does not exceed the scope of his invitation while inside the home. But '[a] ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent.' " (*Whalen v. McMullen* (9th Cir. 2018) 907 F.3d 1139, 1146–1147, internal citations omitted.)

- "Because he entered the home while using a ruse and not while undercover, it is immaterial that he stayed within [plaintiff]'s presence in the home and did not conduct a broader search. He did not have consent to be in the home for the purposes of his visit." (*Whalen, supra,* 907 F.3d at p. 1150.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

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.)

- "An official 'cannot seize children suspected of being abused or neglected unless reasonable avenues of investigation are first pursued.' Further, because the 'scope of the intrusion' must be 'reasonably necessary to avert' a specific injury, the intrusion cannot be longer than necessary to avert the injury." (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1237, internal citations omitted.)

- "[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].)

- "Lack of health insurance … does not provide a reasonable cause to believe a child is in imminent danger." (*Keates, supra,* 883 F.3d at p. 1237.)

- "[B]arring a reasonable concern that material physical evidence might dissipate . . . or that some urgent medical problem exists requiring immediate medical attention, the state is required to notify parents and to obtain judicial approval before children are subjected to investigatory physical examinations." (*Mann v. Cty. of San Diego* (9th Cir. 2018) 907 F.3d 1154, 1161.)

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)

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

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

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

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

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

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

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

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

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

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

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

New November 2017

Directions for Use

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

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

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

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

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

Sources and Authority

- " '[C]itizens do not surrender their First Amendment rights by accepting public employment.' Moreover, '[t]here is considerable value . . . in encouraging, rather than inhibiting, speech by public employees,' because 'government employees are often in the best position to know what ails the agencies for which they work.' At the same time, '[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions.' Accordingly, government employees may be subject to some restraints on their speech 'that would be unconstitutional if applied to the general public.' " (*Moonin v. Tice* (9th Cir. 2017) 868 F.3d 853, 860-861, internal citations omitted.)

- "First Amendment retaliation claims are governed by the framework in *Eng.* See 552 F.3d at 1070-72. [Plaintiff] must show that (1) he spoke on a matter of public concern, (2) he spoke as a private citizen rather than a public employee, and (3) the relevant speech was a substantial or motivating factor in the adverse employment action. Upon that showing, the State must demonstrate that (4) it had an adequate justification for treating [plaintiff] differently from other members of the general public, or (5) it would have taken the adverse employment action even absent the protected speech. '[A]ll the factors are necessary, in the sense that failure to meet any one of them is fatal to the plaintiff's case.' " (*Kennedy v. Bremerton Sch. Dist.* (9th Cir. 2017) 869 F.3d 813, 822, internal citations omitted.)

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

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

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

- "The public concern inquiry is purely a question of law … ." (*Eng, supra,* 552 F.3d at p. 1070.)

- "Whether an individual speaks as a public employee is a mixed question of fact and law. 'First, a factual determination must be made as to the "scope and content of a plaintiff's job responsibilities." ' 'Second, the "ultimate constitutional significance" of those facts must be determined as a matter of law.' " (*Barone v. City of Springfield* (9th Cir. 2018) 902 F.3d 1091, 1099, internal citations omitted~~While 'the question of the scope and content of a plaintiff's job responsibilities is a question of fact,' the 'ultimate constitutional significance of the facts as found' is a question of law." (*Eng, supra,* 552 F.3d at p. 1071~~.)

- "An employee does not speak as a citizen merely because the employee directs speech towards the public, or speaks in the presence of the public, particularly when an employee's job duties include interacting with the public." (*Barone, supra,* 902 F.3d at p. 1100.)

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

- "[I]n synthesizing relevant Ninth Circuit precedent since *Garcetti*, an en banc panel of this Court in *Dahlia v. Rodriguez,* 735 F.3d 1060, 1074-76 (9th Cir. 2013), announced three guiding principles for undertaking the practical factual inquiry of whether an employee's speech is insulated from employer discipline under the First Amendment. … The guiding principles are: [¶]

1. ‘First, particularly in a highly hierarchical employment setting such as law enforcement, whether or not the employee confined his communications to his chain of command is a relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties. When a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his duties.’ [¶] 2. ‘Second, the subject matter of the communication is also of course highly relevant to the ultimate determination whether the speech is protected by the First Amendment … When an employee prepares a routine report, pursuant to normal departmental procedure, about a particular incident or occurrence, the employee's preparation of that report is typically within his job duties. . . By contrast, if a public employee raises within the department broad concerns about corruption or systemic abuse, it is unlikely that such complaints can reasonably be classified as being within the job duties of an average public employee, except when the employee's regular job duties involve investigating such conduct.’ [¶] 3. ‘Third, we conclude that when a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties. Indeed, the fact that an employee is threatened or harassed by his superiors for engaging in a particular type of speech provides strong evidence that the act of speech was not, as a ‘practical' matter, within the employee's job duties notwithstanding any suggestions to the contrary in the employee's formal job description.’ ” (*Brandon v. Maricopa County* (9th Cir. 2017) 849 F.3d 837, 843–844, internal citations omitted.)

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

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

- “Although the *Pickering* framework is most often applied in the retaliation context, a similar analysis is used when assessing prospective restrictions on government employee speech. Where a ‘wholesale deterrent to a broad category of expression’ rather than ‘a post hoc analysis of one employee's speech and its impact on that employee's public responsibilities’ is at issue, the Court weighs the impact of the ban as a whole—both on the employees whose speech may be curtailed and on the public interested in what they might say—against the restricted speech's ‘ “necessary impact on the actual operation” of the Government,’ ‘[U]nlike an adverse action taken in response to actual speech,’ a prospective restriction ‘chills potential speech before it happens.’ The government therefore must shoulder a heavier burden when it seeks to justify an ex ante speech restriction as opposed to ‘an isolated disciplinary action.’ ” (*Moonin, supra,* 868 F.3d at p. 861,

internal citations omitted.)

Secondary Sources

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

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

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

3065. Sexual Harassment in Defined Relationship—Essential Factual Elements (Civ. Code, § 51.9)

[*Name of plaintiff*] claims that [*name of defendant*] sexually harassed [him/her]. To establish this claim, [*name of plaintiff*] must prove all of the following:

[1. That [*name of plaintiff*] had a [business/, ~~service~~/, [or] professional relationship] with [*name of defendant*];]

[*or*]

[1. That [*name of defendant*] held [himself/herself] out as being able to help [*name of plaintiff*] establish a [business/service/ [or] professional relationship] with [[*name of defendant*]/[or] [*name of third party*]];]

2. [That [*name of defendant*] made [sexual advances/solicitations/sexual requests/demands for sexual compliance/[*insert other actionable conduct*]] to [*name of plaintiff*];]

[or]

[That [*name of defendant*] engaged in [verbal/visual/physical] conduct of a [sexual nature/hostile nature based on gender];]

3. That [*name of defendant*]'s conduct was unwelcome and also pervasive or severe; and

~~4. That [*name of plaintiff*] was unable to easily end the relationship with [*name of defendant*]; and~~

~~5~~4. That [*name of plaintiff*] has suffered or will suffer [economic loss or disadvantage/personal injury/the violation of a statutory or constitutional right] as a result of [*name of defendant*]'s conduct.

New September 2003; Revised April 2008; Renumbered from CACI No. 3024 December 2012; Revised May 2019

Directions for Use

Select the appropriate option for element 1 depending on the nature of the relationship between the parties. Select either or both options for element 2 depending on the defendant's conduct. For a nonexclusive list of relationships covered, see Civil Code section 51.9(a)(1).

See also CACI No. 2524, *"Severe or Pervasive" Explained*.

Sources and Authority

- Sexual Harassment in Defined Relationship. Civil Code section 51.9.

- "[The] history of the [1999] amendments to Civil Code section 51.9 leaves no doubt of the Legislature's intent to conform the requirements governing liability for sexual harassment in professional relationships outside the workplace to those of the federal law's Title VII and California's FEHA, both of which pertain to liability for sexual harassment in the workplace. Under both laws, an employee plaintiff who cannot prove a demand for sexual favors in return for a job benefit (that is, quid pro quo harassment) must show that the sexually harassing conduct was so pervasive or severe as to alter the conditions of employment. With respect to liability under section 51.9, which covers a wide variety of business relationships outside the workplace, the relevant inquiry is whether the alleged sexually harassing conduct was sufficiently pervasive or severe as to alter the conditions of the business relationship. This inquiry must necessarily take into account the nature and context of the particular business relationship." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1048 [95 Cal.Rptr.3d 636, 209 P.3d 963].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law § 896

1 California Landlord-Tenant Practice, Ch. 3, *Liability for Sexual Harassment* (Cont.Ed.Bar 2d ed.) § 3.70A

1 Wrongful Employment Termination Practice, Ch. 3, *When Plaintiff is Not Employee, Applicant, or Independent Contractor* (Cont.Ed.Bar 2d ed.) § 3.12

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.35, 116.90, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.32 (Matthew Bender)

1 Westley et al., Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 2, *Creation of Tenancy*, 2.13 (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~~k).) 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~~k).) 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)

VF-3035. Bane Act (Civ. Code, § 52.1)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make threats of violence against [[***name of plaintiff***]/ [or] [***name of plaintiff***]'s property]?**
   ____ Yes ____ No

   [*or***]**

1. **Did [***name of defendant***] act violently against [[***name of plaintiff***]/ [and] [***name of plaintiff***]'s property]?**
   ____ Yes ____ No

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

2. **Did [***name of defendant***]'s threats cause [***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 threat?**
   ____ Yes ____ No

   [*or***]**

2. **Did [***name of defendant***] commit these acts of violence to [prevent [***name of plaintiff***] from exercising [his/her] right [***insert right, e.g., "to vote"***]/retaliate against [***name of plaintiff***] for having exercised [his/her] right [***insert right***]]?**
   ____ 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 $ _____

[Answer question 5.

5. What amount do you award as punitive damages?
$ _____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3015 and Revised December 2012, December 2016

Directions for Use

This verdict form is based on CACI No. 3066, *Bane Act—Essential Factual Elements.*

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

Give the first option for elements 1 and 2 if the defendant has threatened violence. Give the second option if the defendant actually committed violence.

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 Bane Act refers to section 52. (See Civ. Code, § 52.1(~~b~~c).) This reference would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52. The court should compute the damages under section 52(a) by multiplying actual damages by three, and awarding $4,000 if the amount is less. Questions 5 addresses punitive damages under section 52(b).

If no actual damages are sought, the $4,000 statutory minimum damages may be awarded without proof of harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].) In this case, only questions 1 and 2 need be answered.

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.

3112. "Dependent Adult" Explained (Welf. & Inst. Code, § 15610.23)

A "dependent adult" is a person, regardless of whether or not the person lives independently, who is between the ages of 18 and 64 years and who [*insert one of the following:***]**

> **[~~who~~ has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. This includes persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.]**
>
> [*or*]
>
> **[~~who~~ is admitted as an inpatient to [a/an] [***insert 24-hour health facility***].]**

New September 2003; Revised May 2019

Directions for Use

Read the alternative that is most appropriate to the facts of the case.

Sources and Authority

- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Developmentally Disabled Person" Defined. Welfare and Institutions Code section 15610.25.

Secondary Sources

California Elder Law Litigation (Cont.Ed.Bar) § 6.22

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.31 (Matthew Bender)

3712. Joint Ventures

Each of the members of a joint venture, and the joint venture itself, are responsible for the wrongful conduct of a member acting in furtherance of the venture.

You must decide whether a joint venture was created in this case. A joint venture exists if all of the following have been proved:

1. **Two or more persons or business entities combine their property, skill, or knowledge with the intent to carry out a single business undertaking;**

2. **Each has an ownership interest in the business;**

3. **They have joint control over the business, even if they agree to delegate control; and**

4. **They agree to share the profits and losses of the business.**

A joint venture can be formed by a written or an oral agreement or by an agreement implied by the parties' conduct.

New September 2003; Revised June 2011, December 2011

Directions for Use

This instruction can be modified for cases involving unincorporated associations by substituting the term "unincorporated association" for "joint venture."

If the venture has no commercial purpose, this instruction may be modified by deleting elements 2 and 4, which do not apply to a noncommercial enterprise. Also modify elements 1 and 3 to substitute another word for "business" depending on the kind of activity involved. (See *Shook v. Beals* (1950) 96 Cal.App.2d 963, 969–970 [217 P.2d 56]; see also *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 872 [32 Cal.Rptr.3d 351].)

Sources and Authority

- "A joint venture is 'an undertaking by two or more persons jointly to carry out a single business enterprise for profit.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482 [286 Cal.Rptr. 40, 816 P.2d 892], internal citations omitted.)

- "A joint venture has been defined in various ways, but most frequently perhaps as an association of two or more persons who combine their property, skill or knowledge to carry out a single business enterprise for profit." (*Holtz v. United Plumbing and Heating Co.* (1957) 49 Cal.2d 501, 506 [319 P.2d 617].)

- " 'There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise.' Where a joint venture is established, the parties to the venture are vicariously liable for the torts of the other in furtherance of the venture." (*Cochrum v. Costa Victoria Healthcare, LLC* (2018) 25 Cal.App.5th 1034, 1053 [236 Cal.Rptr.3d 457], internal citation omitted.)

- "~~'There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise. … .'~~ 'Whether a joint venture actually exists depends on the intention of the parties. … [¶] … [¶] [W]here evidence is in dispute the existence or nonexistence of a joint venture is a question of fact to be determined by the jury. [Citation.]' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 370 [76 Cal.Rptr.3d 146], internal citations omitted.)

- " 'A joint venture exists when there is "an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control [citing this instruction]." ' " (*Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1053 [153 Cal.Rptr.3d 178], internal citation omitted.)

- "We turn next to the element of joint control. 'An essential element of a partnership or joint venture is the right of joint participation in the management and control of the business. [Citation.] Absent such right, the mere fact that one party is to receive benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make him a partner or joint venturer. [Citations.]' " (*Simmons, supra,* 213 Cal.App.4th at p. 1056.)

- "The law requires little formality in the creation of a joint venture and the agreement is not invalid because it may be indefinite with respect to its details." (*Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 285 [55 Cal.Rptr. 610].)

- "The distinction between joint ventures and partnerships is not sharply drawn. A joint venture usually involves a single business transaction, whereas a partnership may involve 'a continuing business for an indefinite or fixed period of time.' Yet a joint venture may be of longer duration and greater complexity than a partnership. From a legal standpoint, both relationships are virtually the same. Accordingly, the courts freely apply partnership law to joint ventures when appropriate." (*Weiner, supra,* 54 Cal.3d at p. 482, internal citations omitted.)

- "The incidents of a joint venture are in all important respects the same as those of a partnership. One such incident of partnership is that all partners are jointly and severally liable for partnership obligations, irrespective of their individual partnership interests. Because joint and several liability arises from the partnership or joint venture, Civil Code section 1431.2 [Proposition 51] is not applicable." (*Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082, 1091 [111 Cal.Rptr.3d 165], internal citations omitted.)

- "Normally, … a partnership or joint venture is liable to an injured third party for the torts of a partner or venturer acting in furtherance of the enterprise." (*Orosco v. Sun-Diamond Corp.* (1997) 51

Cal.App.4th 1659, 1670 [60 Cal.Rptr.2d 179, 186].)

- "The joint enterprise theory, while rarely invoked outside the automobile accident context, is well established and recognized in this state as an exception to the general rule that imputed liability for the negligence of another will not be recognized." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 893 [2 Cal.Rptr.2d 79, 820 P.2d 181], internal citation omitted.)

- "The term 'joint enterprise' may cause some confusion because it is 'sometimes used to define a noncommercial undertaking entered into by associates with equal voice in directing the conduct of the enterprise … .' However, when it is 'used to describe a business or commercial undertaking[,] it has been used interchangeably with the term "joint venture" and courts have not drawn any significant legal distinction between the two.' " (*Jeld-Wen, Inc., supra,* 131 Cal.App.4th at p. 872, internal citation omitted.)

- "In the annotations [to Restatement of the Law of Torts, section 491], many California cases are cited holding that to have a joint venture there must be ' "a community of interest in objects and equal right to direct and govern movements and conduct of each other with respect thereto. Each must have voice and right to be heard in its control and management" . . .' " (*Shook, supra,* 96 Cal.App.2d at pp. 969–970.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1235

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.07 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Actions*, § 82.16 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.132 (Matthew Bender)

35 California Forms of Pleading and Practice, Ch. 401, *Partnerships: Actions Between General Partners and Partnership*, § 401.11 (Matthew Bender)

17 California Points and Authorities, Ch. 170, *Partnerships*, § 170.222 (Matthew Bender)

1 California Civil Practice: Torts §§ 3:38–3:39 (Thomson Reuters West)

3903A. Medical Expenses—Past and Future (Economic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] medical expenses.**

[To recover damages for past medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] has received.]**

[To recover damages for future medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] is reasonably certain to need in the future.]**

New September 2003

Sources and Authority

- " 'In tort actions, medical expenses fall generally into the category of economic damages, representing actual pecuniary loss caused by the defendant's wrong.' 'A person who undergoes necessary medical treatment for tortiously caused injuries suffers an economic loss by taking on liability for the costs of treatment. Hence, any reasonable charges for treatment the injured person has paid or, having incurred, still owes the medical provider are recoverable as economic damages.' " (*Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225, 237 [238 Cal.Rptr.3d 809].)

- "[A] person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, 640 [246 Cal.Rptr. 192], internal citations omitted; see also *Helfend v. Southern Cal Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 [84 Cal.Rptr. 173, 465 P.2d 61 [collateral source rule].)

- ~~"An injured plaintiff is entitled to recover the reasonable value of medical services that are reasonably certain to be necessary in the future." (*J.P. v. Carlsbad Unified School Dist.* (2014) 232 Cal.App.4th 323, 341 [181 Cal.Rptr.3d 286].)~~

- "The jury in this case was properly instructed with CACI No. 3903A, which directs the jury to determine 'the reasonable cost of reasonably necessary medical care that [plaintiff] is reasonably certain to need in the future.' " (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050 [208 Cal.Rptr.3d 363]; see also *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 183 [217 Cal.Rptr.3d 519] [CACI 3903A is an accurate statement of the law].)

- "The jury was properly instructed in this case to determine 'the reasonable cost of reasonably necessary medical care that [plaintiff] has received' and 'the reasonable cost of reasonably necessary medical care that [plaintiff] is reasonably certain to need in the future.' But as a consequence of the discrepancy in recent decades between the amount patients are typically billed by health care providers and the lower amounts usually paid in satisfaction of the charges (whether by a health insurer or otherwise), controversy has arisen as to how to measure the reasonable costs of medical

care in a variety of factual scenarios." (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1328 [188 Cal.Rptr.3d 820].)

- "[A] plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less. California decisions have focused on 'reasonable value' in the context of *limiting* recovery to reasonable expenditures, not expanding recovery beyond the plaintiff's actual loss or liability. To be recoverable, a medical expense must be both incurred *and* reasonable." (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555 [129 Cal.Rptr.3d 325, 257 P.3d 1130], original italics, internal citations omitted.)

- "[A]n injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial. In so holding, we in no way abrogate or modify the collateral source rule as it has been recognized in California; we merely conclude the negotiated rate differential—the discount medical providers offer the insurer—is not a benefit provided to the plaintiff in compensation for his or her injuries and therefore does not come within the rule." (*Howell, supra,* 52 Cal.4th at p. 566.)

- "[W]hen a medical care provider has, by agreement with the plaintiff's private health insurer, accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial. Evidence that such payments were made in whole or in part by an insurer remains, however, generally inadmissible under the evidentiary aspect of the collateral source rule. Where the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses." (*Howell, supra,* 52 Cal.4th at p. 567, internal citation omitted.)

- "*Howell* offered no bright-line rule on how to determine 'reasonable value' when uninsured plaintiffs have incurred (but not paid) medical bills. [Defendant] is correct that the concept of market or exchange value was endorsed by *Howell* as the proper way to think about the 'reasonable value' of medical services. But she is incorrect to the extent she suggests (1) [Plaintiff] is necessarily in the same market as insured health care recipients or wealthy health care recipients who can pay cash; or (2) *Howell* prescribes a particular method for determining the 'reasonable value' of medical services." (*Bermudez, supra,* 237 Cal.App.4th at p. 1330.)

- "In sum, the measure of medical damages is the lesser of (1) the amount paid or incurred, and (2) the reasonable value of the medical services provided. In practical terms, the measure of damages in insured plaintiff cases will likely be the amount paid to settle the claim in full. It is theoretically possible to prove the reasonable value of services is lower than the rate negotiated by an insurer. But nothing in the available case law suggests this will be a particularly fruitful avenue for tort defendants. Conversely, the measure of damages for uninsured plaintiffs who have not paid their medical bills will usually turn on a wide-ranging inquiry into the reasonable value of medical services provided, because uninsured plaintiffs will typically incur standard, nondiscounted charges that will be challenged as unreasonable by defendants." (*Bermudez, supra,* 237 Cal.App.4th at pp. 1330−1331.)

- "Here, we are confronted with an insured plaintiff who has chosen to treat with doctors and medical facility providers outside his insurance plan. We hold that such a plaintiff shall be considered uninsured, as opposed to insured, for the purpose of determining economic damages." (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1269 [232 Cal.Rptr.3d 404].)

- "[T]he inquiry into reasonable value for the medical services provided to an uninsured plaintiff is not necessarily limited to the billed amounts where a defendant seeks to introduce evidence that a lesser payment has been made to the provider by a factor … . In such cases, the inquiry requires some additional evidence showing a nexus between the amount paid by the factor and the reasonable value of the medical services." (*Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 1007 [194 Cal.Rptr.3d 364].)

- "Where a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule." (*Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 769 [133 Cal.Rptr.3d 342].)

"[T]he collateral source rule is not violated when a defendant is allowed to offer evidence of the market value of future medical benefits." (*Cuevas, supra,* 11 Cal.App.5th at p. 180.)

- "It is established that 'the reasonable value of nursing services required by the defendant's tortious conduct may be recovered from the defendant even though the services were rendered by members of the injured person's family and without an agreement or expectation of payment. Where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained. The fact that the injured party had a legal right to the nursing services (as in the case of a spouse) does not, as a general rule, prevent recovery of their value … .' " (*Hanif, supra,* 200 Cal.App.3d at pp. 644–645, internal citations omitted.)

- "Two points about the sufficiency of evidence to support a judgment can fairly be taken from *Howell*. First, the amount paid to settle in full an insured plaintiff's medical bills is likely substantial evidence on its own of the reasonable value of the services provided. Second, consistent with pre-*Howell* law, initial medical bills are generally insufficient on their own as a basis for determining the reasonable value of medical services. Ensuing cases have held that a plaintiff who relies solely on evidence of unpaid medical charges will not meet his burden of proving the reasonable value of medical damages with substantial evidence." (*Bermudez, supra,* 237 Cal.App.4th at p. 1335, internal citations omitted.)

- Nor is it necessary that the amount of the award equal the alleged medical expenses for it has long been the rule that the costs alone of medical treatment and hospitalization do not govern the recovery of such expenses. It must be shown additionally that the services were attributable to the accident, that they were necessary, and that the charges for such services were reasonable." (*Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216 [16 Cal.Rptr. 308].)

- "The intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by the medical provider for care and treatment, as long as the plaintiff

legitimately incurs those expenses and remains liable for their payment. Nor does the rule [that a plaintiff in a tort action cannot recover more than the amount of medical expenses he or she paid or incurred, even if the reasonable value of those services might be a greater sum] forbid the jury from considering the amounts billed by the provider as evidence of the reasonable value of the services." (*Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1291 [62 Cal.Rptr.3d 309]; see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 436 [209 Cal.Rptr.3d 101] ["Nothing in *Howell* suggests a need to revisit the issues we addressed in *Katiuzhinsky"*].)

- "The fact that a hospital or doctor, for administrative or economic convenience, decides to sell a debt to a third party at a discount does not reduce the value of the services provided in the first place." (*Uspenskaya, supra,* 241 Cal.App.4th at p. 1003.)

- "Because the provider may no longer assert a lien for the full cost of its services, the Medicaid beneficiary may only recover the amount payable under Medicaid as his or her medical expenses in an action against a third party tortfeasor." (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827 [135 Cal.Rptr.2d 1, 69 P.3d 927], internal citation omitted.)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "It is for the jury to determine the probabilities as to whether future detriment is reasonably certain to occur in any particular case. [Citation.] It is 'not required' for a doctor to 'testify that he [is] reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty. [Citations.]' [Citation.] The fact that the amount of future damages may be difficult to measure or subject to various possible contingencies does not bar recovery." (*J.P., supra,* 232 Cal.App.4th at pp. 341−342.)

- "[W]hile an injured plaintiff is entitled to recover the reasonable value of medical services that are reasonably certain to be necessary in the future, evidence of the full amount billed for past medical services cannot support an expert opinion on the reasonable value of future medical services. It does not appear, however, that [expert] used the full amount billed for past medical services in making the calculations for her life care plan. We observe 'the "requirement of certainty … cannot be strictly applied where prospective damages are sought, because probabilities are really the basis for the award." ' At the time of trial, the precise medical costs a plaintiff will incur in the future are not known. Nor is it known how a plaintiff will necessarily pay for such expenses. It is unknown, for example, what, if any, insurance a plaintiff will have at any given time or what rate an insurer will have negotiated with any given medical provider for a particular service at the time and location the plaintiff will require the medical care. The fact finder is entrusted with the tasks of evaluating the probabilities based on the evidence presented and arriving at a reasonable result." (*Cuevas, supra,* 11 Cal.App.5th at p. 182, internal citations omitted.)

- "[I]t seems particularly appropriate for the trial court to perform its traditional gatekeeper role as to the admissibility of evidence and, pursuant to Evidence Code section 352, to determine whether

evidence that is minimally probative should be admitted or whether it will require an undue consumption of time to try the collateral issues that evidence of what a third party paid for an account receivable and lien will necessarily raise." (*Moore, supra,* 4 Cal.App.5th at p. 443.)

- "[E]vidence which might be admissible in one case might not be admissible in another. '[T]he facts and circumstances of the particular case dictate what evidence is relevant to show the reasonable market value of the services at issue … .' " (*Moore, supra,* 4 Cal.App.5th at p. 442.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1846 et seq.

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-A, *Damages: Introduction*, ¶¶ 3:1–3:19.4 (The Rutter Group)

Hanning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶¶ 3:33–3:233 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.19–1.31

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.01, 52.03 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.45 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.192 (Matthew Bender)

1 California Civil Practice: Torts § 5:12 (Thomson Reuters)

3903E. Loss of Ability to Provide Household Services (Economic Damage)

[*Insert number, e.g.,* "5."] The loss of [*name of plaintiff*]'s ability to provide household services.

To recover damages for the loss of the ability to provide household services, [*name of plaintiff*] must prove the reasonable value of the services [he/she] would have been reasonably certain to provide to [his/her] household if the injury had not occurred.

New September 2003

Sources and Authority

- "The first category consists of the reasonable value of nursing and other services that Decedent would have provided to his wife prior to his death, but was unable to provide due to his illness (replacement care). Again, [defendant] does not contest the recoverability of such damages here. Nor did it below. Such damages are recoverable. 'Generally, household services damages represent the detriment suffered when injury prevents a person from contributing some or all of his or her customary services to the family unit.' " (*Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225, 238 [238 Cal.Rptr.3d 809] [citing this instruction].)

- "~~Although the parties do not distinguish between the different types of lost years damages that were awarded, we note that lost household services damages are different than the other types of future earnings included in this category. Generally, household services damages represent the detriment suffered when injury prevents a person from contributing some or all of his or her customary services to the family unit.~~ The justification for awarding this type of damage as part of the loss of future earnings award is that the plaintiff should be compensated for the value of the services he would have performed during the lost years which, because of the injury, will now have to be performed by someone else." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171, fn. 5 [87 Cal.Rptr.2d 626], internal citation omitted.)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

Secondary Sources

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.64–1.66

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

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

3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress/[***insert other damages***]].**

No fixed standard exists for deciding the amount of these noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

[To recover for future [*insert item of pain and suffering***], [***name of plaintiff***] must prove that [he/she] is reasonably certain to suffer that harm.**

For future [*insert item of pain and suffering***], determine the amount in current dollars paid at the time of judgment that will compensate [***name of plaintiff***] for future [***insert item of pain and suffering***]. [This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.]]**

New September 2003; Revised April 2008, December 2009, December 2011

Directions for Use

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

If future noneconomic damages are sought, include the last two paragraphs. Do not instruct the jury to further reduce the award to present cash value. (See CACI No. 3904A, *Present Cash Value,* and CACI No. 3904B, *Use of Present-Value Tables*.) The amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].) Include the last sentence only if the plaintiff is claiming both future economic and noneconomic damages.

Sources and Authority

- "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the 'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856, 500 P.2d 880], internal citations and footnote omitted.)

- "[N]oneconomic damages do not consist of only emotional distress and pain and suffering. They also

consist of such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 [213 Cal.Rptr.3d 82].)

- " ' " '[T]here is no fixed or absolute standard by which to compute the monetary value of emotional distress,' " ' and a ' "jury is entrusted with vast discretion in determining the amount of damages to be awarded … ." [Citation.]' " (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602 [146 Cal.Rptr.3d 585].

- "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)

- "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13, 426 P.2d 173], internal citations omitted.)

- "We note that there may be certain cases where testimony of an expert witness would be necessary to support all or part of an emotional distress damages claim. For example, expert testimony would be required to the extent a plaintiff's damages are alleged to have arisen from a psychiatric or psychological disorder caused or made worse by a defendant's actions and the subject matter is beyond common experience. We are not addressing such a case here. In this case, the emotional distress damages arose from feelings of anxiety, pressure, betrayal, shock, and fear of others to which [plaintiff] herself could and did testify. Expert testimony was not required." (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1099 [236 Cal.Rptr.3d 473].)

- "The law in this state is that the testimony of a single person, *including the plaintiff,* may be sufficient to support an award of emotional distress damages." (*Knutson, supra,* 25 Cal.App.5th at p. 1096, original italics.)

- "[W]here a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate

as a matter of law." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933 [64 Cal.Rptr.3d 920].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647.)

- "[R]ecovery for emotional distress caused by injury to property is permitted only where there is a preexisting relationship between the parties or an intentional tort." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 203 [147 Cal.Rptr.3d 41].)

- "[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]'s act of intentionally striking [plaintiff's dog] with a bat." (*Plotnik, supra,* 208 Cal.App.4th at p. 1608 [under claim for trespass to chattels].)

- "Furthermore, 'the *negligent* infliction of emotional distress—anxiety, worry, discomfort—is compensable without physical injury in cases involving the tortious interference with *property rights* [citations].' Thus, if [defendant]'s failure to repair the premises constitutes a tort grounded on negligence, appellant is entitled to prove his damages for emotional distress because the failure to repair must be deemed to constitute an injury to his tenancy interest (right to habitable premises), which is a species of property." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1299 [173 Cal.Rptr.3d 159], original italics, internal citation omitted.)

- "[U]nless the defendant has assumed a duty to plaintiff in which the emotional condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests." (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 156 [184 Cal.Rptr.3d 26].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1850–1854

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:140 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.68–1.74

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.01–51.14 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.145 et seq. (Matthew Bender)

1 California Civil Practice Torts, § 5:10 (Thomson Reuters)

4200. Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements (Civ. Code, § 3439.04(a)(1))

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] in order to avoid paying a debt to [***name of plaintiff***]. [This is called "actual 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***] [transferred the property/incurred the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/its] creditors;**

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

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

To prove intent to hinder, delay, or defraud creditors, it is not necessary to show that [*name of debtor***] had a desire to harm [his/her/its] creditors. [***Name of plaintiff***] need only show that [***name of debtor***] intended to remove or conceal assets to make it more difficult for [his/her/its] creditors to collect payment.**

[It does not matter whether [*name of plaintiff***]'s right to payment arose before or after [***name of debtor***] [transferred property/incurred an obligation].]**

New June 2006; Revised June 2013, 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, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud a creditor. (Civ. Code, § 3439.04(a)(1).)

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence if the plaintiff is asserting claims for both actual and constructive fraud. Read the last bracketed sentence if the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Note that in element 3, only the debtor-transferor's intent is required. (See Civ. Code, § 3439.04(a)(1).)

The intent of the transferee is irrelevant. However, a transferee who receives the property both in good faith and for a reasonably equivalent value has an affirmative defense. (See Civ. Code, § 3439.08(a); CACI No. 4207, *Affirmative Defense—Good Faith*.)

If the case concerns an incurred obligation, users may wish to insert a brief description of the obligation in this instruction, e.g., "a lien on the property."

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.

Note that there may be a split of authority regarding the appropriate standard of proof of intent. The Sixth District Court of Appeal has stated: "Actual intent to defraud must be shown by clear and convincing evidence. (*Hansford v. Lassar* (1975) 53 Cal.App.3d 364, 377 [125 Cal.Rptr. 804].)" (*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123 [10 Cal.Rptr.2d 58].) Note that the case relied on by the *Hansford* court (*Aggregates Assoc., Inc. v. Packwood* (1962) 58 Cal.2d 580 [25 Cal.Rptr. 545, 375 P.2d 425]) was disapproved by the Supreme Court in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291–292 [137 Cal.Rptr. 635, 562 P.2d 316]. The Fourth District Court of Appeal, Division Two, disagreed with *Reddy*: "In determining whether transfers occurred with fraudulent intent, we apply the preponderance of the evidence test, even though we recognize that some courts believe that the test requires clear and convincing evidence." (*Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 839 [86 Cal.Rptr.2d 733], internal citations omitted, disapproved on other grounds in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

Sources and Authority

- Uniform Voidable Transactions Act. Civil Code section 3439 et seq.
- "Claim" Defined for UVTA. Civil Code section 3439.01(b).
- Creditor Remedies Under UVTA. Civil Code section 3439.07.
- "The UFTA permits defrauded creditors to reach property in the hands of a transferee." (*Mejia, supra,* 31 Cal.4th at p. 663.)
- "The UVTA, formerly known as the Uniform Fraudulent Transfer Act, 'permits defrauded creditors to reach property in the hands of a transferee.' 'A fraudulent conveyance is a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.' … The purpose of the voidable transactions statute is ' "to prevent debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach … ." ' " (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1071 [234 Cal.Rptr.3d 824], internal citations omitted.)~~A fraudulent conveyance under the UFTA involves 'a transfer by the~~

~~debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.'" (*Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 829 [28 Cal.Rptr.3d 884].)~~

- "Under the UFTA, 'a transfer of assets made by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer, if the debtor made the transfer (1) with an actual intent to hinder, delay or defraud any creditor, or (2) without receiving reasonably equivalent value in return, and either (a) was engaged in or about to engage in a business or transaction for which the debtor's assets were unreasonably small, or (b) intended to, or reasonably believed, or reasonably should have believed, that he or she would incur debts beyond his or her ability to pay as they became due.' " (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 121−122 [173 Cal.Rptr.3d 356], internal citations omitted.)

- "[A] conveyance will not be considered fraudulent if the debtor merely transfers property which is otherwise exempt from liability for debts. That is, because the theory of the law is that it is fraudulent for a judgment debtor to divest himself of assets against which the creditor could execute, if execution by the creditor would be barred while the property is in the possession of the debtor, then the debtor's conveyance of that exempt property to a third person is not fraudulent." (*Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13 [33 Cal.Rptr.2d 283].)

- "A transfer is not voidable against a person 'who took in good faith and for a reasonably equivalent value or against any subsequent transferee.' " (*Filip, supra,* 129 Cal.App.4th at p. 830, internal citations omitted.)

- " '[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.' " (*Wisden, supra,* 124 Cal.App.4th at p. 758, internal citation omitted.)

- "[E]ven if the Legislature intended that all fraudulent conveyance claims be brought under the UFTA, the Legislature could not thereby dispense with a right to jury trial that existed at common law when the California Constitution was adopted." (*Wisden, supra,* 124 Cal.App.4th at p. 758, internal citation omitted.)

- "Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer." (*Filip, supra,* 129 Cal.App.4th at p. 834, internal citations omitted.)

- "In order to constitute intent to defraud, it is not necessary that the transferor act maliciously with the desire of causing harm to one or more creditors." (*Economy Refining & Service Co. v. Royal Nat'l Bank* (1971) 20 Cal.App.3d 434, 441 [97 Cal.Rptr. 706].)

- "There is no minimum number of factors that must be present before the scales tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra,* 129 Cal.App.4th at p. 834.)

- "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.)

- "[G]ranting [plaintiff judgment creditor] an additional judgment against [defendant judgment debtor] under the UFTA for … 'the amount transferred here to avoid paying part of his underlying judgment, *would in effect allow [him] to recover more than the underlying judgment,* which the [UFTA] does not allow.' (Italics added.) We thus conclude that because [plaintiff] obtained a judgment in the prior action for the damages [defendant] caused him, the principle against double recovery for the same harm bars him from obtaining a second judgment against her under the UFTA for a portion of those same damages." (*Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1238 [167 Cal.Rptr.3d 874], original italics.)

Secondary Sources

8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgment, § 495 et seq.

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:291 et seq. (The Rutter Group)
Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Fraud--Fraudulent Transfers--Elements of Claim*, ¶ 5:528 (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

1 Goldsmith et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 4, *Fraudulent Transfers*, 4.05

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

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

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

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

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

[*or***]**

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

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

"Good faith" means that [*name of defendant/third party***] acted without actual fraudulent intent and that [he/she/it] did not collude with [***name of debtor***] or otherwise actively participate in any fraudulent scheme. If you decide that [***name of defendant/third party***] knew facts showing that [***name of debtor***] had a fraudulent intent, then [***name of defendant/third party***] cannot have taken the property in good faith.**

New June 2006; Revised June 2016, November 2017

Directions for Use

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

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

Sources and Authority

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

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

- When Value is Given. Civil Code section 3439.03.

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

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

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

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

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

- "[U]nder section 3439.08, subdivision (b)(1)(A), judgment for a fraudulent transfer may be entered against '[t]he first transferee of the asset *or the person for whose benefit the transfer was made*.' " (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1072 [234 Cal.Rptr.3d 824], original italics.)

- "Contrary to plaintiff's suggestion, the fact that a person received any kind of 'benefit,' no matter how intangible or indirect, from a fraudulent transaction does not necessarily subject that person to

liability. There are limits to the legal assessment of the type of 'benefit' that will subject a beneficiary to liability for the debtor's alleged fraudulent transfer. The benefit received must be 'direct, ascertainable and quantifiable' and must bear a ' "necessary correspondence to the value of the property transferred." ' ' "[T]ransfer beneficiary status depends on three aspects of the 'benefit': (1) it must actually have been received by the beneficiary; (2) it must be quantifiable; and (3) it must be accessible to the beneficiary." ' " (*Lo, supra,* 24 Cal.App.5th at p. 1073.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:324 (The Rutter Group)

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

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

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

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

[1. That [*name of defendant***] was not in default in the payment of [his/her/its] rent;]**

2. That [*name of plaintiff***] filed this lawsuit in retaliation because [***name of defendant***] had complained about the condition of the property to [[***name of plaintiff***]/[***name of appropriate agency***]]; and**

3. That [*name of plaintiff***] filed this lawsuit within 180 days after**

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

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

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

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

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

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

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

New August 2007; Revised June 2010

Directions for Use

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

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

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

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

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

Sources and Authority

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

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

- "Thus, California has two parallel and independent sources for the doctrine of retaliatory eviction. This court must decide whether petitioner raised a legally cognizable defense of retaliatory eviction under the statutory scheme and/or the common law doctrine." (*Barela, supra,* 30 Cal.3d at p. 251.)

- "Retaliatory eviction occurs, as Witkin observes, '[When] a landlord exercises his legal right to terminate a residential tenancy in an authorized manner, but with the motive of retaliating against a tenant who is not in default but has exercised his legal right to obtain compliance with requirements of habitability.' It is recognized as an affirmative defense in California; and as appellant correctly argues, it extends beyond warranties of habitability into the area of First Amendment rights." (*Four Seas Inv. Corp. v. International Hotel Tenants' Assn.* (1978) 81 Cal.App.3d 604, 610 [146 Cal.Rptr. 531], internal citations omitted.)

- "If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. … 'If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all.' " (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97], internal citations omitted.)

- "The existence or nonexistence of a landlord's retaliatory motive is ordinarily a question of fact." (*W. Land Office v. Cervantes* (1985) 175 Cal.App.3d 724, 731 [220 Cal.Rptr. 784].)

- "[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith--i.e., a bona fide--intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence." (*Drouet supra,* 31 Cal.4th at p. 596.)

- "Only when the landlord has been unable to establish a bona fide intent need the fact finder proceed to determine whether the eviction is for the purpose of retaliating against the tenant under subdivision (a) or (c) of section 1942.5." (*Drouet, supra,* 31 Cal.4th at p. 600.)

- "*Drouet*'s interpretation 'give[s] effect to the plain language of [Civil Code section 1942.5], including [former] subdivisions (d) and (e), which permit a landlord to go out of business and evict the tenants—even if the landlord has a retaliatory motive—so long as the landlord *also* has the bona fide intent to go out of business. … If, on the other hand, the landlord cannot establish a bona fide intent to go out of business, the tenants may rely on [former] subdivisions (a) and (c) to resist the eviction.' " (*Coyne v. De Leo* (2018) 26 Cal.App.5th 801, 806 [237 Cal.Rptr.3d 359], original italics.)

- "[T]he cause of action for retaliation recognized by section 1942.5 applies to tenants of a mobilehome park. … 'By their terms, subdivisions (c) and (f) of section 1942.5 give a right of action to any lessee who has been subjected to an act of unlawful retaliation. Thus, on its face the statute provides protection to mobilehome park tenants who own their own dwellings and merely rent space from their landlord.' " (*Banuelos v. LA Investment, LLC* (2013) 219 Cal.App.4th 323, 330 [161 Cal.Rptr.3d 772].)

- "[T]he Legislature intended to create a cause of action for retaliatory eviction that is not barred by the litigation privilege. If the litigation privilege trumped a suit for retaliatory eviction under section 1942.5 the privilege would " 'effectively immunize conduct that the [statute] prohibits' " [citation], thereby encouraging, rather than suppressing, " 'the mischief at which it was directed. [Citation.]' " ' " (*Winslett v. 1811 27th Avenue LLC* (2018) 26 Cal.App.5th 239, 254 [237 Cal.Rptr.3d 25].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 739, 742, 745

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

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

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

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

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

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

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

Miller & Starr, California Real Estate, *Landlord-Tenant*, § 34.206 (Thomson Reuters)

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

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

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

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

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

AND

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

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

New August 2007

Directions for Use

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

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

Sources and Authority

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

- Lawful Acts Permitted; No Tenant Waiver. Civil Code section 1942.5(f).

- Landlord's Good-Faith Acts. Civil Code section 1942.5(g).

- "If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. … 'If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all. The question of permissible or impermissible purpose is one of fact for the court or jury.' " (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97], internal citations omitted.)

- "In an unlawful detainer action, where the defense of retaliatory eviction is asserted pursuant to Civil Code section 1942.5, the tenant has the overall burden of proving his landlord's retaliatory motive by a preponderance of the evidence. If the landlord takes action for a valid reason not listed in the unlawful detainer statutes, he must give notice to the tenant of the ground upon which he proceeds; and if the tenant controverts that ground, the landlord has the burden of proving its existence by a preponderance of the evidence." (*Western Land Office, Inc. v. Cervantes* (1985) 175 Cal.App.3d 724, 741 [220 Cal.Rptr. 784].)

- "[T]he burden was on the tenants to establish retaliatory motive by a preponderance of the evidence." (*Western Land Office, Inc., supra,* 175 Cal.App.3d at p. 744.)

- "[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith--i.e., a bona fide--intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence." (*Drouet, supra,* 31 Cal.4th at p. 596.)

- "Only when the landlord has been unable to establish a bona fide intent need the fact finder proceed to determine whether the eviction is for the purpose of retaliating against the tenant under subdivision (a) or (c) of section 1942.5." (*Drouet, supra,* 31 Cal.4th at p. 600.)

- "*Drouet*'s interpretation 'give[s] effect to the plain language of [Civil Code section 1942.5], including [former] subdivisions (d) and (e), which permit a landlord to go out of business and evict the tenants—even if the landlord has a retaliatory motive—so long as the landlord *also* has the bona fide intent to go out of business. … If, on the other hand, the landlord cannot establish a bona fide intent to go out of business, the tenants may rely on [former] subdivisions (a) and (c) to resist the eviction.' " (*Coyne v. De Leo* (2018) 26 Cal.App.5th 801, 806 [237 Cal.Rptr.3d 359], original italics.)

- "[T]he cause of action for retaliation recognized by section 1942.5 applies to tenants of a mobilehome park. … 'By their terms, subdivisions (c) and (f) of section 1942.5 give a right of action to any lessee who has been subjected to an act of unlawful retaliation. Thus, on its

face the statute provides protection to mobilehome park tenants who own their own dwellings and merely rent space from their landlord.' " (*Banuelos v. LA Investment, LLC* (2013) 219 Cal.App.4th 323, 330 [161 Cal.Rptr.3d 772].)

- "[T]he Legislature intended to create a cause of action for retaliatory eviction that is not barred by the litigation privilege. If the litigation privilege trumped a suit for retaliatory eviction under section 1942.5 the privilege would " 'effectively immunize conduct that the [statute] prohibits' ' [citation], thereby encouraging, rather than suppressing, " 'the mischief at which it was directed. [Citation.]' " ' " (*Winslett v. 1811 27th Avenue LLC* (2018) 26 Cal.App.5th 239, 254 [237 Cal.Rptr.3d 25].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 739, 742, 745

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

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

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

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

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

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

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

Miller & Starr, California Real Estate, *Landlord-Tenant*, § 34:206 (Thomson Reuters)

4328. Affirmative Defense—Tenant Was Victim of Domestic Violence, Sexual Assault, Stalking, Elder/Dependent Adult Abuse, or Human Trafficking (Code Civ. Proc., § 1161.3)

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her] because [***name of plaintiff***] filed this lawsuit based on [an] act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] against [[***name of defendant***]/ [or] a member of [***name of defendant***]'s household]. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [[***name of defendant***]/ [or] a member of [***name of defendant***]'s household] was a victim of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult];**

2. **That the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] [was/were] documented in a [court order/law enforcement report/statement of a third party acting in a professional capacity];**

3. **That the person who committed the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] is not also a tenant of the same living unit as [***name of defendant***]; and**

4. **That [***name of plaintiff***] filed this lawsuit because of the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult].**

Even if [*name of defendant***] proves all of the above, [***name of plaintiff***] may still evict [***name of defendant***] if [***name of plaintiff***] proves both of the following:**

1. **[Either] [***Name of defendant***] allowed the person who committed the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] to visit the property after [the taking of a police report/issuance of a court order] against that person;**

   [or]

   [*Name of plaintiff***] reasonably believed that the presence of the person who committed the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] posed a physical threat to [other persons with a right to be on the property/ [or] another tenant's right of quiet possession];**

and

2. **[***Name of plaintiff***] previously gave at least three days' notice to [***name of defendant***] to correct this situation.**

New December 2011; Revised June 2013, June 2014, May 2019

Directions for Use

This instruction is a tenant's affirmative defense alleging that he or she is being evicted because he or she was the victim of domestic violence, sexual assault, stalking, human trafficking, or elder or dependent adult abuse. (See Code Civ. Proc., § 1161.3.) If the tenant establishes the elements of the defense, the landlord may attempt to establish a statutory exception that would allow the eviction. The last part of the instruction sets forth the exception.

All protected statuses are defined by statute. (See Civ. Code, § 1708.7 [stalking]; Code Civ. Proc., § 1219 [sexual assault]; Fam. Code, § 6211 [domestic violence]; Pen. Code, § 236.1 [human trafficking]; Welf. & Inst. Code, § 15610.07 [abuse of elder or dependent adult].) Consider an additional instruction defining the protected status to make the meaning clear to the jury.

The acts of domestic violence, sexual assault, stalking, human trafficking, or elder or dependent adult abuse must be documented in a court order, law enforcement report, or tenant and qualified third-party statement (element 2). (Code Civ. Proc., § 1161.3(a)(1)(C), (D).) A "qualified third party" is a health practitioner, domestic violence counselor, a sexual assault counselor, or a human trafficking caseworker. (Code Civ. Proc., 1161.3(d)(3).)

Under the exception the tenant may be evicted if the landlord reasonably believes that the presence of the perpetrator poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to quiet possession pursuant to section 1927 of the Civil Code. (Code Civ. Proc., § 1161.3(b)(1)(B).) In the second option for element 1 of the landlord's response, this group has been expressed as "other persons with a right to be on the property." If more specificity is required, use the appropriate words from the statute.

The tenant must prove that the perpetrator is not a tenant of the same "dwelling unit" (see Code Civ. Proc., § 1161.3(a)(2)), which is expressed in element 3 as "living unit." Presumably, the legislative intent is to permit the perpetrator to be evicted notwithstanding that the victim will be evicted also. The term "dwelling unit" is not defined. In a multi-unit building, the policies underlying the statute would support defining "dwelling unit" to include a single unit or apartment, but not the entire building. Otherwise, the victim could be evicted if the perpetrator lives in the same building but not the same apartment.

Sources and Authority

- Defense to Termination of Tenancy: Tenant Was Victim of Domestic Violence, Sexual Assault, Stalking, Elder/Dependent Adult Abuse, or Human Trafficking. Code of Civil Procedure section 1161.3.

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, § 683A

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 4-D, *Rights And Obligations During The Tenancy—Other Issues,* ¶ 4:240 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls,* ¶ 5:288 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-D, *Answer To Unlawful Detainer Complaint,* ¶ 8:297 et seq., 8:381.10 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.41 (Matthew Bender)

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

29 California Forms of Pleading and Practice, Ch. 330, *Landlord and Tenant: Eviction Actions*, § 330.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.76 (Matthew Bender)

1 Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.20B

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

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

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

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

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

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

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

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

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

New November 2017

Directions for Use

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

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

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

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

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

Other prohibited practices involve a failure to disclose information. (See *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1258 [228 Cal.Rptr.3d 699]; see, e.g., Civ. Code, § 1770(a)(9) [advertising goods or services with intent not to sell them as advertised].) Reliance in concealment cases is best expressed in terms that the plaintiff would have behaved differently had the true facts been known. (See *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].) The next-to-last paragraph may be modified to express reliance in this manner. (See CACI No. 1907, *Reliance*.)

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

Sources and Authority

- Consumers Legal Remedies Act: Prohibited Practices. Civil Code section 1770(a).
- Consumers Legal Remedies Act: Private Cause of Action. Civil Code section 1780(a).
- " 'The CLRA makes unlawful, in Civil Code section 1770, subdivision (a) … various "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." ' The CLRA proscribes 27 specific acts or practices." (*Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 880–881 [222 Cal.Rptr.3d 397], internal citation omitted.)
- " 'Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires "consideration and weighing of evidence from both sides" and which usually cannot be made on demurrer.' " (*Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, 1164 [237 Cal.Rptr.3d 683].)
- "The CLRA is set forth in Civil Code section 1750 et seq. … [U]nder the CLRA a consumer may recover actual damages, punitive damages and attorney fees. However, relief under the CLRA is limited to '[a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice' unlawful under the act. As [defendant] argues, this limitation on relief requires that plaintiffs in a CLRA action show not only that a defendant's conduct was

deceptive but that the deception caused them harm." (*Massachusetts Mutual Life Ins. Co., supra,* 97 Cal.App.4th at p. 1292, original italics, internal citations omitted.)

- "[T]he CLRA does not require lost injury or property, but does require damage and causation. 'Under Civil Code section 1780, subdivision (a), CLRA actions may be brought "only by a consumer 'who suffers any damage as a result of the use or employment' of a proscribed method, act, or practice. … Accordingly, 'plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm." ' " (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 916, fn. 3 [211 Cal.Rptr.3d 769].)

- " 'To have standing to assert a claim under the CLRA, a plaintiff must have "suffer[ed] any damage as a result of the … practice declared to be unlawful." ' Our Supreme Court has interpreted the CLRA's 'any damage' requirement broadly, concluding that the 'phrase … is not synonymous with "actual damages," which generally refers to pecuniary damages.' Rather, the consumer must merely 'experience some [kind of] damage,' or 'some type of increased costs' as a result of the unlawful practice." (*Hansen v. Newegg.com Americas, Inc.* (2018) 25 Cal.App.5th 714, 724 [236 Cal.Rptr.3d 61], internal citations omitted.)

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

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

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

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

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

- "[M]ateriality usually is a question of fact. In certain cases, a court can determine the factual misrepresentation or omission is so obviously unimportant that the jury could not reasonably find

that a reasonable person would have been influence (*sic*) by it." (*Gutierrez, supra,* 19 Cal.App.5th at p. 1262, internal citations omitted.)

- "If a claim of misleading labeling runs counter to ordinary common sense or the obvious nature of the product, the claim is fit for disposition at the demurrer stage of the litigation." (*Brady, supra,* 26 Cal.App.5th at p. 1165.)

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

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

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

- "In California … product mislabeling claims are generally evaluated using a 'reasonable consumer' standard, as distinct from an 'unwary consumer' or a 'suspicious consumer' standard." (*Brady, supra,* 26 Cal.App.5th at p. 1174.)

- "Not every omission or nondisclosure of fact is actionable. Consequently, we must adopt a test identifying which omissions or nondisclosures fall within the scope of the CLRA. Stating that test in general terms, we conclude an omission is actionable under the CLRA if the omitted fact is (1) 'contrary to a [material] representation actually made by the defendant' or (2) is 'a fact the defendant was obliged to disclose.' " (*Gutierrez, supra,* 19 Cal.App.5th at p. 1258.)

- "[T]here is no independent duty to disclose [safety] concerns. Rather, a duty to disclose material safety concerns 'can be actionable in four situations: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; or (4) when the defendant makes partial representations but also suppresses some material fact.' " (*Gutierrez, supra,* 19 Cal.App.5th at p. 1260.)

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

- "Defendants next allege that plaintiffs cannot sue them for violating the CLRA because their debt collection efforts do not involve 'goods or services.' The CLRA prohibits 'unfair methods of competition and unfair or deceptive acts or practices.' This includes the inaccurate 'represent[ation] that a transaction confers or involves rights, remedies, or obligations which it does not have or involve … .' However, this proscription only applies with respect to

‘transaction[s] intended to result or which result[] in the sale or lease of goods or services to [a] consumer … .’ The CLRA defines ‘goods’ as ‘tangible chattels bought or leased for use primarily for personal, family, or household purposes’, and ‘services’ as ‘work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.’ ” (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 39−40 [185 Cal.Rptr.3d 84], internal citations omitted [mortgage loan is neither a good nor a service].)

Secondary Sources

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

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

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

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

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

Item number: 02

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: January 24, 2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Proposed additions, revisions, and deletions to the Judicial Council of California Criminal Jury Instructions (CALCRIM)

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

Staff contact (name, phone and e-mail): Kara Portnow, 865-4961, kara.portnow@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: October 19, 2018
Project description from annual agenda: Maintenance, New Instructions and Expansion into New Areas, Technical Corrections

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
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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: March 14–15, 2019

Title
Jury Instructions: Additions, Deletions, and Revisions to Criminal Jury Instructions

Rules, Forms, Standards, or Statutes Affected
Judicial Council of California Criminal Jury Instructions (CALCRIM)

Recommended by
Advisory Committee on Criminal Jury Instructions
Hon. Peter J. Siggins, Chair

Agenda Item Type
Action Required

Effective Date
March 15, 2019

Date of Report
January 2, 2019

Contact
Kara Portnow, 415-865-4961
kara.portnow@jud.ca.gov

Executive Summary

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

Recommendation

The Advisory Committee on Criminal Jury Instructions recommends that the Judicial Council, effective March 15, 2019, approve for publication under rule 2.1050 of the California Rules of Court the criminal jury instructions prepared by the committee. Once approved, the revised instructions will be published in the next official edition of the *Judicial Council of California Criminal Jury Instructions*.

A table of contents and the proposed revisions to the criminal jury instructions are attached at pages 7–134.

Relevant Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.59 of the California Rules of Court, which established the Advisory Committee on Criminal Jury Instructions and its charge.[1] In August 2005, the council voted to approve the *CALCRIM* instructions under what is now rule 2.1050 of the California Rules of Court.

Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CALCRIM.* The council approved the last *CALCRIM* release at its September 2018 meeting.

Analysis/Rationale

The committee recommends proposed revisions to the following instructions: CALCRIM Nos. 104, 202, 222, 301, 334, 335, 520, 625, 707, 708, 1244, 1650, 1900, 1901, 1902, 1904, 1905, 1930, 1932, 1935, 2140, 2300, 2500, 2530 (with related revisions to 984, 1161, 1162, 2966), 3181, 3412, 3413, 3426, and 3454. It recommends approval of the following new instruction: CALCRIM No. 1145.

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

Below is an overview of some of the proposed changes.

Evidence, Note-Taking, and Reading Back of Testimony (CALCRIM Nos. 104, 202, and 222)

Some courts electronically record misdemeanor trials. At the request of a trial court judge, the committee added alternate language related to electronic recording.

Murder, First and Second Degree (CALCRIM No. 520)

In *People v. Johnson* (2016) 6 Cal.App.5th 505, 515–516 [211 Cal.Rptr.3d 425] (disapproved on another ground in *People v. Hicks* (2017) 4 Cal.5th 203, 214 [226 Cal.Rptr.3d 565, 407 P.3d 409]), the court found the duty to act section of CALCRIM No. 520 was confusing. This section informs the jury that: "If you conclude that the defendant owed a duty to [the victim], and the defendant failed to perform that duty, (his/her) failure to act is the same as doing a negligent or injurious act." The *Johnson* court determined this language was confusing because the concept of negligence was not otherwise addressed in the instructions and may have caused the jury to conflate negligence with implied malice. In response, the committee deleted the legal duty to act

[1] Rule 10.59(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's criminal jury instructions."

paragraph. The committee instead incorporated a failure to act within the elements of the instruction itself and within the explanatory paragraphs that define implied malice and causation.

Voluntary Intoxication (CALCRIM Nos. 625 and 3426)

People v. Soto (2018) 4 Cal.5th 968, 970 [231 Cal.Rptr.3d 732, 415 P.3d 789] held that evidence of voluntary intoxication is not admissible on the question of whether the defendant subjectively believed it was necessary to act in self-defense. The committee added a bench note to reflect this holding.

Possession of Matter Depicting Minor Engaged in Sexual Conduct (Proposed NEW CALCRIM No. 1145)

Penal Code section 311.11, which prohibits possession of matter depicting a minor engaged in sexual conduct, is an offense that can be charged as either a felony or misdemeanor. Although CALCRIM has instructions for other child pornography–related offenses, it did not contain an instruction for this offense. Upon the request of a trial court judge, the committee drafted a new instruction.

Carjacking (CALCRIM No. 1650)

A longstanding case, *People v. Cabrera* (2007) 152 Cal.App.4th 695, 702–703 [61 Cal.Rptr.3d 373], distinguished carjacking from robbery by holding that "carjacking is strictly a crime against possession rather than ownership. As such it is not subject to a claim of right defense." Recently, a user pointed out that the language in the carjacking instruction still refers to the taking of "a motor vehicle that was not (his/her) own" despite the *Cabrera* holding. Based on this user's suggestion, the committee deleted the ownership language. The committee also updated the authority section with two recent cases that address the use of force in the context of carjacking: *People v. Hudson* (2017) 11 Cal.App.5th 831, 837 [217 Cal.Rptr.3d 775] and *People v. Lopez* (2017) 8 Cal.App.5th 1230, 1237 [214 Cal.Rptr.3d 618].

Forgery (CALCRIM Nos. 1900, 1901, 1902, 1904, 1905, 1930, 1932, and 1935)

Passed by the voters in 2014, Proposition 47 created new penalty allegations for forgery when committed with any of seven specified instruments and where the value of the forged instruments exceeds $950. See Penal Code, section 473(b). In 2015, the committee updated CALCRIM No. 1900 to incorporate the value requirement but did not modify the other affected forgery instructions. The committee has now updated these forgery instructions to include the value requirement as well as to specify the seven types of instruments that qualify under section 473(b). The committee also added the citation of *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280] in which the California Supreme Court addressed the scope of Penal Code section 473(b).

Sale, Transportation for Sale, etc., of Controlled Substance (CALCRIM No. 2300)

In *People v. Lua* (2017) 10 Cal.App.5th 1004, 1014–1016 [217 Cal.Rptr.3d 23], the court reviewed the adequacy of jury instructions in a prosecution for transporting drugs for sale, pursuant to Health and Safety Code section 11379. The *Lua* court noted, "Nevertheless, although CALCRIM No. 2300 tracks the language of section 11379, it is at best questionable whether,

standing alone, the instruction adequately explains the specific intent element of the offense." (*Id.* at 1016.) In response to this case, the committee added *Lua* to the authority section but did not alter the instruction. Since *Lua*, several unpublished opinions have reiterated the same concerns about whether this instruction goes far enough to convey the specific intent required in transportation for sale cases. In response to these continuing expressions of concern, the committee has now inserted an additional element addressing intent to be used in transportation for sale cases.

Carrying Loaded Firearm (CALCRIM No. 2530) with related revisions to CALCRIM Nos. 984, 1161, 1162, and 2966

Penal Code section 25850(a) prohibits carrying a loaded firearm in a public place or on a public street. CALCRIM No. 2530 instructs the jury to determine whether the defendant was in a public place or on a public street but does not include a definition of public place. The committee added the definition of public place, as it currently appears in other instructions. The committee also updated the case law in the authority section for "Public Place Defined" by deleting some older cases and adding a more recent case (*People v. Strider* (2009) 177 Cal.App.4th 1393 [100 Cal.Rptr.3d 66]). This revision of "Public Place Defined" affected four other CALCRIM instructions: Nos. 984, 1161, 1162, and 2966. The committee also made two other changes to CALCRIM No. 2530: the committee added *People v. Wade* (2016) 63 Cal.4th 137, 140 [201 Cal.Rptr.3d 876] (holding that a loaded firearm in a backpack is "on the person") to the authority section; and the committee deleted the taser section under related issues because the type of taser at issue in the cited case (*People v. Heffner* (1977) 70 Cal.App.3d 643, 652 [139 Cal.Rptr. 45]) is a defunct model that used gunpowder as a propellant. Since the late 1990s, tasers have been manufactured to use compressed nitrogen instead of gunpowder, and therefore no longer qualify as firearms.

Policy implications

Rule 2.1050 of the California Rules of Court requires the committee to regularly update, amend, and add topics to *CALCRIM* and to submit its recommendations to the council for approval. This proposal fulfills that requirement.

Comments

The proposed additions and revisions to *CALCRIM* circulated for public comment from October 29 through November 30, 2018. The committee received responses from two commenters. One commenter agreed with the proposed changes. The second commenter requested that the committee add a bench note to CALCRIM No. 1145. The committee declined to add the bench note because the proposed authority was a case that rested on a substantial evidence determination. The text of all comments received and committee responses is included in a comments chart attached at page 6.

Alternatives considered

The proposed revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee considered no 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 print a new edition and pay royalties to the Judicial Council. The council's contract with West Publishing provides additional royalty revenue.

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

Attachments and Links

1. Chart of comments, at page 6
2. Full text of revised *CALCRIM* instructions, including table of contents, at pages 7–134

CALCRIM 2018, November Invitation to Comment
Revised CALCRIM Instructions

Instruction	Commentator	Comment	Response
All	Cheryl Glennie	Agree	No response necessary.
1145	Los Angeles Superior Court	This is a new instruction relating to Penal Code Section 311.11, possession of child pornography. The following should be placed in the "Bench Notes" or "Related Issues" section of that instruction: A violation of Penal Code Section 311.11 may be proved by testimony only; i.e., the actual photos need not be produced. *People v. Mendoza* (2015) 240 Cal.App.4th 72.	The committee considered adding the suggested bench note. However, the holding in *People v. Mendoza* is based on a substantial evidence determination. As such, the committee felt that its reasoning was not broadly applicable enough to include in the bench notes.

CALCRIM Invitation to Comment

October 29 - November 30, 2018

Instruction Number	Instruction Title
104, 202, 222	Evidence, Note-Taking and Read Back of Evidence
301, 334, 335	Single Witness's Testimony, Accomplice Testimony
520	Murder: First and Second Degree
625, 3426	Voluntary Intoxication
707, 708	Special Circumstances: Accomplice Testimony
NEW 1145	Possession of Matter Depicting Minor Engaged in Sexual Conduct
1244	Causing Minor to Engage in Commercial Sex Act
1650	Carjacking
1900, 1901, 1902, 1904, 1905, 1930, 1932 & 1935	Forgery
2140	Failure to Perform Duty Following Accident
2300	Sale, Transportation for Sale, etc., of Controlled Substance
2500	Possession of Illegal or Deadly Weapon
2530 (984, 1161, 1162, 2966)	Carrying Loaded Firearm (& Brandishing, Lewd Conduct in Public, Disorderly Conduct)
3181	Sex Offenses: Sentencing Factors – Multiple Victims
3412 & 3413	Compassionate Use; Collective or Cooperative Cultivation Defense
3454	Initial Commitment as Sexually Violent Predator

104. Evidence

You must decide what the facts are in this case. You must use only the evidence that is presented in the courtroom [or during a jury view]. "Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I tell you to consider as evidence. The fact that the defendant was arrested, charged with a crime, or brought to trial is not evidence of guilt.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys will discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they help you understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asks a question that suggests it is true.

During the trial, the attorneys may object to questions asked of a witness. I will rule on the objections according to the law. If I sustain an objection, the witness will not be permitted to answer, and you must ignore the question. If the witness does not answer, do not guess what the answer might have been or why I ruled as I did. If I order testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose.

You must disregard anything you see or hear when the court is not in session, even if it is done or said by one of the parties or witnesses.

The court [reporter] is making a (record/recording) of everything that was said during the trial. If you decide that it is necessary, you may ask that the (court reporter's record be read to/court's recording be played for) you. You must accept the (court reporter's record/court's recording) as accurate.

New January 2006; Revised April 2008, August 2009, March 2019

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these principles has been approved. (See *People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750]; *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2]; *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].)

AUTHORITY

- Evidence Defined ▸ Evid. Code, § 140.
- Arguments Not Evidence ▸ *People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750].
- Questions Not Evidence ▸ *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2].
- Striking Testimony ▸ *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].
- This Instruction Upheld ▸ *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1183 [67 Cal.Rptr.3d 871].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 636.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, §§ 83.01[1], 83.02[2] (Matthew Bender).

202. Note-Taking and Reading Back of Testimony

[You have been given notebooks and may have taken notes during the trial. You may use your notes during deliberations.] Your notes are for your own individual use to help you remember what happened during the trial. Please keep in mind that your notes may be inaccurate or incomplete.

If there is a disagreement about the testimony [and stipulations] at trial, you may ask that the (court reporter's record be read to/court's recording be played for) you. It is the record that must guide your deliberations, not your notes. You must accept the (court reporter's record/court's recording) as accurate.

Please do not remove your notes from the jury room.

At the end of the trial, your notes will be (collected and destroyed/collected and retained by the court but not as a part of the case record/_____<*specify other disposition*>**).**

New January 2006; Revised June 2007, April 2008, August 2009, February 2012, March 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct the members of the jury that they may take notes. California Rules of Court, Rule 2.1031.

The court may specify its preferred disposition of the notes after trial. No statute or rule of court requires any particular disposition.

AUTHORITY

- Jurors' Use of Notes ▸ California Rules of Court, Rule 2.1031.

Secondary Sources

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, § 83.05[1], Ch. 85, *Submission to Jury and Verdict*, § 85.05[2], [3], Ch. 87, *Death Penalty*, §§ 87.20, 87.24 (Matthew Bender).

222. Evidence

"Evidence" is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence.

Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence. The attorneys' questions are significant only if they helped you to understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true.

During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose.

You must disregard anything you saw or heard when the court was not in session, even if it was done or said by one of the parties or witnesses.

[During the trial, you were told that the People and the defense agreed, or stipulated, to certain facts. This means that they both accept those facts as true. Because there is no dispute about those facts you must also accept them as true.]

The court (reporter has made a record of/has recorded) everything that was said during the trial. If you decide that it is necessary, you may ask that the (court reporter's record be read to/court's recording be played for) you. You must accept the (court reporter's record/court's recording) as accurate.

New January 2006; Revised June 2007, August 2009, February 2012, March 2019

BENCH NOTES

Instructional Duty

There is no sua sponte duty to instruct on these evidentiary topics; however, instruction on these topics has been approved. (*People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750]; *People v. Samayoa* (1997) 15 Cal.4th

795, 843–844 [64 Cal.Rptr.2d 400, 938 P.2d 2]; *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].)

If the parties stipulated to one or more facts, give the bracketed paragraph that begins with "During the trial, you were told."

AUTHORITY

- Evidence Defined ▸ Evid. Code, § 140.
- Arguments Not Evidence ▸ *People v. Barajas* (1983) 145 Cal.App.3d 804, 809 [193 Cal.Rptr. 750].
- Questions Not Evidence ▸ *People v. Samayoa* (1997) 15 Cal.4th 795, 843–844 [64 Cal.Rptr.2d 400].
- Stipulations ▸ *Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141–142 [199 P.2d 952].
- Striking Testimony ▸ *People v. Horton* (1995) 11 Cal.4th 1068, 1121 [47 Cal.Rptr.2d 516, 906 P.2d 478].

Secondary Sources

5 Witkin & Epstein, California Criminal Law (3d ed. 2000), Criminal Trial, §§ 636, 643.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 83, *Evidence*, §§ 83.01[1], 83.02[2] (Matthew Bender).

RELATED ISSUES

Non-Testifying Courtroom Conduct

There is authority for an instruction informing the jury to disregard defendant's in-court, but non-testifying behavior. (*People v. Garcia* (1984) 160 Cal.App.3d 82, 90 [206 Cal.Rptr. 468] [defendant was disruptive in court; court instructed jurors they should not consider this behavior in deciding guilt or innocence].) However, if the defendant has put his or her character in issue or another basis for relevance exists, such an instruction should not be given. (*People v. Garcia, supra,* 160 Cal.App.3d at p. 91, fn. 7; *People v. Foster* (1988) 201 Cal.App.3d 20, 25 [246 Cal.Rptr. 855].)

301. Single Witness's Testimony

[Unless I instruct you otherwise,] (T/the) testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.

New January 2006; Revised April 2010, February 2012, February 2014, September 2017, March 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give an instruction on this issue in every case. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 [123 Cal.Rptr. 119, 538 P.2d 247].) Insert the bracketed language if the testimony of an accomplice or other witness requires corroboration. (*People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].)

Give the bracketed phrase if any testimony requires corroboration. See: Cal. Const., art. I, § 18 [treason]; Pen. Code, §§ 1111 [accomplice testimony]; 1111.5 [in-custody informant]; 653f [solicitation of felony]; 118 [perjury]; 1108 [abortion and seduction of minor]; 532 [obtaining property by false pretenses].

Give the bracketed phrase "if you decide (he/she) is an accomplice" and CALCRIM No. 334 if the jury must determine whether a witness is an accomplice.

AUTHORITY

- Instructional Requirements ▸ Evid. Code, § 411; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885 [123 Cal.Rptr. 119, 538 P.2d 247].
- Corroboration Required ▸ *People v. Chavez* (1985) 39 Cal.3d 823, 831–832 [218 Cal.Rptr. 49, 705 P.2d 372].
- No Corroboration Requirement for Exculpatory Accomplice Testimony ▸ *People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892].

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, § 125.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 85, *Submission to Jury and Verdict*, § 85.03[2][b] (Matthew Bender).

RELATED ISSUES

Uncorroborated Testimony of Defendant

The cautionary admonition regarding a single witness's testimony applies with equal force to uncorroborated testimony by a defendant. (*People v. Turner* (1990) 50 Cal.3d 668, 696, fn. 14 [268 Cal.Rptr. 706, 789 P.2d 887].)

Uncorroborated Testimony in Sex Offense Cases

In a prosecution for forcible rape, an instruction that the testimony of a single witness is sufficient may be given in conjunction with an instruction that there is no legal corroboration requirement in a sex offense case. Both instructions correctly state the law and because each focuses on a different legal point, there is no implication that the victim's testimony is more credible than the defendant's testimony. (*People v. Gammage* (1992) 2 Cal.4th 693, 700–702 [7 Cal.Rptr.2d 541, 828 P.2d 682] [resolving split of authority on whether the two instructions can be given together].)

334. Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice

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Before you may consider the (statement/ [or] testimony) of _____ *<insert name[s] of witness[es]>* **as evidence against (the defendant/ _____** *<insert names of defendants>*) **[regarding the crime[s] of _____** *<insert name[s] of crime[s] if corroboration only required for some crime[s]>*], **you must decide whether _____** *<insert name[s] of witness[es]>*) **(was/were) [an] accomplice[s] [to (that/those) crime[s]]. A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if:**

1. **He or she personally committed the crime;**

OR

2. **He or she knew of the criminal purpose of the person who committed the crime;**

AND

3. **He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime[;]/ [or] participate in a criminal conspiracy to commit the crime).**

The burden is on the defendant to prove that it is more likely than not that _____ *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s].**

[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.]

[A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute those who commit that crime is not an accomplice.]

[A person may be an accomplice even if he or she is not actually prosecuted for the crime.]

[You may not conclude that a child under 14 years old was an accomplice unless you also decide that when the child acted, (he/she) understood:

1. **The nature and effect of the criminal conduct;**

2. **That the conduct was wrongful and forbidden;**

AND

3. **That (he/she) could be punished for participating in the conduct.]**

If you decide that a (declarant/ [or] witness) was not an accomplice, then supporting evidence is not required and you should evaluate his or her (statement/ [or] testimony) as you would that of any other witness.

If you decide that a (declarant/ [or] witness) was an accomplice, then you may not convict the defendant of _____ *<insert charged crime[s]>* **based on his or her (statement/ [or] testimony) alone. You may use ~~the~~ (a statement/ [or] testimony) of an accomplice that tends to incriminate the defendant to convict the defendant only if:**

1. **The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;**

2. **That supporting evidence is independent of the accomplice's (statement/ [or] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of the crime[s].**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime[s], and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the accomplice testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

[The evidence needed to support the (statement/ [or] testimony) of one accomplice cannot be provided by the (statement/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

New January 2006; Revised June 2007, April 2010, April 2011, February 2016, March 2019

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331 [106 Cal.Rptr.2d 80, 21 P.3d 758]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) When the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice, do not give this instruction. Give CALCRIM No. 335, *Accomplice Testimony: No Dispute Whether Witness Is Accomplice*.

If a codefendant's testimony tends to incriminate another defendant, the court **must give** an appropriate instruction on accomplice testimony. (*People v. Avila* (2006) 38 Cal.4th 491, 562 [43 Cal.Rptr.3d 1, 133 P.3d 1076]; *citing People v. Box* (2000) 23 Cal.4th 1153, 1209 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Alvarez* (1996) 14 Cal.4th 155, 218 [58 Cal.Rptr.2d 385, 926 P.2d 365].) The court **must** also instruct on accomplice testimony when two codefendants testify against each other and blame each other for the crime. (*Id.* at 218–219).

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the

testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

Do not give this instruction if accomplice testimony is solely exculpatory or neutral. (*People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892] [telling jurors that corroboration is required to support neutral or exonerating accomplice testimony was prejudicial error].)

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word "statement" throughout the instruction. (See discussion in Related Issues section below.)

In a multiple codefendant case, if the corroboration requirement does not apply to all defendants, insert the names of the defendants for whom corroboration is required where indicated in the first sentence.

If the witness was an accomplice to only one or some of the crimes he or she testified about, the corroboration requirement only applies to those crimes and not to other crimes he or she may have testified about. (*People v. Wynkoop* (1958) 165 Cal.App.2d 540, 546 [331 P.2d 1040].) In such cases, the court may insert the specific crime or crimes requiring corroboration in the first sentence.

Give the bracketed paragraph that begins with "A person who lacks criminal intent" when the evidence suggests that the witness did not share the defendant's specific criminal intent, e.g., witness was an undercover police officer or an unwitting assistant.

Give the bracketed paragraph that begins with "You may not conclude that a child under 14 years old" on request if the defendant claims that a child witness's testimony must be corroborated because the child acted as an accomplice. (Pen. Code, § 26; *People v. Williams* (1936) 12 Cal.App.2d 207, 209 [55 P.2d 223].)

AUTHORITY

• Instructional Requirements. Pen. Code, § 1111; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].

• Accomplice May Not Provide Sole Basis for Admission of Other Evidence. *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].

• Consideration of Incriminating Testimony. *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].

• Defendant's Burden of Proof. *People v. Belton* (1979) 23 Cal.3d 516, 523 [153 Cal.Rptr. 195, 591 P.2d 485].

• Defense Admissions May Provide Necessary Corroboration. *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].

• Accomplice Includes Co-perpetrator. *People v. Felton* (2004) 122 Cal.App.4th 260, 268 [18 Cal.Rptr.3d 626].

• Definition of Accomplice as Aider and Abettor. *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].

• Extent of Corroboration Required. *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].

• One Accomplice May Not Corroborate Another. *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44] and *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697].

• Presence or Knowledge Insufficient. *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].

• Testimony of Feigned Accomplice Need Not Be Corroborated. *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].

• Uncorroborated Accomplice Testimony May Establish Corpus Delicti. *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rtpr. 834, 756 P.2d 221].

• Witness an Accomplice as a Matter of Law. *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

• In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other ‣ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].

• No Corroboration Requirement for Exculpatory Accomplice Testimony ‣ *People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892].

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, §§ 110, 111, 118, 122.
4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b], [d], Ch. 87, *Death Penalty*, § 87.23[4][b] (Matthew Bender).
6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.02[5][b] (Matthew Bender).

RELATED ISSUES

Out-of-Court Statements

The out-of court statement of a witness *may* constitute "testimony" within the meaning of Penal Code section 1111, and may require corroboration. (*People v. Williams* (1997) 16 Cal.4th 153, 245 [66 Cal.Rptr.2d 123, 940 P.2d 710]; *People v. Belton* (1979) 23 Cal.3d 516, 526 [153 Cal.Rptr. 195, 591 P.2d 485].) The Supreme Court has quoted with approval the following summary of the corroboration requirement for out-of-court statements:

> '[T]estimony' within the meaning of … section 1111 includes … all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by the police. [Citation.] On the other hand, when the out-of-court statements are not given under suspect circumstances, those statements do not qualify as 'testimony' and hence need not be corroborated under … section 1111.

(*People v. Williams, supra*, 16 Cal.4th at p. 245 [quoting *People v. Jeffery* (1995) 37 Cal.App.4th 209, 218 [43 Cal.Rptr.2d 526] [quotation marks, citations, and italics removed]; see also *People v. Sully* (1991) 53 Cal.3d 1195, 1230 [283 Cal.Rptr. 144, 812 P.2d 163] [out-of-court statement admitted as excited utterance did not require corroboration].) The court must determine whether the out-of-court statement requires corroboration and, accordingly, whether this instruction is appropriate. The court should also determine whether the statement is testimonial, as defined in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], and whether the *Crawford* holding effects the corroboration requirement of Penal Code section 1111.

Incest With a Minor

Accomplice instructions are not appropriate in a trial for incest with a minor. A minor is a victim, not an accomplice, to incest. (*People v. Tobias* (2001) 25 Cal.4th 327, 334 [106 Cal.Rptr.2d 80, 21 P.3d 758]; see CALCRIM No. 1180, *Incest*.)

Liable to Prosecution When Crime Committed

The test for determining if a witness is an accomplice is not whether that person is subject to trial when he or she testifies, but whether he or she was liable to prosecution for the same offense at the time the acts were committed. (*People v. Gordon* (1973) 10 Cal.3d 460, 469 [110 Cal.Rptr. 906, 516 P.2d 298].) However, the fact that a witness was charged for the same crime and then granted immunity does not necessarily establish that

he or she is an accomplice. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 90 [270 Cal.Rptr. 817, 793 P.2d 23].)

Threats and Fear of Bodily Harm

A person who is induced by threats and fear of bodily harm to participate in a crime, other than murder, is not an accomplice. (*People v. Brown* (1970) 6 Cal.App.3d 619, 624 [86 Cal.Rptr. 149]; *People v. Perez* (1973) 9 Cal.3d 651, 659–660 [108 Cal.Rptr. 474, 510 P.2d 1026].)

Defense Witness

"[A]lthough an accomplice witness instruction must be properly formulated … , there is no error in giving such an instruction when the accomplice's testimony favors the defendant." (*United States v. Tirouda* (9th Cir. 2005) 394 F.3d 683, 688.)

335. Accomplice Testimony: No Dispute Whether Witness Is Accomplice

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If the crime[s] of _____ <*insert charged crime[s]*> (was/were) committed, then _____ <*insert name[s] of witness[es]*> (was/were) [an] accomplice[s] to (that/those) crime[s].

You may not convict the defendant of _____ <*insert crime[s]*> based on the (statement/ [or] testimony) of an accomplice alone. You may use ~~the~~ (a statement/ [or] testimony) of an accomplice that tends to incriminate the defendant to convict the defendant only if:

1. **The accomplice's (statement/ [or] testimony) is supported by other evidence that you believe;**

2. **That supporting evidence is independent of the accomplice's (statement/ [or] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of the crime[s].**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.

[The evidence needed to support the (statement/ [or] testimony) of one accomplice cannot be provided by the (statement/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.

New January 2006; Revised June 2007, April 2010, August 2012, February 2016, March 2019

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct on the principles governing the law of accomplices, including the need for corroboration, if the evidence at trial suggests that a witness could be an accomplice. (*People v. Tobias* (2001) 25 Cal.4th 327, 331 [106 Cal.Rptr.2d 80, 21 P.3d 758].)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) Give this instruction only if the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161 [123 Cal.Rptr.2d 322] [only give instruction " 'if undisputed evidence established the complicity' "].) If there is a dispute about whether the witness is an accomplice, give CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.

If a codefendant's testimony tends to incriminate another defendant, the court **must give** an appropriate instruction on accomplice testimony. (*People v. Avila* (2006) 38 Cal.4th 491, 562 [43 Cal.Rptr.3d 1, 133 P.3d 1076]; *citing People v. Box* (2000) 23 Cal.4th 1153, 1209 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Alvarez* (1996) 14 Cal.4th 155, 218 [58 Cal.Rptr.2d 385, 926 P.2d 365].) The court **must** also instruct on accomplice testimony when two co-defendants testify against each other and blame each other for the crime. (*Id.* at 218-219).

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the non-testifying codefendant, the testimony must be corroborated and should be viewed with

caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 105 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

Do not give this instruction if accomplice testimony is solely exculpatory or neutral. (*People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892] [telling jurors that corroboration is required to support neutral or exonerating accomplice testimony was prejudicial error].)

If the court concludes that the corroboration requirement applies to an out-of-court statement, use the word "statement" throughout the instruction. (See discussion in Related Issues section to CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.)

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 1111; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▸ *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony ▸ *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Defense Admissions May Provide Necessary Corroboration ▸ *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Definition of Accomplice as Aider and Abettor ▸ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817 793 P.2d 23].
- Extent of Corroboration Required ▸ *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 301, fn. 11 [124 Cal.Rptr. 204, 540 P.2d 44] and *People v. Dillon* (1983) 34 Cal.3d 441, 454, fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697].
- Presence or Knowledge Insufficient ▸ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Testimony of Feigned Accomplice Need Not Be Corroborated ▸ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v.*

Brocklehurst (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].

- Uncorroborated Accomplice Testimony May Establish Corpus Delicti ▸ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law ▸ *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- This Instruction Upheld ▸ *People v. Tuggles* (2009) 179 Cal.App.4th 339, 363-367 [100 Cal.Rptr.3d 820].
- In-Custody Informant Testimony and Accomplice Testimony May Corroborate Each Other ▸ *People v. Huggins* (2015) 235 Cal.App.4th 715, 719-720 [185 Cal.Rptr.3d 672].
- No Corroboration Requirement for Exculpatory Accomplice Testimony ▸ *People v. Smith* (2017) 12 Cal.App.5th 766, 778-780 [218 Cal.Rptr.3d 892].

Secondary Sources

3 Witkin, California Evidence (5th ed. 2012) Presentation at Trial, §§ 108, 109, 118, 122.

5 Witkin & Epstein, California Criminal Law (4th ed. 2012) Criminal Trial, §§ 686, 738, 739.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses*, § 82.03, Ch. 85, *Submission to Jury and Verdict*, §§ 85.02[2][b], 85.03[2][b], [d], Ch. 87, *Death Penalty*, § 87.23[4][b] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 141, *Conspiracy, Solicitation, and Attempt*, § 141.02[5][b] (Matthew Bender).

520. First or Second Degree Murder With Malice Aforethought (Pen. Code, § 187)

The defendant is charged [in Count __] with murder [in violation of Penal Code section 187].

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

[1A. The defendant committed an act that caused the death of (another person/ [or] a fetus);]

[OR]

[1B. The defendant had a legal duty to (help/care for/rescue/warn/maintain the property of/ _____ <*insert other required action[s]*>) _____ <*insert description of decedent/person to whom duty is owed*> and the defendant failed to perform that duty and that failure caused the death of (another person/ [or] a fetus);]

[AND]

2. When the defendant (acted/[or] failed to act), (he/she) had a state of mind called malice aforethought(;/.)

<*Give element 3 when instructing on justifiable or excusable homicide.*>
[AND

3. (He/She) killed without lawful (excuse/[or] justification).]

There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

The defendant ~~acted with~~ had *express malice* if (he/she) unlawfully intended to kill.

The defendant ~~acted with~~ had *implied malice* if:

1. (He/She) intentionally (committed ~~an~~ the act/[or] failed to act);

2. **The natural and probable consequences of the (act/[or] failure to act) were dangerous to human life;**

3. **At the time (he/she) (acted/[or] failed to act), (he/she) knew (his/her) (act/[or] failure to act) was dangerous to human life;**

AND

4. **(He/She) deliberately (acted/[or] failed to act) with conscious disregard for (human/ [or] fetal) life.**

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

[It is not necessary that the defendant be aware of the existence of a fetus to be guilty of murdering that fetus.]

[A *fetus* is an unborn human being that has progressed beyond the embryonic stage after major structures have been outlined, which typically occurs at seven to eight weeks after fertilization.]

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

[There may be more than one cause of death. (An act/[or] (A/a) failure to act) causes death only if it is a substantial factor in causing the death. A *substantial factor* is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.]

[(A/An) _____<*insert description of person owing duty*> **has a legal duty to (help/care for/rescue/warn/maintain the property of/ _____** <*insert other required action[s]*>**) _____**<*insert description of decedent/person to whom duty is owed*>**.]**

~~**If you conclude that the defendant owed a duty to _____ <insert name of decedent>, and the defendant failed to perform that duty, (his/her) failure to act is the same as doing a negligent or injurious act.]**~~

<Give the following bracketed paragraph if the second degree is the only possible degree of the crime for which the jury may return a verdict>

[If you find the defendant guilty of murder, it is murder of the second degree.]

<Give the following bracketed paragraph if there is substantial evidence of first degree murder>

[If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. ___ *<insert number of appropriate first degree murder instruction>*.**]**

New January 2006; Revised August 2009, October 2010, February 2013, August 2013, September 2017, March 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to instruct on the first two elements of the crime. If there is sufficient evidence of excuse or justification, the court has a **sua sponte** duty to include the third, bracketed element in the instruction. (*People v. Frye* (1992) 7 Cal.App.4th 1148, 1155–1156 [10 Cal.Rptr.2d 217].) The court also has a **sua sponte** duty to give any other appropriate defense instructions. (See CALCRIM Nos. 505–627, and CALCRIM Nos. 3470–3477.)

If causation is at issue, the court has a **sua sponte** duty to instruct on proximate cause. (*People v. Bernhardt* (1963) 222 Cal.App.2d 567, 590–591 [35 Cal.Rptr. 401].) If the evidence indicates that there was only one cause of death, the court should give the "direct, natural, and probable" language in the first bracketed paragraph on causation. If there is evidence of multiple causes of death, the court should also give the "substantial factor" instruction and definition in the second bracketed causation paragraph. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 363 [43 Cal.Rptr.2d 135]; *People v. Pike* (1988) 197 Cal.App.3d 732, 746–747 [243 Cal.Rptr. 54].) If there is an issue regarding a superseding or intervening cause, give the appropriate portion of CALCRIM No. 620, *Causation: Special Issues*.

If the prosecution's theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty, the court may give element 1B. ~~the bracketed portion that begins, "(A/An) _____ <*insert description of person owing duty*> has a legal duty to."~~ Review the Bench Notes to CALCRIM No. 582, *Involuntary Manslaughter: Failure to Perform Legal Duty—Murder Not Charged*.

If the defendant is charged with first degree murder, give this instruction and CALCRIM No. 521, *First Degree Murder*. If the defendant is charged with second degree murder, no other instruction need be given.

If the defendant is also charged with first or second degree felony murder, instruct on those crimes and give CALCRIM No. 548, *Murder: Alternative Theories*.

AUTHORITY

- Elements ▸ Pen. Code, § 187.
- Malice ▸ Pen. Code, § 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217–1222 [264 Cal.Rptr. 841, 783 P.2d 200]; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 103–105 [13 Cal.Rptr.2d 864, 840 P.2d 969]; *People v. Blakeley* (2000) 23 Cal.4th 82, 87 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- Causation ▸ *People v. Roberts* (1992) 2 Cal.4th 271, 315–321 [6 Cal.Rptr.2d 276, 826 P.2d 274].
- Fetus Defined ▸ *People v. Davis* (1994) 7 Cal.4th 797, 814–815 [30 Cal.Rptr.2d 50, 872 P.2d 591]; *People v. Taylor* (2004) 32 Cal.4th 863, 867 [11 Cal.Rptr.3d 510, 86 P.3d 881].
- Ill Will Not Required for Malice ▸ *People v. Sedeno* (1974) 10 Cal.3d 703, 722 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12 [160 Cal.Rptr. 84, 603 P.2d 1]; *People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal.Rptr.2d 870, 960 P.2d 1094].
- Prior Version of This Instruction Upheld ▸ *People v. Genovese* (2008) 168 Cal.App.4th 817, 831 [85 Cal.Rptr.3d 664].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, §§ 96-101, 112-113.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes,* § 140.04, Ch. 142, *Crimes Against the Person,* § 142.01 (Matthew Bender).

LESSER INCLUDED OFFENSES

- Voluntary Manslaughter ▸ Pen. Code, § 192(a).
- Involuntary Manslaughter ▸ Pen. Code, § 192(b).
- Attempted Murder ▸ Pen. Code, §§ 663, 189.
- Sentence Enhancements and Special Circumstances Not Considered in Lesser Included Offense Analysis ▸ *People v. Boswell* (2016) 4 Cal.App.5th 55, 59-60 [208 Cal.Rptr.3d 244].

Gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5(a)) is not a lesser included offense of murder. (*People v. Sanchez* (2001) 24 Cal.4th 983, 988–992 [103 Cal.Rptr.2d 698, 16 P.3d 118].) Similarly, child abuse homicide (Pen. Code, § 273ab) is not a necessarily included offense of murder. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 744 [125 Cal.Rptr.2d 618].)

RELATED ISSUES

Causation—Foreseeability

Authority is divided on whether a causation instruction should include the concept of foreseeability. (See *People v. Autry* (1995) 37 Cal.App.4th 351, 362–363 [43 Cal.Rptr.2d 135]; *People v. Temple* (1993) 19 Cal.App.4th 1750, 1756 [24 Cal.Rptr.2d 228] [refusing defense-requested instruction on foreseeability in favor of standard causation instruction]; but see *People v. Gardner* (1995) 37 Cal.App.4th 473, 483 [43 Cal.Rptr.2d 603] [suggesting the following language be used in a causation instruction: "[t]he death of another person must be foreseeable in order to be the natural and probable consequence of the defendant's act"].) It is clear, however, that it is error to instruct a jury that foreseeability is immaterial to causation. (*People v. Roberts* (1992) 2 Cal.4th 271, 315 [6 Cal.Rptr.2d 276, 826 P.2d 274] [error to instruct a jury that when deciding causation it "[w]as immaterial that the defendant could not reasonably have foreseen the harmful result"].)

Second Degree Murder of a Fetus

The defendant does not need to know a woman is pregnant to be convicted of second degree murder of her fetus. (*People v. Taylor* (2004) 32 Cal.4th 863, 868 [11 Cal.Rptr.3d 510, 86 P.3d 881] ["[t]here is no requirement that the defendant specifically know of the existence of each victim."]) "[B]y engaging in the conduct he did, the defendant demonstrated a conscious disregard for all life, fetal

or otherwise, and hence is liable for all deaths caused by his conduct." (*Id.* at p. 870.)

625. Voluntary Intoxication: Effects on Homicide Crimes (Pen. Code, § 29.4)

You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill[,] [or] [the defendant acted with deliberation and premeditation[,]] [[or] the defendant was unconscious when (he/she) acted[,]] [or the defendant _____ *<insert other specific intent required in a homicide charge or other charged offense>***.]**

A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

You may not consider evidence of voluntary intoxication for any other purpose.

New January 2006; Revised August 2014, February 2016, March 2019

BENCH NOTES

Instructional Duty

With the statutory elimination of diminished capacity as a defense, there is no sua sponte duty to instruct on the effect of voluntary intoxication on the mental states required for homicide. (Pen. Code, § 28(b); *People v. Saille* (1991) 54 Cal.3d 1103, 1119–1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].) However, subsequent cases affirm that voluntary intoxication can be used to negate an element of the crime that must be proven by the prosecution. (*People v. Reyes* (1997) 52 Cal.App.4th 975, 982 [61 Cal.Rptr.2d 39]; *People v. Visciotti* (1992) 2 Cal.4th 1, 56–57 [5 Cal.Rptr.2d 495, 825 P.2d 388].) Such an instruction is a "pinpoint" instruction, which must be given on request when there is sufficient evidence supporting the theory. (*People v. Saille, supra,* 54 Cal.3d at p. 1120.)

Include the bracketed language regarding unconsciousness if the court also gives CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

If the defendant is charged with a homicide crime that has as an element an additional specific intent requirement other than intent to kill, include the required

intent in the last bracketed portion of the second sentence. For example, if the defendant is charged with torture murder, include "whether the defendant intended to inflict extreme and prolonged pain." Or, if the defendant is charged with felony-murder, insert intent to commit the felony where indicated. Similarly, if the defendant is also charged with a nonhomicide crime with a specific intent requirement, include that intent requirement. For example, if the defendant is charged with murder and robbery, include "whether the defendant intended to permanently deprive the owner of the property."

Evidence of voluntary intoxication is inadmissible on the question of whether a defendant believed it necessary to act in self-defense. (*People v. Soto* (2018) 4 Cal.5th 968, 970 [231 Cal.Rptr.3rd 732, 415 P.3d 789].)

AUTHORITY

- Voluntary Intoxication Defined. ▸ Pen. Code, § 29.4(c).
- Unconsciousness Not Required. ▸ *People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].
- No Sua Sponte Duty to Instruct. ▸ *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588].
- Evidence of Intoxication Inapplicable to Implied Malice. ▸ Pen. Code, § 29.4(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].
- Applies to Attempted Murder. ▸ *People v. Castillo* (1997) 16 Cal.4th 1009, 1016 [68 Cal.Rptr.2d 648, 945 P.2d 1197].
- Voluntary Intoxication Relevant to Knowledge. ▸ *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39].
- This Instruction Upheld. ▸ *People v. Turk* (2008) 164 Cal.App.4th 1361, 1381 [80 Cal.Rptr.3d 473]; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298 [60 Cal.Rptr.3d 677].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 30–34.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* §§ 73.01[4], 73.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person,* §§ 142.01[3][d.1], [e], 142.02[1][e], [f], [2][b], [3][c] (Matthew Bender).

RELATED ISSUES

General Instruction on Voluntary Intoxication
This instruction is a specific application of CALCRIM No. 3426, *Voluntary Intoxication*, to homicide.

Unconsciousness
Unconsciousness (as defined in CALCRIM No. 3425, *Unconsciousness*) is not required. (*People v. Ray* (1975) 14 Cal.3d 20, 28–29 [120 Cal.Rptr. 377, 533 P.2d 1017], disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [96 Cal.Rptr.2d 451, 999 P.2d 675].)

Not Applicable in Murder Cases Based Exclusively on Implied Malice
This instruction is inapplicable to cases where the murder charge is exclusively based on a theory of *implied* malice~~,~~ because voluntary intoxication can only negate *express* malice. (Pen. Code, § 29.4(b); *People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433].) Drunk-driving second degree murder is one type of case that is typically based exclusively on an implied malice theory.

3426. Voluntary Intoxication (Pen. Code, § 29.4)

You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted [or failed to do an act] with _____ <*insert specific intent or mental state required, e.g.,"the intent to permanently deprive the owner of his or her property" or "knowledge that . . . " or "the intent to do the act required"***>.**

A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.

In connection with the charge of _____ *<insert first charged offense requiring specific intent or mental state>* **the People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with _____<***insert specific intent or mental state required, e.g.,"the intent to permanently deprive the owner of his or her property" or "knowledge that . . ."***>. If the People have not met this burden, you must find the defendant not guilty of _____** *<insert first charged offense requiring specific intent or mental state>***.**

<Repeat this paragraph for each offense requiring specific intent or a specific mental state.>

You may not consider evidence of voluntary intoxication for any other purpose. [Voluntary intoxication is not a defense to _____ *<insert general intent offense[s]>***.]**

New January 2006; Revised August 2012, August 2013, February 2015, March 2019

BENCH NOTES

Instructional Duty

The court has no sua sponte duty to instruct on voluntary intoxication; however, the trial court must give this instruction on request. (*People v. Ricardi* (1992) 9 Cal.App.4th 1427, 1432 [12 Cal.Rptr.2d 364]; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].) Although voluntary intoxication is not an affirmative defense to a crime, the jury may consider evidence of voluntary

intoxication and its effect on the defendant's required mental state. (Pen. Code, § 29.4; *People v. Reyes* (1997) 52 Cal.App.4th 975, 982–986 [61 Cal.Rptr.2d 39] [relevant to knowledge element in receiving stolen property]; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131–1134 [77 Cal.Rptr.2d 428, 959 P.2d 735] [relevant to mental state in aiding and abetting].)

Voluntary intoxication may not be considered for general intent crimes. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1127–1128 [77 Cal.Rptr.2d 428, 959 P.2d 735]; *People v. Atkins* (2001) 25 Cal.4th 76, 81 [104 Cal.Rptr.2d 738, 18 P.3d 660]; see also *People v. Hood* (1969) 1 Cal.3d 444, 451 [82 Cal.Rptr. 618, 462 P.2d 370] [applying specific vs. general intent analysis and holding that assault type crimes are general intent; subsequently superseded by amendments to former Penal Code Section 22 [now Penal Code section 29.4] on a different point].)

If both specific and general intent crimes are charged, the court must specify the general intent crimes in the bracketed portion of the last sentence and instruct the jury that voluntary intoxication is not a defense to those crimes. (*People v. Aguirre* (1995) 31 Cal.App.4th 391, 399–402 [37 Cal.Rptr.2d 48]; *People v. Rivera* (1984) 162 Cal.App.3d 141, 145–146 [207 Cal.Rptr. 756].)

If the defendant claims unconsciousness due to involuntary intoxication as a defense to driving under the influence, see *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1317-1323 [149 Cal.Rptr.3d 167].

The court may need to modify this instruction if given with CALCRIM No. 362, *Consciousness of Guilt*. (*People v. Wiidanen* (2011) 201 Cal.App.4th 526, 528, 533 [135 Cal.Rptr.3d 736].)

Evidence of voluntary intoxication is inadmissible on the question of whether a defendant believed it necessary to act in self-defense. (*People v. Soto* (2018) 4 Cal.5th 968, 970 [231 Cal.Rptr.3rd 732, 415 P.3d 789].)

Related Instructions

CALCRIM No. 3427, *Involuntary Intoxication*.

CALCRIM No. 625, *Voluntary Intoxication: Effects on Homicide Crimes*.

CALCRIM No. 626, *Voluntary Intoxication Causing Unconsciousness: Effects on Homicide Crimes*.

AUTHORITY

- Instructional Requirements ▸ Pen. Code, § 29.4; *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 [68 Cal.Rptr.2d 648, 945 P.2d 1197]; *People v. Saille* (1991) 54 Cal.3d 1103, 1119 [2 Cal.Rptr.2d 364, 820 P.2d 588].
- Effect of Prescription Drugs ▸ *People v. Mathson* (2012) 210 Cal.App.4th 1297, 1328, fn. 32 [149 Cal.Rptr.3d 167].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Defenses, §§ 32-39.

3 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 73, *Defenses and Justifications,* § 73.04 (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 124, *Jurisdiction and Disposition Hearings,* § 124.04 (Matthew Bender).

RELATED ISSUES

Implied Malice

"[E]vidence of voluntary intoxication is no longer admissible on the issue of implied malice aforethought." (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1114–1115 [93 Cal.Rptr.2d 433], quoting *People v. Reyes* (1997) 52 Cal.App.4th 975, 984, fn. 6 [61 Cal.Rptr.2d 39].)

Intoxication Based on Mistake of Fact Is Involuntary

Intoxication resulting from trickery is not "voluntary." (*People v. Scott* (1983) 146 Cal.App.3d 823, 831–833 [194 Cal.Rptr. 633] [defendant drank punch not knowing it contained hallucinogens; court held his intoxication was result of trickery and mistake and involuntary].)

Premeditation and Deliberation

"[T]he trial court has no sua sponte duty to instruct that voluntary intoxication may be considered in determining the existence of premeditation and deliberation." (*People v. Hughes* (2002) 27 Cal.4th 287, 342 [116 Cal.Rptr.2d 401, 39 P.3d 432], citing *People v. Saille* (1991) 54 Cal.3d 1103, 1120 [2 Cal.Rptr.2d 364, 820 P.2d 588]; see *People v. Castillo* (1997) 16 Cal.4th 1009, 1018 [68 Cal.Rptr.2d 648, 945 P.2d 1197] [counsel not ineffective for failing to request instruction specifically relating voluntary intoxication to premeditation and deliberation].)

Unconsciousness Based on Voluntary Intoxication Is Not a Complete Defense
Unconsciousness is typically a complete defense to a crime except when it is caused by voluntary intoxication. (*People v. Heffington* (1973) 32 Cal.App.3d 1, 8 [107 Cal.Rptr. 859].) Unconsciousness caused by voluntary intoxication is governed by former Penal Code section 22 [now Penal Code section 29.4], rather than by section 26 and is only a partial defense to a crime. (*People v. Walker* (1993) 14 Cal.App.4th 1615, 1621 [18 Cal.Rptr.2d 431] [no error in refusing to instruct on unconsciousness when defendant was voluntarily under the influence of drugs at the time of the crime]; see also *People v. Ochoa* (1998) 19 Cal.4th 353, 423 [79 Cal.Rptr.2d 408, 966 P.2d 442] ["if the intoxication is voluntarily induced, it can never excuse homicide. Thus, the requisite element of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication [citation]."].)

707. Special Circumstances: Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice (Pen. Code, § 1111)

In order to prove the special circumstance[s] of _____ *<insert special circumstance[s] requiring proof of additional crime>***, the People must prove that the defendant committed _____** *<insert crime[s] (other than murder) that must be proved>***. The People have presented the (statement[s]/ [or] testimony) of _____** *<insert name[s] of witness[es]>* **on this issue. Before you may consider the (statement[s]/ [or] testimony) of _____** *<insert name[s] of witness[es]>* **on the question of whether the special circumstance[s] (was/were) proved, you must decide whether (he/she/they) (was/were) [an] accomplice[s]. A person is an *accomplice* if he or she is subject to prosecution for the identical offense alleged against the defendant. Someone is subject to prosecution if he or she personally committed the offense or if:**

1. **He or she knew of the criminal purpose of the person who committed the offense;**

AND

2. **He or she intended to, and did, in fact, (aid, facilitate, promote, encourage, or instigate the commission of the offense[,]/ [or] participate in a criminal conspiracy to commit the offense).**

The burden is on the defendant to prove that it is more likely than not that _____ *<insert name[s] of witness[es]>* **(was/were) subject to prosecution for the identical offense.**

[An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime [will be committed or] is being committed and does nothing to stop it.]

[A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute (the person/those) who commit[s] that crime is not an accomplice.]

[A person may be an accomplice even if he or she is not actually prosecuted for the crime.]

[You may not conclude that a child under 14 years old was an accomplice unless you also decide that when the child acted, (he/she) understood:

1. **The nature and effect of the criminal conduct;**

2. **That the conduct was wrongful and forbidden;**

AND

3. **That (he/she) could be punished for participating in the conduct.]**

If you find that _____ *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s], then you may not find that the special circumstance[s] of _____** *<insert special circumstance[s] requiring proof of additional crime>* **(is/are) true based on (his/her/their) (statement[s]/ [or] testimony) alone. You may use the (statement[s]/ [or] testimony) of an accomplice to find the special circumstance true only if:**

1. **The accomplice's (statement[s]/ [and] testimony) (is/are) supported by other evidence that you believe;**

2. **That supporting evidence is independent of the accomplice's (statement[s]/ [and] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of _____** *<insert crime[s] (other than murder) that must be proved>***.**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant committed _____ *<insert crime[s] (other than murder) that must be proved>***, and it does not need to support every fact (mentioned by the witness in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of _____** *<insert crime[s] (other than murder) that must be proved>***.**

[The evidence needed to support the (statement[s]/ [or] testimony) of one accomplice cannot be provided by the (statement[s]/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in light of all the other evidence.

If you decide that _____ *<insert name[s] of witness[es]>* **(was/were) not [an] accomplice[s], you should evaluate (his/her/their) (statement[s]/ [or] testimony) as you would that of any other witness.**

New January 2006, Revised March 2019

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct that testimony by an accomplice must be corroborated if that testimony is used to prove a special circumstance based on a crime other than the murder charged in the case. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730].) "When the special circumstance requires proof of some other crime [besides the charged murder], that crime cannot be proved by the uncorroborated testimony of an accomplice. But when . . . it requires only proof of the motive for the murder for which defendant has already been convicted, the corroboration requirement . . . does not apply." (*Ibid.*~~)~~; see also *People v. Rices* (2017) 4 Cal.5th 49, 85-86 [226 Cal.Rptr.3d 118, 406 P.3d 788].)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710 96 P.3d 30].) When the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice, do not give this instruction. Give CALCRIM No. 708, *Special Circumstances: Accomplice Testimony Must Be Corroborated— No Dispute Whether Witness Is Accomplice*.

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the

court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the nontestifying codefendant, the testimony must be corroborated and should be viewed with caution. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103–106 [17 Cal.Rptr.3d 710, 96 P.3d 30].)

When the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice, give CALCRIM No. 708, *Special Circumstances: Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice*.

Give the bracketed paragraph beginning "A person who lacks criminal intent" when the evidence suggests that the witness did not share the defendant's specific criminal intent, e.g., witness is an undercover police officer or an unwitting assistant.

Give the bracketed paragraph beginning "You may not conclude that a child under 14 years old" on request if the defendant claims that a child witness's testimony must be corroborated because the child acted as an accomplice. (Pen. Code, § 26; *People v. Williams* (1936) 12 Cal.App.2d 207, 209 [55 P.2d 223].)

Related Instructions
CALCRIM No. 708, *Special Circumstances: Accomplice Testimony Must Be Corroborated—No Dispute Whether Witness Is Accomplice*.
CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.
CALCRIM No. 335, *Accomplice Testimony: No Dispute Whether Witness Is Accomplice*.

AUTHORITY

- Duty to Instruct ▸ Pen. Code, § 1111; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▸ *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony ▸ *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].

- Defendant's Burden of Proof ‣ *People v. Belton* (1979) 23 Cal.3d 516, 523 [153 Cal.Rptr. 195, 591 P.2d 485].
- Defense Admissions May Provide Necessary Corroboration ‣ *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Definition of Accomplice as Aider and Abettor ‣ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Extent of Corroboration Required ‣ *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another ‣ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697], and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 301 fn.11 [124 Cal.Rptr. 204, 540 P.2d 44].
- Presence or Knowledge Insufficient ‣ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].
- Testimony of Feigned Accomplice Need Not Be Corroborated ‣ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti ‣ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law ‣ *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

Secondary Sources

3 Witkin & Epstein, California Evidence (4th ed. 2000) Presentation, § 98, p. 134 [wrongdoers who are not accomplices]; § 99, p. 136 ["accomplices" who appear to be victims]; § 105, p. 142.

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 461.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses,* § 82.03, Ch. 85, *Submission to Jury and Verdict,* § 85.03[2][d], Ch. 87, *Death Penalty,* § 87.23[4][b] (Matthew Bender).

708. Special Circumstances: Accomplice Testimony Must Be Corroborated— No Dispute Whether Witness Is Accomplice (Pen. Code, § 1111)

In order to prove the special circumstance[s] of _____ *<insert special circumstance[s] requiring proof of additional crime>***, the People must prove that the defendant committed _____** *<insert crime[s] (other than murder) that must be proved>***. The People have presented the (statement[s]/ [or] testimony) of _____** *<insert name[s] of witness[es]>* **on this issue.**

If the crime[s] of _____ *<insert crime[s]>* **(was/were) committed, then _____** *<insert name[s] of witness[es]>* **(was/were) [an] accomplice[s] to (that/those) crime[s].**

You may not find that the special circumstance[s] of _____ *<insert special circumstance[s] requiring proof of additional crime>* **is true based on the (statement[s]/ [or] testimony) of an accomplice alone. You may use the (statement[s]/ [or] testimony) of an accomplice to find the special circumstance true only if:**

1. **The accomplice's (statement[s]/ [and] testimony) (is/are) supported by other evidence that you believe;**

2. **That supporting evidence is independent of the accomplice's (statement[s]/ [and] testimony);**

AND

3. **That supporting evidence tends to connect the defendant to the commission of _____** *<insert crime[s] (other than murder) that must be proved>***.**

Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant committed _____ *<insert crime[s] (other than murder) that must be proved>***, and it does not need to support every fact (mentioned by the witness in the statement/ [or] about which the witness testified). On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of _____** *<insert crime[s] (other than murder) that must be proved>***.**

[The evidence needed to support the (statement[s]/ [or] testimony) of one accomplice cannot be provided by the (statement[s]/ [or] testimony) of another accomplice.]

Any (statement/ [or] testimony) of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that (statement/ [or] testimony) the weight you think it deserves after examining it with care and caution and in light of all the other evidence.

New January 2006, Revised March 2019

BENCH NOTES

Instructional Duty

There is a **sua sponte** duty to instruct that testimony by an accomplice must be corroborated if that testimony is used to prove a special circumstance based on a crime other than the murder charged in the case. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730].) "When the special circumstance requires proof of some other crime [besides the charged murder], that crime cannot be proved by the uncorroborated testimony of an accomplice. But when . . . it requires only proof of the motive for the murder for which defendant has already been convicted, the corroboration requirement . . . does not apply." (*Ibid.*~~;~~; see also *People v. Rices* (2017) 4 Cal.5th 49, 85-86 [226 Cal.Rptr.3d 118, 406 P.3d 788].)

"Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 104 [17 Cal.Rptr.3d 710, 96 P.3d 30].) Give this instruction only if the court concludes that the witness is an accomplice as a matter of law or the parties agree about the witness's status as an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1161 [123 Cal.Rptr.2d 322] [only give instruction " 'if undisputed evidence established the complicity' "].) If there is a dispute about whether the witness is an accomplice, give CALCRIM No. 707, *Special Circumstances: Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice*.

When the witness is a codefendant whose testimony includes incriminating statements, the court **should not** instruct that the witness is an accomplice as a matter of law. (*People v. Hill* (1967) 66 Cal.2d 536, 555 [58 Cal.Rptr. 340, 426 P.2d 908].) Instead, the court should give this instruction, informing the jury that it must decide whether the testifying codefendant is an accomplice. In addition, the

court should instruct that when the jury considers this testimony as it relates to the testifying codefendant's defense, the jury should evaluate the testimony using the general rules of credibility, but if the jury considers testimony as incriminating evidence against the nontestifying codefendant, the testimony must be corroborated and should be viewed with caution.

Related Instructions
CALCRIM No. 707, *Special Circumstances: Accomplice Testimony Must Be Corroborated—Dispute Whether Witness Is Accomplice*.
CALCRIM No. 334, *Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice*.
CALCRIM No. 335, *Accomplice Testimony; No Dispute Whether Witness Is Accomplice*.

AUTHORITY

- Duty to Instruct ▸ Pen. Code, § 1111; *People v. Hamilton* (1989) 48 Cal.3d 1142, 1177 [259 Cal.Rptr. 701, 774 P.2d 730]; *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Accomplice May Not Provide Sole Basis for Admission of Other Evidence ▸ *People v. Bowley* (1963) 59 Cal.2d 855, 863 [31 Cal.Rptr. 471, 382 P.2d 591].
- Consideration of Incriminating Testimony ▸ *People v. Guiuan* (1998) 18 Cal.4th 558, 569 [76 Cal.Rptr.2d 239, 957 P.2d 928].
- Defense Admissions May Provide Necessary Corroboration ▸ *People v. Williams* (1997) 16 Cal.4th 635, 680 [66 Cal.Rptr.2d 573, 941 P.2d 752].
- Definition of Accomplice as Aider and Abettor ▸ *People v. Stankewitz* (1990) 51 Cal.3d 72, 90–91 [270 Cal.Rptr. 817, 793 P.2d 23].
- Extent of Corroboration Required ▸ *People v. Szeto* (1981) 29 Cal.3d 20, 27 [171 Cal.Rptr. 652, 623 P.2d 213].
- One Accomplice May Not Corroborate Another ▸ *People v. Montgomery* (1941) 47 Cal.App.2d 1, 15 [117 P.2d 437], disapproved on other grounds in *People v. Dillon* (1983) 34 Cal.3d 441, 454 fn. 2 [194 Cal.Rptr. 390, 668 P.2d 697], and *Murgia v. Municipal Court* (1975) 15 Cal.3d 286 301 fn.11 [124 Cal.Rptr. 204, 540 P.2d 44].
- Presence or Knowledge Insufficient ▸ *People v. Boyd* (1990) 222 Cal.App.3d 541, 557, fn. 14 [271 Cal.Rptr. 738]; *In re Michael T.* (1978) 84 Cal.App.3d 907, 911 [149 Cal.Rptr. 87].

- Testimony of Feigned Accomplice Need Not Be Corroborated ▸ *People v. Salazar* (1962) 201 Cal.App.2d 284, 287 [20 Cal.Rptr. 25]; but see *People v. Brocklehurst* (1971) 14 Cal.App.3d 473, 476 [92 Cal.Rptr. 340]; *People v. Bohmer* (1975) 46 Cal.App.3d 185, 191–193 [120 Cal.Rptr. 136].
- Uncorroborated Accomplice Testimony May Establish Corpus Delicti ▸ *People v. Williams* (1988) 45 Cal.3d 1268, 1317 [248 Cal.Rptr. 834, 756 P.2d 221].
- Witness an Accomplice as a Matter of Law ▸ *People v. Williams* (1997) 16 Cal.4th 635, 679 [66 Cal.Rptr.2d 573, 941 P.2d 752].

Secondary Sources

3 Witkin & Epstein, California Evidence (4th ed. 2000) Presentation, § 98, p. 134 [wrongdoers who are not accomplices]; § 99, p. 136 ["accomplices" who appear to be victims]; § 105, p. 142.

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, § 461.

4 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 82, *Witnesses,* § 82.03, Ch. 85, *Submission to Jury and Verdict,* § 85.03[2][d], Ch. 87, *Death Penalty,* § 87.23[4][b] (Matthew Bender).

709–719. Reserved for Future Use

1145. Possession of Matter Depicting Minor Engaged in Sexual Conduct (Pen. Code, § 311.11(a))

The defendant is charged [in Count __] with possessing matter that shows a minor engaged in or simulating sexual conduct [in violation of Penal Code section 311.11(a).]

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

1. **The defendant possessed or controlled matter that contained [an] image[s] of a minor personally engaging in or simulating sexual conduct;**

2. **The defendant knew that (he/she) possessed or controlled the matter;**

   [AND]

3. **The defendant knew that the matter contained [an] image[s] of a minor personally engaging in or simulating sexual conduct.**

***Matter,* as used in this instruction, means any visual work[s], including any (film/filmstrip/photograph/negative/slide/photocopy/video recording/computer-generated media[,]/[or] _____** <*insert other item listed in Pen. Code § 311.11(a)*>**.**

[*Matter* does not include drawings, figurines, or statues.]

[*Matter* does not include any film rated by the Motion Picture Association of America.]

[The *matter* does not have to be obscene.] <*For a definition of obscene, see CALCRIM 1141*>

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it) either personally or through another person.

[Two or more people may possess something at the same time.]

A *minor* is anyone under the age of 18. [Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

***Sexual conduct* means actual or simulated (sexual intercourse/ [or] oral copulation[,]/ [or] anal intercourse[,]/ [or] anal oral copulation[,]/ [or] _____ <*insert other sexual conduct as defined in Pen. Code, § 311.4(d)(1)*>). An act is simulated when it gives the appearance of being sexual conduct.**

<*Sentencing Factors*>
[If you find the defendant guilty of this crime [as charged in Count[s] __], you must then decide whether the People have proved the additional allegation[s]. [You must decide whether the People have proved (this/these) allegation[s] for each crime beyond a reasonable doubt and return a separate finding for each crime.]

<*Give the following paragraph if the defendant is charged with the felony enhancement under Penal Code section 311.11(b)*>

[To prove the prior conviction allegation, the People must prove that the defendant has at least one prior conviction for violating or attempting to violate Penal Code section 311.11(a) or for committing or attempting to commit (_____) <*insert description of offense requiring registration pursuant to Penal Code section 290*>*(./;)*]

<*Give the following four paragraphs if the defendant is charged with the felony enhancement under Penal Code section 311.11(c)(1)*>

[To prove the multiple images allegation, the People must prove that:

The *matter* the defendant knowingly possessed or controlled contained more than 600 images all of which the defendant knew showed a minor engaged in or simulating sexual conduct;

AND

The *matter* contained at least ten or more images involving a prepubescent minor or a minor under 12 years of age(./;)

Each photograph, picture, computer or computer-generated image, or any similar visual depiction counts as *one image*.

Each video, video-clip, movie, or similar visual depiction counts as *50 images*(./;)]

<Give the following three paragraphs if the defendant is charged under Penal Code section 311.11(c)(2)>

[To prove the sexual sadism or sexual masochism allegation, the People must prove that the *matter* showed sexual sadism or sexual masochism involving a minor.

***Sexual sadism* means intentionally causing pain for purposes of sexual gratification or stimulation.**

***Sexual masochism* means intentionally experiencing pain for purposes of sexual gratification or stimulation.]**

New March 2019

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give an instruction defining the elements of the crime. Give the sentencing factors if appropriate.

AUTHORITY

- Elements ▸ Pen. Code, § 311.11(a)-(c).
- Sexual Conduct Defined ▸ Pen. Code, § 311.4(d)(1); see *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130–1131 [8 Cal.Rptr.3d 372].
- Person Defined ▸ Pen. Code, § 311(c).
- Knowingly Defined ▸ Pen. Code, § 311(e); see *People v. Kuhns* (1976) 61 Cal.App.3d 735, 756–758 [132 Cal.Rptr. 725].
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849–850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Personally Defined ▸ *People v. Gerber* (2011) 196 Cal.App.4th 368, 386 [126 Cal.Rptr.3d 688].
- Possession or Control of Computer Image ▸ *Tecklenburg v. Appellate Div. of Superior Court* (2009) 169 Cal.App.4th 1402, 1418-1419 [87 Cal.Rptr.3d 460].

- Simultaneous Possession of Materials at Same Location is One Offense ▸ *People v. Manfredi* (2008) 169 Cal.App.4th 622, 624 [86 Cal.Rptr.3d 810].

1244. Causing Minor to Engage in Commercial Sex Act (Pen. Code, § 236.1(c))

The defendant is charged [in Count __] with (causing, inducing, or persuading / (and/or) attempting to cause, induce, or persuade) a minor to engage in a commercial sex act [in violation of Penal Code section 236.1(c)].

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

1. **The defendant (caused/ [or] induced/ [or] persuaded) [or] attempted to (cause/ [or] induce/ [or] persuade)] another person to engage in a commercial sex act;**

2. **When the defendant acted, (he/she) intended to (commit/ [or] maintain) a [felony] violation of _____ <***insert appropriate code section[s]***>;**

   AND

3. **When the defendant did so, the other person was under 18 years of age.**

A *commercial sex act* is sexual conduct that takes place in exchange for anything of value.

When you decide whether the defendant (caused/ [or] induced/ [or] persuaded) the other person to engage in a commercial sex act, consider all of the circumstances, including the age of the other person, (his/her) relationship to the defendant [or defendant's agent[s]], and the other person's handicap or disability, if any.

[Under the law, a person becomes one year older as soon as the first minute of his or her birthday has begun.]

[The other person's consent is not a defense to this crime.]

[Being mistaken about the other person's age is not a defense to this crime.]

New February 2014; Revised March 2019

BENCH NOTES

Instructional Duty

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

Insert the correct Penal Code section into the blank provided in element 2 and give the corresponding instruction or instructions.

This instruction is based on the language of the statute effective November 7, 2012, and applies only to crimes committed on or after that date.

If the charged crime is a Penal Code section 21a attempt to violate Penal Code section 236.1(c) (*e.g.* when the intended victim is an undercover officer), also give CALCRIM No. 460, Attempt Other Than Attempted Murder. If the charged crime includes a violation of the attempt provision of Penal Code section 236.1(c) (e.g., when the victim is a minor), do not give CALCRIM No. 460, Attempt Other Than Attempted Murder. *People v. Shields* (2018) 23 Cal.App.5th 1242, 1257 [233 Cal.Rptr.3d 701] ["the attempt prong of the statute is distinct from the separate crime of attempt because a completed violation of the statute requires a person under the age of 18 while an attempt to violate the statute does not."]

AUTHORITY

- Elements and Definitions ▸ Pen. Code, § 236.1.
- Menace Defined [in context of false imprisonment] ▸ *People v. Matian* (1995) 35 Cal.App.4th 480, 484–486 [41 Cal.Rptr.2d 459].
- Calculating Age ▸ Fam. Code, § 6500; *In re Harris* (1993) 5 Cal.4th 813, 849-850 [21 Cal.Rptr.2d 373, 855 P.2d 391].
- Actual Minor Required ▸ *People v. Shields* (2018) 23 Cal.App.5th 1242, 1256-1257 [233 Cal.Rptr.3d 701].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 278.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.14A (Matthew Bender).

1650. Carjacking (Pen. Code, § 215)

The defendant is charged [in Count __] with carjacking [in violation of Penal Code section 215].

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

1. **The defendant took a motor vehicle ~~that was not (his/her) own~~;**

2. **The vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger;**

3. **The vehicle was taken against that person's will;**

4. **The defendant used force or fear to take the vehicle or to prevent that person from resisting;**

AND

5. **When the defendant used force or fear to take the vehicle, (he/she) intended to deprive the other person of possession of the vehicle either temporarily or permanently.**

The defendant's intent to take the vehicle must have been formed before or during the time (he/she) used force or fear. If the defendant did not form this required intent until after using the force or fear, then (he/she) did not commit carjacking.

[A *motor vehicle* includes a (passenger vehicle/motorcycle/motor scooter/bus/school bus/commercial vehicle/truck tractor and trailer/_____ *<insert other type of motor vehicle>***).]**

[The term *motor vehicle* is defined in another instruction to which you should refer.]

A person *takes* something when he or she gains possession of it and moves it some distance. The distance moved may be short.

[An act is done *against a person's will* if that person does not consent to the act. In order to *consent*, a person must act freely and voluntarily and know the nature of the act.]

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[*Fear*, as used here, means fear of (injury to the person himself or herself[,]/ [or] injury to the person's family or property[,]/ [or] immediate injury to someone else present during the incident or to that person's property).]

[A vehicle is within a person's *immediate presence* if it is sufficiently within his or her control so that he or she could keep possession of it if not prevented by force or fear.]

New January 2006; Revised March 2017, March 2019

BENCH NOTES

Instructional Duty

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

There is no sua sponte duty to define the terms "possession," "fear," and "immediate presence." (*People v. Anderson* (1966) 64 Cal.2d 633, 639 [414 P.2d 366, 51 Cal.Rptr. 238] [fear]; *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708 [286 Cal.Rptr. 394] [fear].) These definitions are discussed in the Commentary to CALCRIM No. 1600, *Robbery*.

Give the bracketed definition of "against a person's will" on request.

AUTHORITY

- Elements ▸ Pen. Code, § 215.
- Fear Defined ▸ Pen. Code, § 212.
- Motor Vehicle Defined ▸ Veh. Code, § 415.

- Immediate Presence Defined ▸ *People v. Hayes* (1990) 52 Cal.3d 577, 626–627 [276 Cal.Rptr. 874, 802 P.2d 376]; *People v. Medina* (1995) 39 Cal.App.4th 643, 650 [46 Cal.Rptr.2d 112].
- Possession Defined ▸ *People v. Bekele* (1995) 33 Cal.App.4th 1457, 1461 [39 Cal.Rptr.2d 797], disapproved on other grounds in *People v. Rodriguez* (1999) 20 Cal.4th 1, 13-14 [82 Cal.Rptr.2d 413, 971 P.2d 618]; see *People v. Hamilton* (1995) 40 Cal.App.4th 1137, 1143–1144 [47 Cal.Rptr.2d 343].
- Carjacking Crime Against Possession, not Ownership, of Vehicle ▸ *People v. Cabrera* (2007) 152 Cal.App.4th 695, 701–702 [61 Cal.Rptr.3d 373].
- Sufficient Force ▸ *People v. Hudson* (2017) 11 Cal.App.5th 831, 837 [217 Cal.Rptr.3d 775]; *People v. Lopez* (2017) 8 Cal.App.5th 1230, 1237 [214 Cal.Rptr.3d 618].

Secondary Sources

1 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against the Person, § 116.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, §§ 142.10[2][b], 142.10A (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Carjacking ▸ Pen. Code, §§ 663, 215; see *People v. Jones* (1999) 75 Cal.App.4th 616, 628 [89 Cal.Rptr.2d 485].

Neither theft or robbery is a necessarily included offense of carjacking. (*People v. Ortega* (1998) 19 Cal.4th 686, 693 [80 Cal.Rptr.2d 489, 968 P.2d 48] [theft]; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 419 [45 Cal.Rptr.2d 153] [robbery].) Vehicle theft (Veh. Code, § 10851(a)) is not a lesser included offense of carjacking. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1035 [16 Cal.Rptr.3d 902, 94 P.3d 1098].)

Attempted grand theft auto is not a lesser included offense of attempted carjacking. *People v. Marquez* (2007) 152 Cal.App.4th 1064, 1066 [62 Cal.Rptr.3d 31].

RELATED ISSUES

Force—Timing

Force or fear must be used against the victim to gain possession of the vehicle. The timing, however, "in no way depends on whether the confrontation and use of force or fear occurs before, while, or after the defendant initially takes possession of the vehicle." (*People v. O'Neil* (1997) 56 Cal.App.4th 1126, 1133 [66 Cal.Rptr.2d 72].)

Asportation—Felonious Taking

"Felonious taking" has the same meaning in carjacking as in robbery. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1062 [6 Cal.Rptr.3d 432, 79 P.3d 548]) "To satisfy the asportation requirement for robbery, no great movement is required, and it is not necessary that the property be taken out of the physical presence of the victim. [S]light movement is enough to satisfy the asportation requirement. (*Id.* at p. 1061 [internal quotation marks and citations omitted].) The taking can occur whether or not the victim remains with the car. (*People v. Duran* (2001) 88 Cal.App.4th 1371, 1375–1377 [106 Cal.Rptr.2d 812].) Carjacking can also occur when a defendant forcibly takes a victim's car keys, not just when a defendant takes a car from the victim's presence. (*People v. Hoard* (2002) 103 Cal.App.4th 599, 608–609 [126 Cal.Rptr.2d 855] [although victim was not physically present in the parking lot when defendant drove the car away, she had been forced to relinquish her car keys].)

1651–1699. Reserved for Future Use

1900. Forgery by False Signature (Pen. Code, § 470(a))

The defendant is charged [in Count __] with forgery committed by signing a false signature [in violation of Penal Code section 470(a)].

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

1. **The defendant signed (someone else's name/ [or] a false name) to [a/an]_____** *<insert type[s] of document[s] from Pen. Code, § 470(d)>***;**

2. **The defendant did not have authority to sign that name;**

3. **The defendant knew that (he/she) did not have that authority;**

AND

4. **When the defendant signed the document, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The People allege that the defendant forged the following documents: _____ *<insert description of each document when multiple items alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant forged at least one of these documents and you all agree on which document (he/she) forged.]**

<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of forgery by false signature, you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) ~~*<insert description of document that was object of the fraud>*~~ **was more than $950. If you have a reasonable doubt whether the value of the** _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) ~~*<insert description of document that was object of the fraud>*~~ **has a value of more than $950, you must find this allegation has not been proved.]**

New January 2006; Revised August 2015, March 2019

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.
If the charged crime involves an instrument listed in Penal Code section 473(b), use the bracketed language beginning "If you find the defendant guilty . . ."

When the People allege the defendant has a prior conviction for an offense listed in Penal Code section 667(e)(2)(C)(iv) or for an offense requiring registration pursuant to subdivision~~(~~ c) of section 290, give CALCRIM No. 3100, *Prior*

Conviction: Nonbifurcated Trial or CALCRIM No. 3101, *Prior Conviction: Bifurcated Trial*.

AUTHORITY

- Elements ▸ Pen. Code, § 470(a).
- Signature Not Authorized—Element of Offense ▸ *People v. Hidalgo* (1933) 128 Cal.App. 703, 707 [18 P.2d 391]; *People v. Maioli* (1933) 135 Cal.App. 205, 207 [26 P.2d 871].
- Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.
- Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Required Additional Findings ▸ Pen. Code, § 473(b).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Property §§ 165, 168-177

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1][a], [d][2][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery ▸ Pen. Code, §§ 664, 470.

RELATED ISSUES

Documents Not Specifically Listed in Penal Code Section 470(d)

A document not specifically listed in Penal Code section 470(d) may still come within the scope of the forgery statute if the defendant "forges the . . . handwriting of another." (Pen. Code, § 470(b).) "[A] writing not within those listed may fall under the part of section 470 covering a person who 'counterfeits or forges the . . . handwriting of another' if, on its face, the writing could possibly defraud anyone. [Citations.] The false writing must be something which will have the effect of defrauding one who acts upon it as genuine." (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741–742 [38 Cal.Rptr.2d 176].) The document must affect an identifiable legal, monetary, or property right. (*Id.* at p. 743; *Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 398–399 [265 Cal.Rptr. 855] [campaign letter with false signature of President Reagan could not be basis of forgery charge].) See CALCRIM No. 1902, *Forgery of Handwriting or Seal*.

Check Fraud

A defendant who forges the name of another on a check may be charged under either Penal Code section 470 or section 476, or both. (*People v. Hawkins* (1961) 196 Cal.App.2d 832, 838 [17 Cal.Rptr. 66]; *People v. Pearson* (1957) 151 Cal.App.2d 583, 586 [311 P.2d 927].) However, the defendant may not be convicted of and sentenced on both charges for the same conduct. (Pen. Code, § 654; *People v. Hawkins, supra,* 196 Cal.App.2d at pp. 839–840 [one count ordered dismissed]; see also CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*.)

Credit Card Fraud

A defendant who forges the name of another on a credit card sales slip may be charged under either Penal Code section 470 or section 484f, or both. (*People v. Cobb* (1971) 15 Cal.App.3d 1, 4.) However, the defendant may not be convicted and sentenced on both charges for the same conduct. (Pen. Code, § 654; see also CALCRIM No. 3516, *Multiple Counts: Alternative Charges for One Event—Dual Conviction Prohibited*.)

Return of Property

Two cases have held that the defendant may present evidence that he or she returned some or all of the property in an effort to demonstrate that he or she did not originally intend to defraud. (*People v. Katzman* (1968) 258 Cal.App.2d 777, 790 [66 Cal.Rptr. 319], disapproved on other grounds in *Rhinehart v. Municipal Court* (1984) 35 Cal.3d 772, 780 fn. 11 [200 Cal.Rptr. 916, 677 P.2d 1206]; *People v. Braver* (1964) 229 Cal.App.2d 303, 307–308 [40 Cal.Rptr. 142].) However, other cases have held, based on the particular facts of the cases, that such evidence was not admissible. (*People v. Parker* (1970) 11 Cal.App.3d 500, 510 [89 Cal.Rptr. 815] [evidence that the defendant made full restitution following arrest not relevant]; *People v. Wing* (1973) 32 Cal.App.3d 197, 202 [107 Cal.Rptr. 836] [evidence of restitution not relevant where defendant falsely signed the name

of another to a check knowing he had no authority to do so].) If such evidence is presented, the court may give CALCRIM No. 1862, *Return of Property Not a Defense to Theft*. (*People v. Katzman, supra,* 258 Cal.App.2d at p. 791.) In addition, in *People v. Katzman, supra,* 258 Cal.App.2d at p. 792, the court held that, on request, the defense may be entitled to a pinpoint instruction that evidence of restitution may be relevant to determining if the defendant intended to defraud. If the court concludes that such an instruction is appropriate, the court may add the following language to the beginning of CALCRIM No. 1862, *Return of Property Not a Defense to Theft*:

> If the defendant returned or offered to return [some or all of the] property obtained, that conduct may show (he/she) did not intend to defraud. If you conclude that the defendant returned or offered to return [some or all of the] property, it is up to you to decide the meaning and importance of that conduct.

Inducing Mentally Ill Person to Sign Document

In *People v. Looney* (2004) 125 Cal.App.4th 242, 248 [22 Cal.Rptr.3d 502], the court held that the defendants could not be prosecuted for forgery where the evidence showed that the defendants induced a mentally ill person to sign legal documents transferring property to them. The court concluded that, because the defendants had accurately represented the nature of the documents to the mentally ill person and had not altered the documents after he signed, they did not commit forgery. *(Ibid.)*

1901. Forgery by Endorsement (Pen. Code, § 470(a))

The defendant is charged [in Count __] with forgery committed by endorsement [in violation of Penal Code section 470(a)].

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

1. **The defendant signed (the back of a check/(a/an) _____ <*insert type of negotiable instrument*>) with (the name of the payee of that (check/_____ <*insert type of negotiable instrument*>)/ [or] the name of another person whose signature was required to (cash that check/negotiate that instrument));**

2. **The defendant did not have authority to sign that name;**

3. **The defendant knew that (he/she) did not have that authority;**

AND

4. **When the defendant signed the document, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The People allege that the defendant forged the following documents: _____ <*insert description of each document when multiple items alleged*>. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant forged at least one of these documents and you all agree on which document (he/she) forged.]

<*Sentencing factor for instruments specified in Penal Code section 473(b)*>
[If you find the defendant guilty of forgery by endorsement, you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved.]

New January 2006; Revised March 2019

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No.3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give CALCRIM No.1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

AUTHORITY

- Elements ▸ Pen. Code, § 470(a).
- Signature Not Authorized—Element of Offense ▸ *People v. Hidalgo* (1933) 128 Cal.App. 703, 707 [18 P.2d 391]; *People v. Maioli* (1933) 135 Cal.App. 205, 207 [26 P.2d 871].

- Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.
- Forgery by Endorsement ▸ *People v. Maldonado* (1963) 221 Cal.App.2d 128, 133–134 [34 Cal.Rptr. 168]; *In re Valencia* (1927) 84 Cal.App. 26, 26 [259 P. 116].
- Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Required Additional Findings ▸ Pen. Code, § 473(b).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 148, 159–168.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1][b], [c], [d] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery ▸ Pen. Code, §§ 664, 470.

RELATED ISSUES

See the Related Issues section of the Bench Notes for CALCRIM No.1900, *Forgery by False Signature*.

1902. Forgery of Handwriting or Seal (Pen. Code, § 470(b))

The defendant is charged [in Count __] with forging [or counterfeiting] the (handwriting/seal) of another person [in violation of Penal Code section 470(b)].

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

1. **The defendant forged [or counterfeited] the (handwriting/seal) of another person on _____** *<insert type[s] of document[s] that could defraud; see discussion in Related Issues>***;**

AND

2. **When the defendant did that act, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The People allege that the defendant forged [or counterfeited] the following documents: _____ *<insert description of each document when multiple items alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the defendant forged [or counterfeited] at least one of these documents and you all agree on which document (he/she) forged [or counterfeited].]**

<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of forging [or counterfeiting] the (handwriting/seal) of another person, you must then decide whether the value of the _____(check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____(check/bond/bank bill/note/cashier's

check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved.]

New January 2006; Revised March 2019

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No.3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give CALCRIM No.1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

AUTHORITY

- Elements ▸ Pen. Code, § 470(b).
- Applies to Document Not Listed in Penal Code Section 470(d) ▸ *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741–742 [38 Cal.Rptr.2d 176].
- Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.

- Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Required Additional Findings ▸ Pen. Code, § 473(b).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 148, 159–168.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery ▸ Pen. Code, §§ 664, 470.

RELATED ISSUES

Documents Not Specifically Listed in Penal Code Section 470(d)
A document not specifically listed in Penal Code section 470(d) may still come within the scope of the statute if the defendant "forges the . . . handwriting of another." (Pen. Code, 470(b).) However, not all writings are included within the scope of this provision. (*Lewis v. Superior Court* (1990) 217 Cal.App.3d 379, 398–399 [265 Cal.Rptr.855] [campaign letter with false signature of President Reagan could not be basis of forgery charge].) "[A] writing not within those listed may fall under the part of section 470 covering a person who 'counterfeits or forges the . . . handwriting of another' if, on its face, the writing could possibly defraud anyone. [Citations.] The false writing must be something which will have the effect of defrauding one who acts upon it as genuine." (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741–742 [38 Cal.Rptr.2d 176].) The document must affect an identifiable legal, monetary, or property right. (*Id.* at p. 743; see also *Lewis v. Superior Court, supra,* 217 Cal.App.3d at pp. 398–399.)

1904. Forgery by Falsifying, Altering, or Counterfeiting Document (Pen. Code, § 470(d))

The defendant is charged [in Count __] with forgery committed by (falsely making[,]/ [or] altering[,]/ [or] forging[,]/ [or] counterfeiting) a document [in violation of Penal Code section 470(d)].

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

1. **The defendant (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) (a/an) _____** *<insert type[s] of document[s] from Pen. Code, § 470(d)>***;**

AND

2. **When the defendant did that act, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

[The People allege that the defendant (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) the following documents: _____ *<insert description of each document when multiple items alleged>***. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) at least one of these documents and you all agree on which document (he/she) (falsely made[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited).]**

<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of forgery by (falsifying[,]/[or] altering[,]/[or] counterfeiting), you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved.]

New January 2006; Revised March 2019

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under a single count that the defendant forged multiple documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant passed or attempted to pass the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

AUTHORITY

- Elements ▸ Pen. Code, § 470(d).

- Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.
- Alteration Defined ▸ *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Required Additional Findings ▸ Pen. Code, § 473(b).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 148, 159–168.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Forgery ▸ Pen. Code, §§ 664, 470.

COMMENTARY

Penal Code section 470(d) provides that every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the items specified in subdivision (d), knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery. Penal Code section 470(d), as amended by Statutes 2005, ch. 295 (A.B. 361), became effective January 1, 2006. The amendment added "or falsifies the acknowledgment of any notary public or any notary public who issues an acknowledgment knowing it to be false" after the list of specified items. The committee believes that the added language has introduced ambiguities. The phrase "falsifies the acknowledgment of any notary public" seems to refer back to

"person" at the beginning of subdivision (d), but it's not clear whether this falsification must also be done with the intent to defraud in order to be forgery. If so, why was "acknowledgement of a notary public," which is parallel in kind to the other documents and instruments listed in subdivision (d), not simply added to the list of items in subdivision (d)? With respect to the provisions regarding a notary public who issues an acknowledgment knowing it to be false, it could be that the Legislature intended the meaning to be that "[e]very person who . . . falsifies the acknowledgment of . . . any notary public who issues an acknowledgment knowing it to be false" is guilty of forgery. However, this interpretation makes the provision superfluous, as the amendment separately makes it forgery to falsify the acknowledgment of any notary public. Also, if a notary issues a false acknowledgment, it seems unlikely that it would be further falsified by a defendant who is not the notary, but who presumably sought and obtained the false acknowledgement. Alternatively, the Legislature could have intended to make a notary's issuance of false acknowledgment an act of forgery on the part of the notary. The Legislative Counsel's Digest of Assembly Bill 361 states that the bill makes it a "misdemeanor for a notary public to willfully fail to perform the required duties of a notary public" and makes "other related changes." The bill amended a number of sections of the Civil Code and the Government Code as well as Penal Code section 470. The committee awaits clarification by the Legislature or the courts to enable judges to better interpret the newly-added provisions to Penal Code section 470(d).

1905. Forgery by Passing or Attempting to Use Forged Document (Pen. Code, § 470(d))

The defendant is charged [in Count __] with forgery committed by (passing[,]/ [or] using[,]/ [or] (attempting/ [or] offering) to use) a forged document [in violation of Penal Code section 470(d)].

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

1. **The defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) [a/an] (false[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) _____** *<insert type[s] of document[s] from Pen. Code, § 470(d)>***;**

2. **The defendant knew that the _____** *<insert type[s] of document[s] from Pen. Code, § 470(d)>***(was/were) (false[,]/ altered[,]/ [or] forged[,]/ [or] counterfeited);**

   AND

3. **When the defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) the _____** *<insert type[s] of document[s] from Pen. Code, § 470(d)>***, (he/she) intended that (it/they) be accepted as genuine and (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

A person *(passes[,]/* [or] *uses[,]/* [or] *(attempts/* [or] *offers) to use)* a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.

[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

[The People allege that the defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) the following documents: _____ <*insert description of each document when multiple items alleged*>**. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use) at least one document that was (false[,]/ [or] altered[,]/ [or] forged[,]/ [or] counterfeited) and you all agree on which document (he/she) (passed[,]/ [or] used[,]/ [or] (attempted/ [or] offered) to use).]**

<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of forgery by (passing[,]/[or] using[,]/[or] attempting[,]/[or] offering to use) a forged document, you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved.]

New January 2006; Revised March 2019

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant passed or attempted to use multiple forged documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 CalRptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term "utter" as to "use" or "attempt to use" an instrument. The committee has omitted the unfamiliar term "utter" in favor of the more familiar terms "use" and "attempt to use."

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

If the prosecution also alleges that the defendant forged the same document, give CALCRIM No. 1906, *Forging and Passing or Attempting to Pass: Two Theories in One Count*.

AUTHORITY

- Elements ▸ Pen. Code, § 470(d).
- Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.
- Pass or Attempt to Use Defined ▸ *People v. Tomlinson* (1868) 35 Cal. 503, 509; *People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [155 Cal.Rptr. 89], overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122 [240 Cal.Rptr. 585, 742 P.2d 1306].
- Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Required Additional Findings ▸ Pen.Code, § 473(b).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 169.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

COMMENTARY

The committee was unable to locate any authority for what constitutes "offering to pass" a forged document. In *People v. Compton* (1899) 123 Cal. 403, 409–411 [56 P. 44], the court held that attempting to pass a forged document requires, at a minimum, that the defendant present the document to an innocent party, with an assertion that the document is genuine. (*Ibid.*; see also *People v. Fork* (1965) 233 Cal.App.2d 725, 730–731 [43 Cal.Rptr. 804] [discussing sufficiency of the evidence for attempting to pass].) In light of this holding, it is unclear if any act less than this would be sufficient for a conviction for "offering to pass." The committee urges caution when considering whether to instruct the jury with the phrase "offering to pass."

Penal Code section 470(d) provides that every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the items specified in subdivision (d), knowing the same to be false, altered, forged, or counterfeited, is guilty of forgery. Penal Code section 470(d), as amended by Statutes 2005, ch. 295 (A.B. 361), became effective January 1, 2006. The amendment added "or falsifies the acknowledgment of any notary public or any notary public who issues an acknowledgment knowing it to be false" after the list of specified items. The committee believes that the added language has introduced ambiguities. The phrase "falsifies the acknowledgment of any notary public" seems to refer back to "person" at the beginning of subdivision (d), but it's not clear whether this falsification must also be done with the intent to defraud in order to be forgery. If so, why was "acknowledgement of a notary public," which is parallel in kind to the other documents and instruments listed in subdivision (d), not simply added to the list of items in subdivision (d)? With respect to the provisions regarding a notary public who issues an acknowledgment knowing it to be false, it could be that the Legislature intended the meaning to be that "[e]very person who . . . falsifies the acknowledgment of . . . any notary public who issues an acknowledgment knowing it to be false" is guilty of forgery. However, this interpretation makes the provision superfluous, as the amendment separately makes it forgery to falsify the acknowledgment of any notary public. Also, if a notary issues a false acknowledgment, it seems unlikely that it would be further falsified by a defendant who is not the notary, but who presumably sought and obtained the false acknowledgement. Alternatively, the Legislature could have intended to make a notary's issuance of false acknowledgment an act of forgery on the part of the notary. The Legislative Counsel's Digest of Assembly Bill 361 states that the bill makes it a "misdemeanor for a notary public to willfully fail to perform the required duties of a notary public" and makes "other related changes."

The bill amended a number of sections of the Civil Code and the Government Code as well as Penal Code section 470. The committee awaits clarification by the Legislature or the courts to enable judges to better interpret the newly-added provisions to Penal Code section 470(d).

1930. Possession of Forged Document (Pen. Code, § 475(a))

The defendant is charged [in Count __] with (possessing/ [or] receiving) (a/an) (forged[,]/ [or] altered[,]/ [or] counterfeit) document [in violation of Penal Code section 475(a)].

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

1. **The defendant (possessed/ [or] received) (a/an) (forged[,]/ [or] altered[,]/ [or] counterfeit) _____** *<insert type[s] of document[s] from Pen. Code, § 470(d)>***;**

2. **The defendant knew that the document was (forged[,]/ [or] altered[,]/ [or] counterfeit);**

3. **The defendant intended to (pass[,]/ [or] use[,]/ [or] aid the passage or use of) the document as genuine;**

AND

4. **When the defendant (possessed/ [or] received) the document, (he/she) intended to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

A person *(passes/* [or] *uses)* a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.

[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

[The People allege that the defendant possessed the following documents: _____ <*insert description of each document when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People have proved that the defendant possessed at least one of these documents and you all agree on which document (he/she) possessed.]

<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of **(possessing/ [or] receiving) (a/an) (forged[,]/ [or] altered[,]/[or] counterfeit) document**, you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved

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New January 2006; Revised March 2019

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant possessed multiple forged items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term "utter" as to "use" or "attempt to use" an instrument. The committee has omitted the unfamiliar term "utter" in favor of the more familiar terms "use" and "attempt to use."

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements ▸ Pen. Code, § 475(a).
- Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.
- Pass or Attempt to Use Defined ▸ *People v. Tomlinson* (1868) 35 Cal. 503, 509; *People v. Jackson* (1979) 92 Cal.App.3d 556, 562 [155 Cal.Rptr. 89], disapproved on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1123 [240 Cal.Rptr. 585, 742 P.2d 1306].
- Alteration Defined ▸ *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Required Additional Findings ▸ Pen. Code, § 473(b).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 173.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

RELATED ISSUES

Possession and Uttering

The defendant cannot be convicted of possessing and uttering the same document. (*People v. Reisdorff* (1971) 17 Cal.App.3d 675, 679 [95 Cal.Rptr.224].)

Possession of Multiple Documents Only One Offense
Even if the defendant possessed multiple forged documents at the same time, only one violation of Penal Code section 475 may be charged. (*People v. Bowie* (1977) 72 Cal.App.3d 143, 156–157 [140 Cal.Rptr.49] [11 checks supported 1 count, not 11].)

1932. Possession of Completed Check: With Intent to Defraud (Pen. Code, § 475(c))

The defendant is charged [in Count __] with possessing a completed (check[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] warrant or county order) with intent to defraud [in violation of Penal Code section 475(c)].

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

1. **The defendant possessed a completed (check[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] warrant or county order);**

AND

2. **When the defendant possessed the document, (he/she) intended to (pass[,]/ [or] use[,]/ [or] aid the passage or use of) the document in order to defraud.**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

A person *(passes/* [or] *uses)* a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[The (check[,]/ [or] money order[,]/ [or] traveler's check[,]/ [or] warrant or county order) may be real or false.]

[The People allege that the defendant possessed the following documents: _____ <*insert description of each document when multiple items alleged*>. You may not find the defendant guilty unless you all agree that the People

have proved that the defendant possessed at least one of these documents and you all agree on which document (he/she) possessed.]

<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of possessing a completed (check[,]/ [or] money order[,]/ [or] traveler's check) with intent to defraud**, you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved.]**

New January 2006; Revised March 2019

BENCH NOTES

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

If the prosecution alleges under a single count that the defendant possessed multiple items, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No.3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term "utter" as to "use" or "attempt to use" an instrument. The committee has omitted the unfamiliar term "utter" in favor of the more familiar terms "use" and "attempt to use."

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements ▸ Pen. Code, § 475(c).
- Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.
- Unanimity Instruction If Multiple Items ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Required Additional Findings ▸ Pen. Code, § 473(b).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, § 173.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

RELATED ISSUES

See the Related Issues section to CALCRIM No.1930, *Possession of Forged Document*.

1933–1934. Reserved for Future Use

1935. Making, Passing, etc., Fictitious Check or Bill (Pen. Code, § 476)

The defendant is charged [in Count _____] with (possessing[,]/ [or] making[,]/ [or] passing[,]/ [or] using[,]/ [or] attempting to pass or use) (a/an) (false/ [or] altered) (check[,]/ [or] bill[,]/ [or] note[,]/ [or other] legal writing for the payment of money or property) [in violation of Penal Code section 476].

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

1. **The defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) (a/an) (false/ [or] altered) (check[,]/ [or] bill[,]/ [or] note[,]/ [or other] legal writing for the payment of money or property);**

2. **The defendant knew that the document was (false/ [or] altered);**

[AND]

3. **When the defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) the document, (he/she) intended to defraud(;/.)**

<Give element 4 only when possession charged.>
[AND

4. **When the defendant possessed the document, (he/she) intended to pass or use the document as genuine.]**

Someone *intends to defraud* if he or she intends to deceive another person either to cause a loss of (money[,]/ [or] goods[,]/ [or] services[,]/ [or] something [else] of value), or to cause damage to, a legal, financial, or property right.

[For the purpose of this instruction, a *person* includes (a governmental agency/a corporation/a business/an association/the body politic).]

[It is not necessary that anyone actually be defrauded or actually suffer a financial, legal, or property loss as a result of the defendant's acts.]

[A person *alters* a document if he or she adds to, erases, or changes a part of the document that affects a legal, financial, or property right.]

A person *(passes[,]/* [or] *uses[,]/* [or] *attempts to pass or use)* a document if he or she represents to someone that the document is genuine. The representation may be made by words or conduct and may be either direct or indirect.

[The People allege that the defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) the following documents: _____ *<insert description of each document when multiple items alleged>***. You may not find the defendant guilty unless you all agree that the People have proved that the defendant (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use) at least one document that was (fictitious/ [or] altered) and you all agree on which document (he/she) (possessed[,]/ [or] made[,]/ [or] passed[,]/ [or] used[,]/ [or] attempted to pass or use).]**

<Sentencing factor for instruments specified in Penal Code section 473(b)>
[If you find the defendant guilty of (possessing[,]/[or] making[,]/ [or] passing [,]/ [or] using[,]/ [or] attempting to pass or use) a fictitious (check/bill/note/legal writing), you must then decide whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) was more than $950. If you have a reasonable doubt whether the value of the _____ (check/bond/bank bill/note/cashier's check/traveler's check/money order) has a value of more than $950, you must find this allegation has not been proved.]

New January 2006; Revised April 2011, March 2019

BENCH NOTES

Instructional Duty

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

If the prosecution alleges under a single count that the defendant passed or possessed multiple forged documents, the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].) Give the last bracketed paragraph, inserting the items alleged. (See also Bench Notes to CALCRIM No. 3500, *Unanimity*, discussing when instruction on unanimity is and is not required.)

People v. Pugh (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770], defines the term "utter" as to "use" or "attempt to use" an instrument. The committee has omitted the unfamiliar term "utter" in favor of the more familiar terms "use" and "attempt to use."

If the prosecution alleges that the defendant possessed the document, give element 4. Do not give element 4 if the prosecution alleges that the defendant made, passed, used, or attempted to pass or use the document.

Give the bracketed sentence that begins with "For the purpose of this instruction" if the evidence shows an intent to defraud an entity or association rather than a natural person. (Pen. Code, § 8.)

Give the bracketed sentence that begins with "It is not necessary" if the evidence shows that the defendant did not succeed in defrauding anyone. (*People v. Morgan* (1956) 140 Cal.App.2d 796, 801 [296 P.2d 75].)

AUTHORITY

- Elements ▸ Pen. Code, § 476.
- Intent to Defraud ▸ *People v. Pugh* (2002) 104 Cal.App.4th 66, 72 [127 Cal.Rptr.2d 770]; *People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 745 [38 Cal.Rptr.2d 176].
- Intent to Defraud Entity ▸ Pen. Code, § 8.
- Pass or Attempt to Use Defined ▸ *People v. Tomlinson* (1868) 35 Cal. 503, 509; *People v. Jackson* (1979) 92 Cal.App.3d 556, 561 [155 Cal.Rptr. 89], overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1122 [240 Cal.Rptr. 585, 742 P.2d 1306].
- Alteration Defined ▸ *People v. Nesseth* (1954) 127 Cal.App.2d 712, 718–720 [274 P.2d 479]; *People v. Hall* (1942) 55 Cal.App.2d 343, 352 [130 P.2d 733].
- Unanimity Instruction If Multiple Documents ▸ *People v. Sutherland* (1993) 17 Cal.App.4th 602, 619, fn. 6 [21 Cal.Rptr.2d 752].
- Explanation of "Fictitious." *People v. Mathers* (2010) 183 Cal.App.4th 1464, 1467-1468 [108 Cal.Rptr.3d 720].
- Required Additional Findings ▸ Pen. Code, § 473(b).
- Scope of Pen. Code, §473(b) ▸ *People v. Gonzales* (2018) 6 Cal.5th 44 [237 Cal.Rptr.3d 193, 424 P.3d 280].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Property, §§ 150, 169, 173.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 143, *Crimes Against Property,* § 143.04[1], [2] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Attempted Making, etc., of Fictitious Check ▸ Pen. Code, §§ 664, 476.

RELATED ISSUES

Check Fraud

A defendant who forges the name of another on a check may be charged under either Penal Code section 470 or section 476. (*People v. Hawkins* (1961) 196 Cal.App.2d 832, 838 [17 Cal.Rptr. 66]; *People v. Pearson* (1957) 151 Cal.App.2d 583, 586 [311 P.2d 927].) However, the defendant may not be convicted of and sentenced on both charges for the same conduct. (Pen. Code, § 654; *People v. Hawkins, supra,* 196 Cal.App.2d at pp. 839–840; see also CALCRIM No. 3516, *Multiple Counts—Alternative Charges for One Event—Dual Conviction Prohibited*.)

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2140. Failure to Perform Duty Following Accident: Death or Injury—Defendant Driver (Veh. Code, §§ 20001, 20003 & 20004)

The defendant is charged [in Count __] with failing to perform a legal duty following a vehicle accident that caused (death/ [or] [permanent] injury) to another person [in violation of _____ <*insert appropriate code section[s]*>].
To prove that the defendant is guilty of this crime, the People must prove that:

1. **While driving, the defendant was involved in a vehicle accident;**

2. **The accident caused (the death of/ [or] [permanent, serious] injury to) someone else;**

3. **The defendant knew that (he/she) had been involved in an accident that injured another person [or knew from the nature of the accident that it was probable that another person had been injured];**

AND

4. **The defendant willfully failed to perform one or more of the following duties:**

   (a) To immediately stop at the scene of the accident;

   (b) To provide reasonable assistance to any person injured in the accident;

   (c) To give to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident all of the following information:

   - **The defendant's name and current residence address;**

   [AND]

   - **The registration number of the vehicle (he/she) was driving(;/.)**

<Give following sentence if defendant not owner of vehicle.>
[[AND]

- **The name and current residence address of the owner of the vehicle if the defendant is not the owner(;/.)]**

<Give following sentence if occupants of defendant's vehicle were injured.>
[AND

- **The names and current residence addresses of any occupants of the defendant's vehicle who were injured in the accident.]**

[AND]

(d) When requested, to show (his/her) driver's license if available, to (the person struck/the driver or occupants of any vehicle collided with) or any peace officer at the scene of the accident(;/.)

<Give element 4(e) if accident caused death.>
[AND

(e) The driver must, without unnecessary delay, notify either the police department of the city where the accident happened or the local headquarters of the California Highway Patrol if the accident happened in an unincorporated area.]

Someone commits an act *willfully* when he or she does it willingly or on purpose. It is not required that he or she intend to break the law, hurt someone else, or gain any advantage.

The duty to *immediately stop* means that the driver must stop his or her vehicle as soon as reasonably possible under the circumstances.

To *provide reasonable assistance* means the driver must determine what assistance, if any, the injured person needs and make a reasonable effort to see that such assistance is provided, either by the driver or someone else. *Reasonable assistance* includes transporting anyone who has been injured for medical treatment, or arranging the transportation for such treatment, if it is apparent that treatment is necessary or if an injured person requests transportation. [The driver is not required to provide assistance that is

unnecessary or that is already being provided by someone else. However, the requirement that the driver provide assistance is not excused merely because bystanders are on the scene or could provide assistance.]

The driver of a vehicle must perform the duties listed regardless of who was injured and regardless of how or why the accident happened. It does not matter if someone else caused the accident or if the accident was unavoidable.

You may not find the defendant guilty unless all of you agree that the People have proved that the defendant failed to perform at least one of the required duties. You must all agree on which duty the defendant failed to perform.

[To be *involved in a vehicle accident* means to be connected with the accident in a natural or logical manner. It is not necessary for the driver's vehicle to collide with another vehicle or person.]

[When providing his or her name and address, the driver is required to identify himself or herself as the driver of a vehicle involved in the accident.]

[A *permanent, serious injury* is one that permanently impairs the function or causes the loss of any organ or body part.]

[An accident causes (death/ [or] [permanent, serious] injury) if the (death/ [or] injury) is the direct, natural, and probable consequence of the accident and the (death/ [or] injury) would not have happened without the accident. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all the circumstances established by the evidence.]

[There may be more than one cause of (death/ [or] [permanent, serious] injury). An accident causes (death/ [or] injury) only if it is a substantial factor in causing the (death/ [or] injury). A *substantial factor* is more than a trivial or remote factor. However, it need not be the only factor that causes the (death/ [or] injury).]

[If the accident caused the defendant to be unconscious or disabled so that (he/she) was not capable of performing the duties required by law, then (he/she) did not have to perform those duties at that time. [However, (he/she) was required to do so as soon as reasonably possible.]]

New January 2006; Revised August 2006, October 2010, February 2012, March 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction defining the elements of the crime. Give this instruction if the prosecution alleges that the defendant drove the vehicle. If the prosecution alleges that the defendant was a nondriving owner present in the vehicle or other passenger in control of the vehicle, give CALCRIM No. 2141, *Failure to Perform Duty Following Accident: Death or Injury—Defendant Nondriving Owner or Passenger in Control.*

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

If the defendant is charged under Vehicle Code section 20001(b)(1) with leaving the scene of an accident causing injury, but not death or permanent, serious injury, delete the words "death" and "permanent, serious" from the instruction. If the defendant is charged under Vehicle Code section 20001(b)(2) with leaving the scene of an accident causing death or permanent, serious injury, use either or both of these options throughout the instruction, depending on the facts of the case. When instructing on both offenses, give this instruction using the words "death" and/or "permanent, serious injury," and give CALCRIM No. 2142, *Failure to Perform Duty Following Accident: Lesser Included Offense*.

Give bracketed element 4(e) only if the accident caused a death.

Give the bracketed portion that begins with "The driver is not required to provide assistance" if there is an issue over whether assistance by the defendant to the injured person was necessary in light of aid provided by others. (See *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676]; *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]; see also discussion in the Related Issues section below.)

Give the bracketed paragraph defining "involved in a vehicle accident" if that is an issue in the case.

Give the bracketed paragraph stating that "the driver is required to identify himself or herself as the driver" if there is evidence that the defendant stopped and identified himself or herself but not in a way that made it apparent to the other parties that the defendant was the driver. (*People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].)

Give the bracketed paragraph that begins with "If the accident caused the defendant to be unconscious" if there is sufficient evidence that the defendant was unconscious or disabled at the scene of the accident.

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

AUTHORITY

- Elements ▸ Veh. Code, §§ 20001, 20003 & 20004.
- Sentence for Death or Permanent Injury ▸ Veh. Code, § 20001(b)(2).
- Sentence for Injury ▸ Veh. Code, § 20001(b)(1).
- Knowledge of Accident and Injury ▸ *People v. Holford* (1965) 63 Cal.2d 74, 79–80 [45 Cal.Rptr. 167, 403 P.2d 423]; *People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207]; *People v. Hamilton* (1978) 80 Cal.App.3d 124, 133–134 [145 Cal.Rptr. 429].
- Willful Failure to Perform Duty ▸ *People v. Crouch* (1980) 108 Cal.App.3d Supp. 14, 21–22 [166 Cal.Rptr. 818].
- Duty Applies Regardless of Fault for Accident ▸ *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914].
- Involved Defined ▸ *People v. Bammes* (1968) 265 Cal.App.2d 626, 631 [71 Cal.Rptr. 415]; *People v. Sell* (1950) 96 Cal.App.2d 521, 523 [215 P.2d 771].
- Immediately Stopped Defined ▸ *People v. Odom* (1937) 19 Cal.App.2d 641, 646–647 [66 P.2d 206].
- Duty to Render Assistance ▸ *People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914]; *People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676].
- Permanent, Serious Injury Defined ▸ Veh. Code, § 20001(d).
- Statute Does Not Violate Fifth Amendment Privilege ▸ *California v. Byers* (1971) 402 U.S. 424, 434 [91 S.Ct. 1535, 29 L.Ed.2d 9].
- Must Identify Self as Driver ▸ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].

- Unanimity Instruction Required ▸ *People v. Scofield* (1928) 203 Cal. 703, 710 [265 P. 914].
- Unconscious Driver Unable to Comply at Scene ▸ *People v. Flores* (1996) 51 Cal.App.4th 1199, 1204 [59 Cal.Rptr.2d 637].
- Offense May Occur on Private Property ▸ *People v. Stansberry* (1966) 242 Cal.App.2d 199, 204 [51 Cal.Rptr. 403].
- Duty Applies to Injured Passenger in Defendant's Vehicle ▸ *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1546 [83 Cal.Rptr.2d 493].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 246–252.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing*, §§ 91.60[2][b][ii], 91.81[1][d] (Matthew Bender).

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 140, *Challenges to Crimes*, § 140.03, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.02[3A][a] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Failure to Stop Following Accident—Injury ▸ Veh. Code, § 20001(b)(1).
- Misdemeanor Failure to Stop Following Accident—Property Damage ▸ Veh. Code, § 20002; but see *People v. Carter* (1966) 243 Cal.App.2d 239, 242–243 [52 Cal.Rptr. 207].

RELATED ISSUES

Constructive Knowledge of Injury

"[K]nowledge may be imputed to the driver of a vehicle where the fact of personal injury is visible and obvious or where the seriousness of the collision would lead a reasonable person to assume there must have been resulting injuries." (*People v. Carter* (1966) 243 Cal.App.2d 239, 241 [52 Cal.Rptr. 207] [citations omitted].)

Accusatory Pleading Alleged Property Damage

If accusatory pleading alleges property damage, Veh. Code, § 20002, see *People v. Carter* (1966) 243 Cal.App.2d 239, 242–243 [52 Cal.Rptr. 207].

Reasonable Assistance

Failure to render reasonable assistance to an injured person constitutes a violation of the statute. (*People v. Limon* (1967) 252 Cal.App.2d 575, 578 [60 Cal.Rptr. 448].) "In this connection it must be noted that the statute requires that *necessary* assistance be rendered." (*People v. Scofield* (1928) 203 Cal. 703, 708 [265 P. 914] [emphasis in original].) In *People v. Scofield, supra,* the court held that where other people were caring for the injured person, the defendant's "assistance was not *necessary*." (*Id.* at p. 709 [emphasis in original].) An instruction limited to the statutory language on rendering assistance "is inappropriate where such assistance by the driver is unnecessary, as in the case where paramedics have responded within moments following the accident." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1027 [80 Cal.Rptr.2d 676].) However, "the driver's duty to render necessary assistance under Vehicle Code section 20003, at a minimum, requires that the driver first ascertain what assistance, if any, the injured person needs, and then the driver must make a reasonable effort to see that such assistance is provided, whether through himself or third parties." *(Ibid.)* The presence of bystanders who offer assistance is not alone sufficient to relieve the defendant of the duty to render aid. *(Ibid.)* "[T]he 'reasonable assistance' referred to in the statute might be the summoning of aid," rather than the direct provision of first aid by the defendant. (*People v. Limon* (1967) 252 Cal.App.2d 575, 578 [60 Cal.Rptr. 448].)

2300. Sale, Transportation for Sale, etc., of Controlled Substance (Health & Saf. Code, §§ 11352, 11379)

The defendant is charged [in Count __] with (selling/furnishing/administering/giving away/transporting for sale/importing) _____ <*insert type of controlled substance*>, a controlled substance [in violation of _____ <*insert appropriate code section[s]*>].

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

1. **The defendant (sold/furnished/administered/gave away/transported for sale/imported into California) a controlled substance;**

2. **The defendant knew of its presence;**

3. **The defendant knew of the substance's nature or character as a controlled substance;**

<When instructing on transportation for sale, give element 4>

[AND]

[4. When the defendant transported the controlled substance, (he/she) intended (to sell it/[or] that someone else sell it);]

[AND]

<If the controlled substance is not listed in the schedules set forth in sections 11054 through 11058 of the Health and Safety Code, give paragraph 4/5B and the definition of analog substance below instead of 4/5A.>

(4/5)A. The controlled substance was _____ *<insert type of controlled substance>***(;/.)**

(4/5)B. The controlled substance was an analog of _____ *<insert type of controlled substance>***(;/.)**

<Give element 4/5/6 when instructing on usable amount; see Bench Notes.>

[AND

(4/5/6). The controlled substance was in a usable amount.]

[In order to prove that the defendant is guilty of this crime, the People must prove that _____<*insert name of analog drug*>** is an analog of _____**<*insert type of controlled substance*>**. An analog of a controlled substance:**

[1. Has a chemical structure substantially similar to the structure of a controlled substance(./;)]

[OR]

[(2/1). Has, is represented as having, or is intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to or greater than the effect of a controlled substance.]]

[*Selling* for the purpose of this instruction means exchanging a controlled substance for money, services, or anything of value.]

[A person *transports* for sale if he or she carries or moves something from one location to another for sale, even if the distance is short.]

[A person *administers* a substance if he or she applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance.]

[A *usable amount* is a quantity that is enough to be used by someone as a controlled substance. Useless traces [or debris] are not usable amounts. On the other hand, a usable amount does not have to be enough, in either amount or strength, to affect the user.]

[The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/furnished/administered/gave away/transported for sale/imported).]

[A person does not have to actually hold or touch something to (sell/furnish/administer/transport it for sale/import/give it away) [it]. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

New January 2006; Revised October 2010, February 2014, August 2014, February 2016, September 2017, March 2019

BENCH NOTES

Instructional Duty

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

Transportation of a controlled substance requires a "usable amount." (*People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].) Sale of a controlled substance does not. (See *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316].) When the prosecution alleges transportation, give bracketed element 5 and the definition of usable amount. When the prosecution alleges sales, do not use these portions. There is no case law on whether furnishing, administering, giving away, or importing require usable quantities.

If the defendant is charged with attempting to import or transport a controlled substance, give CALCRIM No. 460, *Attempt Other Than Attempted Murder*, with this instruction.

AUTHORITY

- Elements. ▸ Health & Saf. Code, §§ 11352, 11379.
- Administering. ▸ Health & Saf. Code, § 11002.
- Administering Does Not Include Self-Administering. ▸ *People v. Label* (1974) 43 Cal.App.3d 766, 770–771 [119 Cal.Rptr. 522].
- Knowledge. ▸ *People v. Horn* (1960) 187 Cal.App.2d 68, 74–75 [9 Cal.Rptr. 578].
- Selling. ▸ *People v. Lazenby* (1992) 6 Cal.App.4th 1842, 1845 [8 Cal.Rptr.2d 541].
- Transportation: Usable Amount. ▸ *People v. Emmal* (1998) 68 Cal.App.4th 1313, 1316 [80 Cal.Rptr.2d 907]; *People v. Ormiston* (2003) 105 Cal.App.4th 676, 682 [129 Cal.Rptr.2d 567].

- Usable Amount. ‣ *People v. Rubacalba* (1993) 6 Cal.4th 62, 65–67 [23 Cal.Rptr.2d 628, 859 P.2d 708]; *People v. Piper* (1971) 19 Cal.App.3d 248, 250 [96 Cal.Rptr. 643].
- Definition of Analog Controlled Substance. ‣ Health & Saf. Code, § 11401; *People v. Davis* (2013) 57 Cal.4th 353, 357, fn. 2 [159 Cal.Rptr.3d 405, 303 P.3d 1179].
- No Finding Necessary for "Expressly Listed" Controlled Substance. ‣ *People v. Davis*, *supra,* 57 Cal.4th at p. 362, fn 5.
- Intent Requirement for Transportation for Sale ‣ *People v. Lua* (2017) 10 Cal.App.5th 1004, 1014-1016 [217 Cal.Rptr.3d 23].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 115-123.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses,* § 145.01[1] (Matthew Bender).

LESSER INCLUDED OFFENSES

- Simple Possession Is Not a Lesser Included Offense of This Crime. (*People v. Murphy* (2007) 154 Cal.App.4th 979, 983-984 [64 Cal.Rptr.3d 926]; *People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)
- Possession for Sale Is Not a Lesser Included Offense of This Crime. (*People v. Peregrina-Larios* (1994) 22 Cal.App.4th 1522, 1524 [28 Cal.Rptr.2d 316] [lesser related offense but not necessarily included].)

Note: In reviewing the appropriateness of sentencing enhancements, *Valenzuela v. Superior Court* (1995) 33 Cal.App.4th 1445, 1451 [39 Cal.Rptr.2d 781], finds that offering to sell is a lesser included offense of selling, and that therefore a lesser sentence is appropriate for offering to sell. However, the cases it cites in support of that conclusion do not address that specific issue. Because offering to sell is a specific-intent crime (see *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1]) and selling does not require specific intent, the committee does not include offering to sell as a lesser included offense.

RELATED ISSUES

Transportation

Transportation does not require personal possession by the defendant. (*People v. Rogers* (1971) 5 Cal.3d 129, 134 [95 Cal.Rptr. 601, 486 P.2d 129] [abrogated in part by statute on other grounds].) Transportation of a controlled substance includes transporting by riding a bicycle (*People v. LaCross* (2001) 91 Cal.App.4th 182, 187 [109 Cal.Rptr.2d 802]) or walking (*People v. Ormiston* (2003) 105 Cal.App.4th 676, 685 [129 Cal.Rptr.2d 567]). The controlled substance must be moved "from one location to another," but the movement may be minimal. (*Id.* at p. 684.)

2500. Illegal Possession, etc., of Weapon

The defendant is charged [in Count __] with unlawfully (possessing/manufacturing/causing to be manufactured/importing/keeping for sale/offering or exposing for sale/giving/lending/buying/receiving) a weapon, specifically (a/an) _____ *<insert type of weapon >* **[in violation of Penal Code section[s] _____***<insert appropriate code section[s]>***].**

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

1. **The defendant (possessed/manufactured/caused to be manufactured/imported into California/kept for sale/offered or exposed for sale/gave/lent/bought/received) (a/an) _____** *<insert type of weapon>***;**

2. **The defendant knew that (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the _____** *<insert type of weapon>***;**

[AND]

<Alternative 3A—object capable of innocent uses>

[3. The defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object as a weapon (;/.)]

<Alternative 3B—object designed solely for use as weapon>

[3. The defendant knew that the object (was (a/an) _____ *<insert characteristics of weapon, e.g., "unusually short shotgun, penknife containing stabbing instrument">*/**could be used _____** *<insert description of weapon, e.g., "as a stabbing weapon," or "for purposes of offense or defense">***).]**

<Give element 4 only if defendant is charged with offering or exposing for sale.>

[AND

4. The defendant intended to sell it.]

[The People do not have to prove that the defendant intended to use the object as a weapon.]

*<Give only if alternative 3A is given.>***[When deciding whether the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the object *as a weapon*, consider all the surrounding circumstances relating to that question, including when and where the object was (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received)[,] [and] [where the defendant was going][,] [and] [whether the object was changed from its standard form][,] and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose.]**

<Give only if alternative 3B is given.>
~~**[The People do not have to prove that the defendant intended to use the object as a weapon.]**~~

(A/An) _____ *<insert type of weapon>* **means** _____ *<insert appropriate definition)>***.**

<Give only if the weapon used has specific characteristics of which the defendant must have been aware.>
[A _____*<insert type of weapon specified in element 3B>* **is** _____*<insert defining characteristics of weapon>.*

[The People do not have to prove that the object was (concealable[,]/ [or] carried by the defendant on (his/her) person[,]/ [or] (displayed/visible)).]]

[(A/An) _____ *<insert prohibited firearm>* **does not need to be in working order if it was designed to shoot and appears capable of shooting.]**

[Two or more people may possess something at the same time.]

[A person does not have to actually hold or touch something to possess it. It is enough if the person has (control over it/ [or] the right to control it), either personally or through another person.]

[The People allege that the defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) the following weapons: _____ *<insert description of each weapon when multiple items alleged>***. You may not find the defendant guilty unless all of you agree that the People have proved that the**

defendant (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) at least one of these weapons and you all agree on which weapon (he/she) (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received).]

<Defense: Statutory Exemptions>
[The defendant did not unlawfully (possess/manufacture/cause to be manufactured/import/keep for sale/offer or expose for sale/give/lend/buy/receive) (a/an) _____ *<insert type of weapon>* **if _____** *<insert exception>***. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully (possessed/manufactured/caused to be manufactured/imported/kept for sale/offered or exposed for sale/gave/lent/bought/received) (a/an) _____** *<insert type of weapon>***. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

New January 2006; Revised August 2006, April 2008, February 2012, February 2015, March 2017, March 2019

BENCH NOTES

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

Penal Code section 12020 has been repealed. In its place, the legislature enacted numerous new statutes that became effective January 1, 2012. Whenever a blank in the instruction calls for inserting a type of weapon, an exception, or a definition, refer to the appropriate new Penal Code section.

Element 3 contains the requirement that the defendant know that the object is a weapon. A more complete discussion of this issue is provided in the Commentary section below. Select alternative 3A if the object is capable of innocent uses. In such cases, the court has a **sua sponte** duty to instruct on when an object is possessed "as a weapon." (*People v. Fannin, supra,* 91 Cal.App.4th at p. 1404; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].)

Select alternative 3B if the object "has no conceivable innocent function" (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1405 [111 Cal.Rptr.2d 496]), or when the

item is specifically designed to be one of the weapons defined in the Penal Code (see *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]).

Give element 4 only if the defendant is charged with offering or exposing for sale. (See *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].)

For any of the weapons not defined in the Penal Code, use an appropriate definition from the case law, where available.

If the prosecution alleges under a single count that the defendant possessed multiple weapons and the possession was "fragmented as to time . . . [or] space," the court has a **sua sponte** duty to instruct on unanimity. (See *People v. Wolfe* (2003) 114 Cal.App.4th 177, 184–185 [7 Cal.Rptr.3d 483].) Give the bracketed paragraph beginning "The People allege that the defendant possessed the following weapons," inserting the items alleged. Also make the appropriate adjustments to the language of the instruction to refer to multiple weapons or objects.

Defenses—Instructional Duty

If there is sufficient evidence to raise a reasonable doubt about the existence of one of the statutory exemptions, the court has a **sua sponte** duty to give the bracketed instruction on that defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph beginning, "The defendant did not unlawfully . . . .".

AUTHORITY

- Elements. ▸ Pen. Code, §§ 19200, 20310, 20410, 20510, 20610, 20710, 20910, 21110, 21810, 22010, 22210, 24310, 24410, 24510, 24610, 24710, 30210, 31500, 32310, 32311, 32900, 33215, 33600.

- Need Not Prove Intent to Use. ▸ *People v. Rubalcava* (2000) 23 Cal.4th 322, 328 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Grubb* (1965) 63 Cal.2d 614, 620–621, fn. 9 [47 Cal.Rptr. 772, 408 P.2d 100].
- Knowledge Required. ▸ *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885].
- Specific Intent Required for Offer to Sell. ▸ *People v. Jackson* (1963) 59 Cal.2d 468, 469–470 [30 Cal.Rptr. 329, 381 P.2d 1].

- Specific Intent Includes Knowledge of Forbidden Characteristics of Weapon. ▸ *People v. King* (2006) 38 Cal.4th 617, 627–628 [42 Cal.Rptr.3d 743, 133 P.3d 636].
- Innocent Object—Must Prove Possessed as Weapon. ▸ *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100]; *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].
- Definition of Blackjack, etc. ▸ *People v. Fannin* (2001) 91 Cal.App.4th 1399, 1402 [111 Cal.Rptr.2d 496]; *People v. Mulherin* (1934) 140 Cal.App. 212, 215 [35 P.2d 174].
- Firearm Need Not Be Operable. ▸ *People v. Favalora* (1974) 42 Cal.App.3d 988, 991 [117 Cal.Rptr. 291].
- Measurement of Sawed-Off Shotgun. ▸ *People v. Rooney* (1993) 17 Cal.App.4th 1207, 1211–1213 [21 Cal.Rptr.2d 900]; *People v. Stinson* (1970) 8 Cal.App.3d 497, 500 [87 Cal.Rptr. 537].
- Measurement of Fléchette Dart. ▸ *People v. Olmsted* (2000) 84 Cal.App.4th 270, 275 [100 Cal.Rptr.2d 755].
- Constructive vs. Actual Possession. ▸ *People v. Azevedo* (1984) 161 Cal.App.3d 235, 242–243 [207 Cal.Rptr. 270], questioned on other grounds in *In re Jorge M.* (2000) 23 Cal.4th 866, 876, fn. 6 [98 Cal.Rptr.2d 466, 4 P.3d 297].
- Knowledge of Specific Characteristics of Weapon. ▸ *People v. King* (2006) 38 Cal.4th 617, 628 [42 Cal.Rptr.3d 743, 133 P.3d 636].
- Intent to Use as a Weapon. ▸ *People v. Baugh* (2018) 20 Cal.App.5th 438, 446 [228 Cal.Rptr.3d 898].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 211-212.

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

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01 (Matthew Bender).

COMMENTARY

Element 3—Knowledge

"Intent to use a weapon is not an element of the crime of weapon possession." (*People v. Fannin* (2001) 91 Cal.App.4th 1399, 1404 [111 Cal.Rptr.2d 496].) However, interpreting now-repealed Penal Code section 12020(a)(4), possession of a concealed dirk or dagger, the Supreme Court stated that "[a] defendant who does not know that he is carrying the weapon or that the concealed instrument may be used as a stabbing weapon is . . . not guilty of violating section 12020." (*People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52].) Applying this holding to possession of other weapons prohibited under now-repealed Penal Code section 12020(a), the courts have concluded that the defendant must know that the object is a weapon or may be used as a weapon, or must possess the object "as a weapon." (*People v. Gaitan* (2001) 92 Cal.App.4th 540, 547 [111 Cal.Rptr.2d 885]; *People v. Taylor* (2001) 93 Cal.App.4th 933, 941 [114 Cal.Rptr.2d 23]; *People v. Fannin, supra,* 91 Cal.App.4th at p. 1404.)

In *People v. Gaitan, supra,* 92 Cal.App.4th at p. 547, for example, the court considered the possession of "metal knuckles," defined in now-repealed Penal Code section 12020(c)(7) as an object "worn for purposes of offense or defense." The court held that the prosecution does not have to prove that the defendant *intended* to use the object for offense or defense but must prove that the defendant *knew* that "the instrument may be used for purposes of offense or defense." (*Id.* at p. 547.)

Similarly, in *People v. Taylor, supra,* 93 Cal.App.4th at p. 941, involving possession of a cane sword, the court held that "[i]n order to protect against the significant possibility of punishing innocent possession by one who believes he or she simply has an ordinary cane, we infer the Legislature intended a scienter requirement of actual knowledge that the cane conceals a sword."

Finally, *People v. Fannin, supra,* 91 Cal.App.4th at p. 1404, considered whether a bicycle chain with a lock at the end met the definition of a "slungshot." The court held that "if the object is not a weapon per se, but an instrument with ordinary innocent uses, the prosecution must prove that the object was possessed *as a weapon*." (*Ibid.* [emphasis in original]; see also *People v. Grubb* (1965) 63 Cal.2d 614, 620–621 [47 Cal.Rptr. 772, 408 P.2d 100] [possession of modified baseball bat].)

In element 3 of the instruction, the court should give alternative 3B if the object has no innocent uses, inserting the appropriate description of the weapon. If the object has innocent uses, the court should give alternative 3A. The court may

choose not to give element 3 if the court concludes that a previous case holding that the prosecution does not need to prove knowledge is still valid authority. However, the committee would caution against this approach in light of *Rubalcava* and *In re Jorge M*. (See *People v. Schaefer* (2004) 118 Cal.App.4th 893, 904–905 [13 Cal.Rptr.3d 442] [observing that, since *In re Jorge M.*, it is unclear if the prosecution must prove that the defendant knew shotgun was "sawed off" but that failure to give instruction was harmless if error].)

It is not unlawful to possess a large-capacity magazine or large-capacity conversion kit. It is unlawful, however, to receive or buy these items after January 1, 2014, the effective date of Penal Code sections 32310 and 32311.

2530. Carrying Loaded Firearm (Pen. Code, § 25850(a))

The defendant is charged [in Count __] with unlawfully carrying a loaded firearm (on (his/her) person/in a vehicle) [in violation of Penal Code section 25850(a)].

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

1. **The defendant carried a loaded firearm (on (his/her) person/in a vehicle);**

2. **The defendant knew that (he/she) was carrying a firearm;**

AND

3. **At that time, the defendant was in a public place or on a public street in (an incorporated city/in an unincorporated area where it was unlawful to discharge a firearm).**

[A *public place* is a place that is open and accessible to anyone who wishes to go there.]

[A *firearm* is any device designed to be used as a weapon, from which a projectile is expelled or discharged through a barrel by the force of any explosion or other form of combustion. [A *firearm* also includes any rocket, rocket-propelled projectile launcher, or similar device containing any explosive or incendiary material, whether or not the device is designed for emergency or distress signaling purposes.]]

[The term *firearm* is defined in another instruction.]

As used here, a firearm is *loaded* if there is an unexpended cartridge or shell in the firing chamber or in either a magazine or clip attached to the firearm. An *unexpended cartridge or shell* consists of a case that holds a charge of powder and a bullet or shot. [A *muzzle-loader firearm is loaded* when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.]

[A firearm does not need to be in working order if it was designed to shoot and appears capable of shooting.]

[_____ *<insert location>* **is (an incorporated city/in an unincorporated area where it is unlawful to discharge a firearm).]**

<Defense: Statutory Exemption>
[The defendant did not unlawfully carry a loaded firearm if _____ *<insert defense from Pen Code, §§ 25900, 26000 et seq.>***. The People have the burden of proving beyond a reasonable doubt that the defendant unlawfully carried a loaded firearm. If the People have not met this burden, you must find the defendant not guilty of this crime.]**

New January 2006; Revised February 2012, March 2019

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to give this instruction defining the elements of the crime. If the defendant is charged with any of the sentencing factors in Penal Code section 25850, the court must also give the appropriate instruction from CALCRIM Nos. 2540–2546. (See *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].)

The court should give the bracketed definition of "firearm" unless the court has already given the definition in other instructions. In such cases, the court may give the bracketed sentence stating that the term is defined elsewhere.

Defenses—Instructional Duty
If the defense presents sufficient evidence to raise a reasonable doubt about the existence of a legal basis for the defendant's actions, the court has a **sua sponte** duty to give the bracketed instruction on the defense. (See *People v. Mower* (2002) 28 Cal.4th 457, 478–481 [122 Cal.Rptr.2d 326, 49 P.3d 1067] [discussing affirmative defenses generally and the burden of proof].) Insert the appropriate language in the bracketed paragraph that begins, "The defendant did not unlawfully . . . ."

Related Instructions
CALCRIM No. 2540, *Carrying Firearm: Specified Convictions*.
CALCRIM No. 2541, *Carrying Firearm: Stolen Firearm*.
CALCRIM No. 2542, *Carrying Firearm: Active Participant in Criminal Street Gang*.
CALCRIM No. 2543, *Carrying Firearm: Not in Lawful Possession*.
CALCRIM No. 2544, *Carrying Firearm: Possession of Firearm Prohibited Due to Conviction, Court Order, or Mental Illness*.

CALCRIM No. 2545, *Carrying Firearm: Not Registered Owner*.
CALCRIM No. 2546, *Carrying Concealed Firearm: Not Registered Owner and Weapon Loaded*.

AUTHORITY

- Elements. ▸ Pen. Code, § 25850(a).
- Firearm Defined. ▸ Pen. Code, § 16520.
- Knowledge of Presence of Weapon Required. ▸ See *People v. Rubalcava* (2000) 23 Cal.4th 322, 331–332 [96 Cal.Rptr.2d 735, 1 P.3d 52]; *People v. Dillard* (1984) 154 Cal.App.3d 261, 267 [201 Cal.Rptr. 136].
- Knowledge Firearm Loaded Not Required. ▸ *People v. Dillard* (1984) 154 Cal.App.3d 261, 266 [201 Cal.Rptr. 136]; *People v. Harrison* (1969) 1 Cal.App.3d 115, 120 [81 Cal.Rptr. 396].
- Factors in Pen. Code, § 25400(c) Sentencing Factors, Not Elements. ▸ *People v. Hall* (1998) 67 Cal.App.4th 128, 135 [79 Cal.Rptr.2d 690].
- Justifications and Exemptions. ▸ Pen. Code, § 25900, 26000 et seq..
- Need Not Be Operable. ▸ *People v. Taylor* (1984) 151 Cal.App.3d 432, 437 [199 Cal.Rptr. 6].
- "Loaded" Firearm. ▸ *People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].
- Must Be in Incorporated City or Prohibited Area of Unincorporated Territory. ▸ *People v. Knight* (2004) 121 Cal.App.4th 1568, 1575 [18 Cal.Rptr.3d 384].
- Public Place Defined. ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Strider* (2009) 177 Cal.App.4th 1393, 1401 [100 Cal.Rptr. 3d 66]. ~~*People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].~~
- Loaded Firearm in Backpack is "On the Person." ▸ *People v. Wade* (2016) 63 Cal.4th 137, 140 [201 Cal.Rptr.3d 876].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 185–186.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.01[1][d], [f] (Matthew Bender).

LESSER INCLUDED OFFENSES

If the defendant is charged with one of the sentencing factors that makes this offense a felony, then the misdemeanor offense is a lesser included offense. The statute defines as a misdemeanor all violations of the statute not covered by the specified sentencing factors. (Pen. Code, § 25850(c)(7).) The court must provide the jury with a verdict form on which the jury will indicate if the sentencing factor has been proved. If the jury finds that the sentencing factor has not been proved, then the offense should be set at a misdemeanor.

RELATED ISSUES

Loaded Firearm

"Under the commonly understood meaning of the term 'loaded,' a firearm is 'loaded' when a shell or cartridge has been placed into a position from which it can be fired; the shotgun is not 'loaded' if the shell or cartridge is stored elsewhere and not yet placed in a firing position." (*People v. Clark* (1996) 45 Cal.App.4th 1147, 1153 [53 Cal.Rptr.2d 99].)

Location—Court May Take Judicial Notice

"The location of local streets within city boundaries is properly a matter of judicial notice [citation omitted], as is the fact that a particular jurisdiction is an incorporated city." (*People v. Vega* (1971) 18 Cal.App.3d 954, 958 [96 Cal.Rptr. 391] [footnote and citation omitted].)

~~***Taser***~~

~~"[A] Taser is a firearm and can be a loaded firearm within [now-repealed] section 12031." (*People v. Heffner* (1977) 70 Cal.App.3d 643, 652 [139 Cal.Rptr. 45].)~~

2531–2539. Reserved for Future Use

984. Brandishing Firearm: Misdemeanor—Public Place (Pen. Code, § 417(a)(2)(A))

If you find the defendant guilty of brandishing a firearm, you must then decide whether the People have proved the additional allegation that the defendant brandished a firearm that was capable of being concealed on the person while in a public place [in violation of Penal Code section 417(a)(2)(A)].

To prove this allegation, the People must prove that:

1. **The defendant drew or exhibited a firearm that was capable of being concealed on the person;**

AND

2. **When the defendant did so, (he/she) was (in a public place in an incorporated city/ [or] on a public street).**

A firearm *capable of being concealed on the person* is a firearm that has a barrel less than 16 inches in length. [A firearm *capable of being concealed on the person* also includes any device that has a barrel 16 inches or more in length that is designed to be interchanged with a barrel less than 16 inches in length.]

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

New January 2006; Revised February 2012, March 2019

BENCH NOTES

Instructional Duty

If the defendant is charged under Penal Code section 417(a)(2)(A), the court has a **sua sponte** duty to instruct on this sentencing factor.

This instruction **must** be given with CALCRIM No. 983, *Brandishing Firearm or Deadly Weapon: Misdemeanor*.

The court must provide the jury with a verdict form on which the jury will indicate if the prosecution has or has not been proved this allegation.

Penal Code section 417(a)(2)(A) applies to a firearm that "is a pistol, revolver, or other firearm capable of being concealed upon the person." Penal Code section 12001(a)(1) provides a single definition for this class of weapons. Thus, the committee has chosen to use solely the all-inclusive phrase "firearm capable of being concealed on the person."

AUTHORITY

- Elements. ▸ Pen. Code, § 417(a)(2)(A).
- Firearm Capable of Being Concealed Defined. ▸ Pen. Code, § 16530.
- Public Place Defined. ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Strider* (2009) 177 Cal.App.4th 1393, 1401 [100 Cal.Rptr. 3d 66].~~*People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].~~

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, § 5.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.01[1][d], [e] (Matthew Bender).

1161. Lewd Conduct in Public (Pen. Code, § 647(a))

The defendant is charged [in Count __] with engaging in lewd conduct in public [in violation of Penal Code section 647(a)].

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

1. **The defendant willfully engaged in the touching of ((his/her) own/ [or] another person's) (genitals[,]/ [or] buttocks[,]/ [or] female breast);**

2. **The defendant did so with the intent to sexually arouse or gratify (himself/herself) or another person, or to annoy or offend another person;**

3. **At the time the defendant engaged in the conduct, (he/she) was in (a public place/ [or] a place open to the public [or to public view]);**

4. **At the time the defendant engaged in the conduct, someone else who might have been offended was present;**

AND

5. **The defendant knew or reasonably should have known that another person who might have been offended by (his/her) conduct was present.**

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

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

New January 2006; Revised September 2017, March 2019

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements. ▸ Pen. Code, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257 [158 Cal.Rptr. 330, 599 P.2d 636]; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 3–4 [181 Cal.Rptr. 723].
- Willfully Defined. ▸ Pen. Code, § 7, subd. 1; *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- "Lewd" and "Dissolute" Synonymous. ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Lewd Conduct Defined. ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined. ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v.* Strider (2009) 177 Cal.App.4th 1393, 1401 [100 Cal.Rptr. 3d 66]. ~~*People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].~~

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 67-68.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order*, § 144.20 (Matthew Bender).

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

RELATED ISSUES

Need Not Prove Someone Was Offended

"It is not the burden of the prosecution to prove that the observer was in fact offended by the conduct but only that the conduct was such that defendant should know that the observer 'may be offended.'" (*People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 11 [181 Cal.Rptr. 723].)

Does Not Apply to Live Theater Performance

"It seems evident from the foregoing that the vagrancy law, [Penal Code] section 647, subdivision (a), was not intended to apply to live performances in a theater before an audience." (*Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 827–828 [83 Cal.Rptr. 819, 464 P.2d 483].)

1162. Soliciting Lewd Conduct in Public (Pen. Code, § 647(a))

The defendant is charged [in Count __] with soliciting another person to engage in lewd conduct in public [in violation of Penal Code section 647(a)].

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

1. **The defendant requested [or _____** *<insert other synonyms for "solicit," as appropriate>***] that another person engage in the touching of ((his/her) own/ [or] another person's) (genitals[,]/ [or] buttocks[,]/ [or] female breast);**

2. **The defendant requested that the other person engage in the requested conduct in (a public place/ [or] a place open to the public [or in public view]);**

3. **When the defendant made the request, (he/she) was in (a public place/ [or] a place open to the public [or in public view]);**

4. **The defendant intended for the conduct to occur in (a public place/ [or] a place open to the public [or in public view]);**

5. When the defendant made the request, (he/she) did so with the intent to sexually arouse or gratify (himself/herself) or another person, or to annoy or offend another person;

[AND]

6. The defendant knew or reasonably should have known that someone was likely to be present who could be offended by the requested conduct(;/.)

<Give element 7 when instructing that person solicited must receive message; see Bench Notes.>
[AND

7. The other person received the communication containing the request.]

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

[As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.]

New January 2006; Revised August 2006, December 2008, September 2017, March 2019

BENCH NOTES

Instructional Duty

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

One court has held that the person solicited must actually receive the solicitous communication. (*People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].) In *Saephanh*, the defendant mailed a letter from prison containing a solicitation to harm the fetus of his girlfriend. (*Id.* at p. 453.) The letter was intercepted by prison authorities and, thus, never received by the intended person. *(Ibid.)* If there is an issue over whether the intended person actually received the communication, give bracketed element 7.

AUTHORITY

- Elements. ▸ Pen. Code, § 647(a); *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256–257 [158 Cal.Rptr. 330, 599 P.2d 636]; *People v. Rylaarsdam* (1982) 130 Cal.App.3d Supp. 1, 8–9 [181 Cal.Rptr. 723].
- Willfully Defined. ▸ Pen. Code, § 7(1); *People v. Lara* (1996) 44 Cal.App.4th 102, 107 [51 Cal.Rptr.2d 402].
- Likely Defined. ▸ *People v. Lake* (2007) 156 Cal.App.4th Supp. 1 [67 Cal.Rptr.3d 452].
- Solicitation Requires Specific Intent. ▸ *People v. Norris* (1978) 88 Cal.App.3d Supp. 32, 38 [152 Cal.Rptr. 134].
- Solicitation Defined. ▸ *People v. Superior Court* (1977) 19 Cal.3d 338, 345–346 [138 Cal.Rptr. 66, 562 P.2d 1315].
- Person Solicited Must Receive Communication. ▸ *People v. Saephanh* (2000) 80 Cal.App.4th 451, 458–459 [94 Cal.Rptr.2d 910].
- "Lewd" and "Dissolute" Synonymous. ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].

- Lewd Conduct Defined. ▸ *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 256 [158 Cal.Rptr. 330, 599 P.2d 636].
- Public Place Defined. ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Strider* (2009) 177 Cal.App.4th 1393, 1401 [100 Cal.Rptr. 3d 66]. ~~*People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338]; but see *People v. White* (1991) 227 Cal.App.3d 886, 892–893 [278 Cal.Rptr. 48] [fenced yard of defendant's home not a "public place"].~~

Secondary Sources

2 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §§ 67-68.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order* § 144.20 (Matthew Bender).

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

RELATED ISSUES

See the Related Issues sections of CALCRIM No. 1161, *Lewd Conduct in Public* and CALCRIM No. 441, *Solicitation: Elements*.

1163–1169. Reserved for Future Use

2966. Disorderly Conduct: Under the Influence in Public (Pen. Code, § 647(f))

The defendant is charged [in Count __] with being under the influence of (alcohol/ [and/or] a drug) in public [in violation of Penal Code section 647(f)].

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

1. **The defendant was willfully under the influence of (alcohol[,]/ [and/or] a drug[,]/ [and/or] a controlled substance[,]/ [and/or] toluene);**

2. **When the defendant was under the influence, (he/she) was in a public place;**

AND

<Alternative 3A—unable to care for self>

[3. The defendant was unable to exercise care for (his/her) own safety [or the safety of others].]

<Alternative 3B—obstructed public way>

[3. Because the defendant was under the influence, (he/she) interfered with, obstructed, or prevented the free use of a street, sidewalk, or other public way.]

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

As used here, a *public place* is a place that is open and accessible to anyone who wishes to go there.

New January 2006; Revised March 2019

BENCH NOTES

Instructional Duty

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

AUTHORITY

- Elements. ▸ Pen. Code, § 647(f).
- Public Place Defined. ▸ *In re Zorn* (1963) 59 Cal.2d 650, 652 [30 Cal.Rptr. 811, 381 P.2d 635]; *People v. Strider* (2009) 177 Cal.App.4th 1393, 1401 [100 Cal.Rptr. 3d 66]. ~~*People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660]; *People v. Perez* (1976) 64 Cal.App.3d 297, 300–301 [134 Cal.Rptr. 338].~~
- Statute Constitutional. ▸ *Sundance v. Municipal Court* (1986) 42 Cal.3d 1101, 1119–1121 [232 Cal.Rptr. 814, 729 P.2d 80]; *In re Joseph G.* (1970) 7 Cal.App.3d 695, 703–704 [87 Cal.Rptr. 25]; *In re Spinks* (1967) 253 Cal.App.2d 748, 752 [61 Cal.Rptr. 743].

Secondary Sources

2 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against Public Peace and Welfare, §§ 55–58.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 144, *Crimes Against Order,* § 144.20 (Matthew Bender).

RELATED ISSUES

Defendant in Parked Car

In *People v. Belanger* (1966) 243 Cal.App.2d 654, 657 [52 Cal.Rptr. 660], the court held that the defendant was in a public place when he was found sitting in a parked car on a public street.

2967–2979. Reserved for Future Use

3181. Sex Offenses: Sentencing Factors—Multiple Victims (Pen. Code, § 667.61(e)(4))

If you find the defendant guilty of two or more sex offenses, as charged in Counts __ <*insert counts charging sex offense[s] from Pen. Code, § 667.61(c)*>, you must then decide whether the People have proved the additional allegation that those crimes were committed against more than one victim in this case.

The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find that this allegation has not been proved.

New January 2006, Revised March 2019

BENCH NOTES

Instructional Duty

The court has a **sua sponte** duty to give this instruction on the sentencing factor when charged. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435].)

This sentencing factor must be pleaded, proved, and found true by the trier of fact. (*People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].) The court may not impose a sentence using this factor unless the jury has specifically made a finding that the factor has been proved, even if the defendant is convicted in the proceeding of qualifying offenses against more than one person. *(Ibid.)*

AUTHORITY

- One-Strike Sex Offense Statute—Multiple Victims Factor. ▸ Pen. Code, § 667.61(e)(4).
- Factors Must Be Pleaded and Proved. ▸ Pen. Code, § 667.61(j); *People v. Mancebo* (2002) 27 Cal.4th 735, 743 [117 Cal.Rptr.2d 550, 41 P.3d 556].).

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 386–389.

5 Witkin & Epstein, California Criminal Law (3d ed. 2000) Criminal Trial, § 644.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 91, *Sentencing,* § 91.102[2][a][ii], [3] (Matthew Bender).

Couzens & Bigelow, Sex Crimes: California Law and Procedure § 13:9 (The Rutter Group).

RELATED ISSUES

"Present Case or Cases"

This sentencing factor applies when the "offenses are prosecuted 'in the present case or cases.'" (*People v. Stewart* (2004) 119 Cal.App.4th 163, 171 [14 Cal.Rptr.3d 353].) There is no requirement that the offenses be committed on the same date or in the course of the same transaction, so long as the offenses are tried together. (*Id.* at p. 172.)

3412. Compassionate Use (Health & Saf. Code, § 11362.5)

Possession or cultivation of cannabis is lawful if authorized by the Compassionate Use Act. The Compassionate Use Act allows a person to possess or cultivate cannabis (for personal medical purposes/ [or] as the primary caregiver of a patient with a medical need) when a physician has recommended [or approved] such use. The amount of cannabis possessed or cultivated must be reasonably related to the patient's current medical needs.

The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to possess or cultivate cannabis for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate cannabis.]

New February 2015; Revised September 2018, March 2019

BENCH NOTES

Instructional Duty

Pursuant to Health & Saf. Code, § 11362.5, defendants may raise a medical cannabis defense in appropriate cases. The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067]; *People v. Jones* (2003) 112 Cal.App.4th 341, 350 [4 Cal.Rptr.3d 916] [error to exclude defense where defendant's testimony raised reasonable doubt about physician approval]; see also *People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441 [7 Cal.Rptr.3d 226] [defendant need not establish "medical necessity"].)

If the evidence shows that a physician may have "approved" but not "recommended" the cannabis use, give the bracketed phrase "or approved" in the first paragraph of this instruction. (*People v. Jones, supra,* 112 Cal.App.4th at p. 347 ["approved" distinguished from "recommended"].)

A local ordinance prohibiting cannabis dispensaries does not nullify a defense under the Medical Marijuana Program Act or the Compassionate Use Act. *People v. Ahmed* (2018) 25 Cal.App.5th 136, 142-143 [235 Cal.Rptr.3d 472].

AUTHORITY

- Elements. ▸ Health & Saf. Code, § 11362.5; *People v. Jackson* (2012) 210 Cal.App.4th 525, 538-539 [148 Cal.Rptr.3d 375].
- Burden of Proof for Defense of Medical Use. ▸ *People v. Mower* (2002) 28 Cal.4th 457, 470 [122 Cal.Rptr.2d 326, 49 P.3d 1067].
- Amount Must Be Reasonably Related to Patient's Medical Needs. ▸ *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1550–1551 [66 Cal.Rptr.2d 559].
- Primary Caregiver. ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061].
- Defendant's Burden of Proof on Compassionate Use Defense. ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 292-294 [85 Cal.Rptr.3d 480, 195 P.3d 1061] (conc.opn. of Chin, J.).

Secondary Sources

7 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, §136.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01[3] (Matthew Bender)

3413. Collective or Cooperative Cultivation Defense (Health & Saf. Code, § 11362.775)

(Planting[,] [or]/ cultivating[,] [or]/ harvesting[,] [or]/ drying[,] [or]/ processing) cannabis is lawful if authorized by the Medical Marijuana Program Act. The Medical Marijuana Program Act allows qualified patients [and their designated primary caregivers] to associate within the State of California to collectively or cooperatively cultivate cannabis for medical purposes, for the benefit of its members, but not for profit.

In deciding whether a collective meets these legal requirements, consider the following factors:

1. **The size of the collective's membership;**
2. **The volume of purchases from the collective;**
3. **The level of members' participation in the operation and governance of the collective;**
4. **Whether the collective was formally established as a nonprofit organization;**
5. **Presence or absence of financial records;**
6. **Accountability of the collective to its members;**
7. **Evidence of profit or loss.**

There is no limit on the number of persons who may be members of a collective.

Every member of the collective does not need to actively participate in the cultivation process. It is enough if a member provides financial support by purchasing cannabis from the collective.

A *qualified patient* is someone for whom a physician has previously recommended or approved the use of cannabis for medical purposes.

***Collectively* means involving united action or cooperative effort of all members of a group.**

***Cooperatively* means working together or using joint effort toward a common end.**

***Cultivate* means to foster the growth of a plant.**

[A *primary caregiver* is someone who has consistently assumed responsibility for the housing, health, or safety of a patient who may legally possess or cultivate cannabis.]

The People have the burden of proving beyond a reasonable doubt that the defendant was not authorized to (plant[,] [or]/ cultivate[,] [or]/ harvest[,] [or]/ dry[,] [or]/ process) cannabis for medical purposes. If the People have not met this burden, you must find the defendant not guilty of this crime.]

New February 2015; Revised August 2015, September 2018, March 2019

BENCH NOTES

Instructional Duty

A collective or cooperative cultivation defense under the Medical Marijuana Program Act may be raised to certain cannabis charges. (See Health & Saf. Code, § 11362.775) The burden is on the defendant to produce sufficient evidence to raise a reasonable doubt that possession was lawful. (*People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 538-539 [148 Cal.Rptr.3d 375].

A local ordinance prohibiting cannabis dispensaries does not nullify a defense under the Medical Marijuana Program Act or the Compassionate Use Act. *People v. Ahmed* (2018) 25 Cal.App.5th 136, 142-143 [235 Cal.Rptr.3d 472].

AUTHORITY

- Elements. ▸ Health & Saf. Code, § 11362.775.
- Factors To Consider. ▸ *People v. Jackson* (2012) 210 Cal.App.4th 525 [148 Cal.Rptr.3d 375].
- Primary Caregiver. ▸ *People v. Mentch* (2008) 45 Cal.4th 274, 282–292 [85 Cal.Rptr.3d 480, 195 P.3d 1061]; *People v. Mitchell* (2014) 225 Cal.App.4th 1189, 1205-1206 [170 Cal.Rptr.3d 825].
- Defendant's Burden of Proof on Medical Marijuana Program Act Defense. ▸ *People v. Jackson* (2012) 210 Cal.App.4th 525, 529-531, 538-539 [148 Cal.Rptr.3d 375].
- All Members Need Not Participate in Cultivation. ▸ *People v. Anderson* (2015) 232 Cal.App.4th 1259 [182 Cal.Rptr.3d 276].

Secondary Sources

7 Witkin & Epstein, California Criminal Law (4th ed. 2012) Crimes Against Public Peace and Welfare, § 147.

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 145, *Narcotics and Alcohol Offenses*, § 145.01 (Matthew Bender).

3454. Initial Commitment as Sexually Violent Predator (Welf. & Inst. Code, §§ 6600, 6600.1)

The petition alleges that _____ <*insert name of respondent*> is a sexually violent predator.

To prove this allegation, the People must prove beyond a reasonable doubt that:

1. **(He/She) has been convicted of committing a sexually violent offense~~s against one or more victims~~;**

2. **(He/She) has a diagnosed mental disorder;**

[AND]

3. **As a result of that diagnosed mental disorder, (he/she) is a danger to the health and safety of others because it is likely that (he/she) will engage in sexually violent predatory criminal behavior(;/.)**

<Give element 4 when evidence has been introduced at trial on the issue of amenability to voluntary treatment in the community.>

[AND

4. **It is necessary to keep (him/her) in custody in a secure facility to ensure the health and safety of others.]**

The term *diagnosed mental disorder* includes conditions either existing at birth or acquired after birth that affect a person's ability to control emotions and behavior and predispose that person to commit criminal sexual acts to an extent that makes him or her a menace to the health and safety of others.

A person is *likely to engage in sexually violent predatory criminal behavior* if there is a substantial danger, that is, a serious and well-founded risk that the person will engage in such conduct if released in the community.
The likelihood that the person will engage in such conduct does not have to be greater than 50 percent.

Sexually violent criminal behavior is *predatory* if it is directed toward a stranger, a person of casual acquaintance with whom no substantial relationship exists, or a person with whom a relationship has been established or promoted for the primary purpose of victimization.

_____ *<Insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)>* **(is/are) [a] *sexually violent offense[s]* when committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the victim or another person or threatening to retaliate in the future against the victim or any other person.**

[_____ *<Insert name[s] of crime[s] enumerated in Welf. & Inst. Code, § 6600(b)>* **(is/are) also [a] *sexually violent offense[s]* when the offense[s] (is/are) committed on a child under 14 years old.]**

As used here, a *conviction* for committing a sexually violent offense is one of the following:

<Give the appropriate bracketed description[s] below.>

<A. Conviction With Fixed Sentence>
[A prior [or current] conviction for one of the offenses I have just described to you that resulted in a prison sentence for a fixed period of time.]

<B. Conviction With Indeterminate Sentence>
[A conviction for an offense that I have just described to you that resulted in an indeterminate sentence.]

<C. Conviction in Another Jurisdiction>
[A prior conviction in another jurisdiction for an offense that includes all of the same elements of one of the offenses that I have just described to you.]

<D. Conviction Under Previous Statute>
[A conviction for an offense under a previous statute that includes all of the elements of one of the offenses that I have just described to you.]

<E. Conviction With Probation>
[A prior conviction for one of the offenses that I have just described to you for which the respondent received probation.]

<F. Acquittal Based on Insanity Defense>

[A prior finding of not guilty by reason of insanity for one of the offenses that I have just described to you.]

<G. Conviction as Mentally Disordered Sex Offender>
[A conviction resulting in a finding that the respondent was a mentally disordered sex offender.]

<*H. Conviction Resulting in Commitment to Department of Youth Authority Pursuant to Welfare and Institutions Code section 1731.5* **>**
[A prior conviction for one of the offenses that I have just described to you for which the respondent was committed to the Department of Youth Authority pursuant to Welfare and Institutions Code section 1731.5.]

You may not conclude that _____ *<insert name of respondent>* **is a sexually violent predator based solely on (his/her) alleged prior conviction[s] without additional evidence that (he/she) currently has such a diagnosed mental disorder.**

In order to prove that _____ *<insert name of respondent>* **is a danger to the health and safety of others, the People do not need to prove a recent overt act committed while (he/she) was in custody. A *recent overt act* is a criminal act that shows a likelihood that the actor may engage in sexually violent predatory criminal behavior.**

New January 2006; Revised August 2006, June 2007, August 2009, April 2011, February 2012, March 2019

BENCH NOTES

Instructional Duty
The court has a **sua sponte** duty to instruct the jury about the basis for a finding that a respondent is a sexually violent predator.

Do not use this instruction for extension or status proceedings. Use instead CALCRIM No. 3454A, *Hearing to Determine Current Status Under Sexually Violent Predator Act.*

If evidence is presented about amenability to voluntary treatment, the court has a **sua sponte** duty to give bracketed element 4. (*People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662]; *People v. Calderon* (2004) 124 Cal.App.4th 80, 93 [21 Cal.Rptr.3d 92].) Evidence of involuntary treatment in the

community is inadmissible at trial because it is not relevant to any of the SVP requirements. (*People v. Calderon, supra,* 124 Cal.App.4th at 93.)

The court also **must give** CALCRIM No. 219, *Reasonable Doubt in Civil Proceedings*; 222, *Evidence*; 226, *Witnesses*; 3550, *Pre-Deliberation Instructions*; and any other relevant post-trial instructions. These instructions may need to be modified.

Jurors instructed in these terms must necessarily understand that one is not eligible for commitment under the SVPA unless his or her capacity or ability to control violent criminal sexual behavior is seriously and dangerously impaired. No additional instructions or findings are necessary. *People v. Williams* (2003) 31 Cal.4th 757, 776–777 [3 Cal.Rptr.3d 684, 74 P.3d 779] (interpreting Welfare and Institutions Code section 6600, the same statute at issue here).

But see *In re Howard N.* (2005) 35 Cal.4th 117, 137-138 [24 Cal.Rptr.3d 866, 106 P.3d 305], which found in a commitment proceeding under a different code section, i.e., Welfare and Institutions Code section 1800, that when evidence of inability to control behavior was insufficient, the absence of a specific "control" instruction was not harmless beyond a reasonable doubt. Moreover, *In re Howard N.* discusses *Williams* extensively without suggesting that it intended to overrule *Williams*. *Williams* therefore appears to be good law in proceedings under section 6600.

AUTHORITY

- Elements and Definitions. ▸ Welf. & Inst. Code, §§ 6600, 6600.1.
- Unanimous Verdict, Burden of Proof. ▸ *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235 [152 Cal.Rptr. 425, 590 P.2d 1] [discussing conservatorship proceedings under the Lanterman-Petris-Short Act and civil commitment proceedings in general].
- Likely Defined. ▸ *People v. Roberge* (2003) 29 Cal.4th 979, 988 [129 Cal.Rptr.2d 861, 62 P.3d 97].
- Predatory Acts Defined. ▸ *People v. Hurtado* (2002) 28 Cal.4th 1179, 1183 [124 Cal.Rptr.2d 186, 52 P.3d 116].
- Must Instruct on Necessity for Confinement in Secure Facility. ▸ *People v. Grassini* (2003) 113 Cal.App.4th 765, 777 [6 Cal.Rptr.3d 662].
- Determinate Sentence Defined. ▸ Pen. Code, § 1170.

- Impairment of Control. ▸ *In re Howard N.* (2005) 35 Cal.4th 117, 128–130 [24 Cal.Rptr.3d 866, 106 P.3d 305].
- Amenability to Voluntary Treatment. ▸ *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 256 [127 Cal.Rptr.2d 177, 57 P.3d 654].
- Need for Treatment and Need for Custody Not the Same. ▸ *People v. Ghilotti* (2002) 27 Cal.4th 888, 927 [119 Cal.Rptr.2d 1, 44 P.3d 949].
- Substantial Danger. ▸ *People v. Ghilotti* (2002) 27 Cal.4th 888, 922 [119 Cal.Rptr.2d 1, 44 P.3d 949].

Secondary Sources

3 Witkin & Epstein, California Criminal Law (3d ed. 2000) Punishment, §§ 154, 172.

5 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 104, *Parole,* § 104.06 (Matthew Bender).

RELATED ISSUES

Different Proof Requirements at Different Stages of the Proceedings
Even though two concurring experts must testify to commence the petition process under Welfare and Institutions Code section 6001, the same requirement does not apply to the trial. (*People v. Scott* (2002) 100 Cal.App.4th 1060, 1064 [123 Cal.Rptr.2d 253].)

Masturbation Does Not Require Skin-to-Skin Contact
Substantial sexual conduct with a child under 14 years old includes masturbation when the touching of the minor's genitals is accomplished through his or her clothing. (*People v. Lopez* (2004) 123 Cal.App.4th 1306, 1312 [20 Cal.Rptr.3d 801]; *People v. Whitlock* (2003) 113 Cal.App.4th 456, 463 [6 Cal.Rptr.3d 389].) "[T]he trial court properly instructed the jury when it told the jury that '[t]o constitute masturbation, it is not necessary that the bare skin be touched. The touching may be through the clothing of the child.' " (*People v. Lopez, supra,* 123 Cal.App.4th at p. 1312.)

Item number:03

RUPRO ACTION REQUEST FORM

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

RUPRO Meeting: January 24, 2019

Title of proposal *(include amend/revise/adopt/approve + form/rule numbers):*
Criminal Procedure: Multicounty Incarceration and Supervision - SP18-19

Committee or other entity submitting the proposal:
Criminal Law Advisory Committee

Staff contact (name, phone and e-mail): Sarah Fleischer-Ihn, 415-865-7702, sarah.fleischer-ihn@jud.ca.gov

Identify project(s) on the committee's annual agenda that is the basis for this item:
Approved by RUPRO: 10/19/18
Project description from annual agenda: Amend California Rules of Court, rule 4.452, determinate sentence consecutive to prior determinate sentence, to incorporate legislative changes made by SB 670

If requesting July 1 or out of cycle, explain:
The committee requests a July 1, 2019 effective date. Changes made to Penal Code sections 1170 and 1170.3 by SB 670 went into effect on January 1, 2018, so the committee would like to implement changes to rule 4.452 in a timely manner.

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

JUDICIAL COUNCIL OF CALIFORNIA

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

For business meeting on: March 14–15, 2019

Title
Criminal Procedure: Multicounty Incarceration and Supervision

Rules, Forms, Standards, or Statutes Affected
Amend Cal. Rules of Court, rule 4.452

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

Agenda Item Type
Action Required

Effective Date
July 1, 2019

Date of Report
December 20, 2018

Contact
Sarah Fleischer-Ihn, 415-865-7702
Sarah.Fleischer-Ihn@jud.ca.gov

Executive Summary

The Criminal Law Advisory Committee recommends amending California Rules of Court, rule 4.452, to implement section 1170.3 of the Penal Code to guide the second or subsequent court when determining the county (or counties) of supervision in multicounty sentencing.

Recommendation

The Criminal Law Advisory Committee recommends that the council, effective July 1, 2019, amend rule 4.452 of the California Rules of Court to guide courts on multiple-county sentencing under Penal Code section 1170(h) by adding the following:

1. Clarification that the second or subsequent court has the discretion to specify whether a previous sentence is to be served in custody or on mandatory supervision—and the terms of such supervision—but may not:

   a. Increase the total length of the sentence imposed by the previous court;
   b. Increase the total length of the actual custody time imposed by the previous court;
   c. Increase the total length of mandatory supervision imposed by the previous court; or

d. Impose additional, more onerous, or more restrictive conditions of release for any previously imposed period of mandatory supervision.

2. A requirement that the second or subsequent court determine the county or counties of incarceration or supervision, including the order of service of incarceration or supervision.

3. A requirement that to the extent reasonably possible, the period of mandatory supervision be served in one county and after completion of any period of incarceration.

4. A requirement that the second or subsequent court calculate the defendant's remaining custody and supervision time in accordance with rule 4.472.

5. Specific factors for the court to consider when making its sentencing determination, including factors relevant to the appropriateness of supervision and incarceration in each respective county.

6. A requirement that if the defendant is ordered to serve only a custody term without supervision in another county, the defendant must be transported at such time and under such circumstances as the court directs, to the county where the custody term is to be served.

7. A requirement that the defendant be transported with an abstract of the court's judgment as required by Penal Code section 1213(a), or other suitable documentation showing the term imposed by the court and any custody credits against the sentence.

8. Discretion for the court to order the custody term to be served in another county without also transferring jurisdiction of the case in accordance with rule 4.530.

9. A requirement that if the defendant is ordered to serve a period of supervision in another county, with or without a term of custody, the matter must be transferred for the period of supervision in accordance with provisions of rule 4.530.

The text of the amended rule is attached at pages 7–8.

Relevant Previous Council Action

The Judicial Council amended rule 4.452, effective January 1, 2018, to reflect changes to California's Determinate Sentencing Law (DSL) after the U.S. Supreme Court's decision in *Cunningham v. California* (2007) 549 U.S. 270 and the legislative responses to that decision, and to provide further guidance to judges in exercising sentencing discretion under the DSL.

Analysis/Rationale

Senate Bill 670 (Jackson; Stats. 2017, ch. 287) amended Penal Code section 1170(h),[1] effective January 1, 2018, requiring courts to determine the county (or counties) of incarceration and supervision for defendants when imposing judgments concurrent or consecutive to another judgment or judgments previously imposed under section 1170(h) in another county (or counties). SB 670 also amended section 1170.3, requiring the Judicial Council to adopt rules of court providing criteria for the consideration of trial judges at the time of sentencing when determining the county (or counties) of incarceration and supervision.

Rule 4.452 and section 1170.1, which govern multiple-count and multiple-case sentencing for commitments to state prison and county jail, require courts rendering second or subsequent judgments under section 1170(h) to "resentence" the defendant to a single aggregate term. Until SB 670, sponsored by the Judicial Council, was passed, realignment was silent on the issue of sentences from multiple jurisdictions.

SB 670 added to section 1170 subdivision (h)(6), which requires that, when the court is imposing a judgment concurrent or consecutive with a judgment or judgments previously imposed in another county, the court rendering the second or subsequent judgment is required to determine the county or counties of incarceration and supervision of the defendant. The Judicial Council is mandated to adopt rules of court that provide criteria for the second or subsequent court to consider when determining the county or counties of incarceration and supervision. (Pen. Code, § 1170.3(a)(7).)

Policy implications

Prior to the passage of SB 670, sentencing law was silent on the issue of sentences from multiple jurisdictions. SB 670 amended section 1170 by adding subdivision (h)(6) and requiring the Judicial Council to adopt rules of court to implement the new law. Concerns raised by commenters to the proposed addition of subdivision (h)(6) prompted the committee to incorporate additional protections for defendants.

Comments

This proposal first circulated for comment from April 9 through June 8, 2018, receiving four comments. The Superior Court of San Diego County agreed with the proposal in its entirety, the Orange County Bar Association and the Orange County Public Defender agreed with the proposal if modified, and an analyst with the Superior Court of Orange County indicated neither agreement nor disagreement but made several suggestions regarding implementation.[2]

The Superior Court of Orange County suggested, for cases involving transfers of persons on mandatory supervision, more specifically listing the provisions required to be followed under rule 4.530, which applies to all intercounty transfers of persons on mandatory supervision. The

[1] All further statutory references are to the Penal Code.
[2] Two additional submissions were received but did not address the proposal in any way.

committee agrees with the suggestion and recommends that the Judicial Council revise proposed rule 4.452(a)(6)(G) to specifically cite subdivisions (f), (g), and (h) of rule 4.530.

Both the Orange County Bar Association and the Orange County Public Defender agreed with the proposal but suggested modifications to proposed subdivision (a)(4) of rule 4.452. The Orange County Public Defender raised concerns that the proposal gave too much discretion to the second or subsequent judge, undermining the finality of judgments, and that it potentially violated defendants' constitutional rights and plea agreements and likely would result in plea withdrawals or requests for specific enforcement of previously imposed dispositions. To avoid those potential violations, the Orange County Public Defender proposed a modification to proposed subdivision(a)(4) of rule 4.452. The committee agrees with the modification, with minor editorial changes, and recirculated the proposal from October 15 to November 9, 2018, to allow for public comment on the proposed modification:

> ~~Notwithstanding paragraph (3),t~~The second or subsequent judge has the discretion to specify whether a previous sentence is to be served in custody or on mandatory supervision and the terms of such supervision, but may not without express consent of the defendant, modify the sentence on the earlier sentenced charges in any manner that will: (i) increase the total length of the sentence imposed by the previous court; (ii) increase the total length of the actual custody time imposed by the previous court; (iii) increase the total length of mandatory supervision imposed by the previous court; or (iv) impose additional, more onerous, or more restrictive conditions of release for any previously imposed period of mandatory supervision.

In the recirculation period from October 15 to November 9, 2018, four comments were received. A commenter from the Superior Court of Orange County and the Joint Rules Subcommittee for the Trial Court Presiding Judges Advisory Committee and the Court Executives Advisory Committee agreed with the proposal in its entirety. Commenters from the Superior Court of Alameda County and the Superior Court of San Diego County agreed with the proposal but suggested modifications.

The Superior Court of Alameda County suggested a rule to encourage courts to have residents of their own counties return there, rather than shift them onto other counties. The committee notes that the proposed language of the rule already directs courts to consider a defendant's ties to a community, including permanency of the person's residence, when determining the county or counties of incarceration or supervision. The court also recommended that the committee review forms CR-290 and CR-290.1, the criminal abstract of judgment forms, for alignment with the multicounty incarceration and sentencing options presented in proposed rule 4.452. The committee will undertake review of forms CR-290 and CR-290.1 in the upcoming invitation-to-comment cycle and determine if changes are necessary.

The Superior Court of San Diego County suggested adding qualifying language to two factors in proposed subdivision (a)(6), which lists the factors that the court must consider before deciding whether the defendant will complete his sentence in this or another county. The commenter suggested adding "if known" to subdivision (a)(6)(C), "the nature and quality of treatment programs available in each county" and, to subdivision (a)(6)(F), "the nature and extent of supervision available in each county," reasoning that a judge is unlikely to know the nature and quality of treatment programs or nature and extent of supervision available in another county. The committee recommends that these additions be made to subdivisions (a)(6)(C) and (a)(6)(F).

Alternatives considered

During the initial comment period in spring 2018, the Superior Court of Orange County suggested the creation of a resource to assist sentencing judges when determining the nature and extent of supervision available in other counties because of the current lack of accurate information regarding available programs by county. The committee declined the suggestion but notes, in the future, that it may consider developing such a resource.

During the recirculation comment period in the winter of 2018, the Superior Court of San Diego County commented that adding the following underlined language to subdivision (a)(3) would be sufficient to address the Orange County Public Defender's concerns about giving the second or subsequent judge too much discretion. The commenter reasoned that subdivision (a)(3) "already forbids the second judge from changing the discretionary decisions of the first judge, so the additions to [subdivision (a)(4)] are unnecessary and overly broad. By simply adding 'but not limited to' to the language of [subdivision (a)(3)], the rule could easily alleviate the Public Defender's concerns."

> Discretionary decisions of the judges in the previous cases may not be changed by the judge in the current case. Such decisions include, <u>but are not limited to</u>, the decision to impose one of the three authorized terms of imprisonment referred to in section 1170(b), making counts in prior cases concurrent with or consecutive to each other, or the decision that circumstances in mitigation or in the furtherance of justice justified striking the punishment for an enhancement. However, if a previously designated principal term becomes a subordinate term after the resentencing, the subordinate term will be limited to one-third the middle base term as provided in section 1170.1(a).

The committee declined the suggestion, concluding that subdivisions (a)(3) and (a)(4) served distinct purposes. Unlike subdivision (a)(3), which prohibits the judge in the current case from changing a discretionary decision made by the judge in the previous case, subdivision (a)(4) grants the second or subsequent judge the discretion to specify whether a previous sentence is to be served in custody or on mandatory supervision and the terms of such supervision. Further, the committee notes that subdivision (a)(4) limits that discretion by requiring the consent of the

defendant in specified situations as to avoid any potential violation of a defendant's constitutional rights.

Fiscal and Operational Impacts

Operational impacts are expected to be minor.

Attachments and Links

1. Cal. Rules of Court, rule 4.452, at pages 7–9
2. Spring 2018 chart of comments, at pages 10–19
3. Fall 2018 chart of comments, at pages 20–30

Rule 4.452 of the California Rules of Court is amended, effective July 1, 2019, to read:

Rule 4.452. Determinate sentence consecutive to prior determinate sentence

(a) If a determinate sentence is imposed under section 1170.1(a) consecutive to one or more determinate sentences imposed previously in the same court or in other courts, the court in the current case must pronounce a single aggregate term, as defined in section 1170.1(a), stating the result of combining the previous and current sentences. In those situations:

(1) The sentences on all determinately sentenced counts in all of the cases on which a sentence was or is being imposed must be combined as though they were all counts in the current case.

(2) The judge in the current case must make a new determination of which count, in the combined cases, represents the principal term, as defined in section 1170.1(a). The principal term is the term with the greatest punishment imposed including conduct enhancements. If two terms of imprisonment have the same punishment, either term may be selected as the principal term.

(3) Discretionary decisions of the judges in the previous cases may not be changed by the judge in the current case. Such decisions include the decision to impose one of the three authorized terms of imprisonment referred to in section 1170(b), making counts in prior cases concurrent with or consecutive to each other, or the decision that circumstances in mitigation or in the furtherance of justice justified striking the punishment for an enhancement. However, if a previously designated principal term becomes a subordinate term after the resentencing, the subordinate term will be limited to one-third the middle base term as provided in section 1170.1(a).

(4) The second or subsequent judge has the discretion to specify whether a previous sentence is to be served in custody or on mandatory supervision and the terms of such supervision, but may not, without express consent of the defendant, modify the sentence on the earlier sentenced charges in any manner that will (i) increase the total length of the sentence imposed by the previous court; (ii) increase the total length of the actual custody time imposed by the previous court; (iii) increase the total length of mandatory supervision imposed by the previous court; or (iv) impose additional, more onerous, or more restrictive conditions of release for any previously imposed period of mandatory supervision.

(5) In cases in which a sentence is imposed under the provisions of section 1170(h) and the sentence has been imposed by courts in two or more counties, the second or subsequent court must determine the county or counties of incarceration or supervision, including the order of service of

such incarceration or supervision. To the extent reasonably possible, the period of mandatory supervision must be served in one county and after completion of any period of incarceration. In accordance with rule 4.472, the second or subsequent court must calculate the defendant's remaining custody and supervision time.

(6) In making the determination under subdivision (a)(5), the court must exercise its discretion after consideration of the following factors:

(A) The relative length of custody or supervision required for each case;

(B) Whether the cases in each county are to be served concurrently or consecutively;

(C) The nature and quality of treatment programs available in each county, if known;

(D) The nature and extent of the defendant's current enrollment and participation in any treatment program;

(E) The nature and extent of the defendant's ties to the community, including employment, duration of residence, family attachments, and property holdings;

(F) The nature and extent of supervision available in each county, if known;

(G) The factors listed in rule 4.530(f), (g), and (h); and

(H) Any other factor relevant to such determination.

(7) If after the court's determination in accordance with subdivision (a)(5) the defendant is ordered to serve only a custody term without supervision in another county, the defendant must be transported at such time and under such circumstances as the court directs to the county where the custody term is to be served. The defendant must be transported with an abstract of the court's judgment as required by section 1213(a), or other suitable documentation showing the term imposed by the court and any custody credits against the sentence. The court may order the custody term to be served in another county without also transferring jurisdiction of the case in accordance with rule 4.530.

(8) If after the court's determination in accordance with subdivision (a)(5) the defendant is ordered to serve a period of supervision in another county, whether with or without a term of custody, the matter must be transferred for the period of supervision in accordance with provisions of rule 4.530.

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Criminal Procedure: Multicounty Incarceration and Supervision (Rule 4.452)

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

	Commenter	Position	Comment	Committee Response
1.	Albert De la Isla, Principal Analyst IMPACT Team—Criminal Operations Superior Court of California, County of Orange	NI	***Does the proposal appropriately address the stated purpose?*** Yes, however issues remain. See 'Discussion' below. ***Would the proposal provide cost savings?*** No ***What would the implementation requirements be for courts?*** Implementation costs would include judicial training as mentioned in the Invitation to Comment as well as staff training to orient court clerks with appropriate methods for multiple jurisdiction sentencings. It is possible that case processing staff will need training and a mechanism for the creation of the abstract to be transported with the defendant to another jurisdiction unless all counties[1] agree to accept minute orders from other counties. Docket codes may need to be added or updated to accommodate these types of sentences. **Discussion** CRC rule 4.452, subsection [(a)] 8 as proposed states that *'If after the court's determination in accordance with [subdivision (a)](5) the defendant is ordered to serve a period of supervision in another county, whether with or without a term of custody, the matter shall be transferred for the period of supervision in accordance with provisions of rule 4.530.'*	The committee appreciates the comments. No response required. No response required. No response required.

[1] County entities such as the Probation Department, County Sheriff, and others who are to receive such documentation.

			Rule 4.530 applies to intercounty transfer of probation and mandatory supervision cases under Penal Code section 1203.9. Among other provisions, rule 4.530 requires the following: • A noticed motion made in the transferring court (Subsection (c)). • Notice of the motion be given at least 60 days before the date set for hearing on the motion (Subsection (d)(4)). • Confirmation by the transferring court that notice was given to the receiving court (Subsection (d)(5)). • An opportunity for the receiving court to provide comment regarding the pending transfer (Subsection (e)). It appears that the totality of requirements listed in rule 4.530 are inconsistent with the intended purpose of rule 4.452, specifically subsections [(a)] 4 and [(a)] 5 which give the second or subsequent judge discretion to determine the length and location of supervision for a single aggregate term. It seems that a narrower listing of the provisions required for the transfer of mandatory supervision should be contemplated which would more readily harmonize with the spirit and intent of rule 4.452. Another issue which may be difficult to implement in a practical sense relates to rule 4.452 subsections [(a)](6)(C) and [(a)](6)(F) which envision a sentencing judge in a second or subsequent county being able to discern the	The committee accepts the suggestion and will propose revisions of Rule 4.452 to specifically list subdivisions (f), (g) and (h) of Rule 4.530. The committee declines the suggestion but, in future, may consider developing such a resource.

			nature and quality of treatment programs available in each county and the nature and extent of supervision available in each county to determine where a defendant should serve term(s) of incarceration or supervision. Unless some resource is available to the sentencing judge to assist with these items, it seems difficult if not impossible to be able to address these two factors.	
2.	Orange County Bar Association By Nikki P. Miliband President	AM	Criminal justice realignment, enacted via the Budget Act of 2011 and various budget trailer bills, realigns the responsibility for managing and supervising non-serious, non-violent, non-sexual felony offenders who are not granted probation, from the state to county governments. Supervision in these cases is carried out by county probation departments. When inmates are serving either consecutive or concurrent sentences out of more than one jurisdiction, there is no statutory guidance on which county's probation department is responsible for supervision. The proposal seeks to amend rule 4.452 of the California Rules of Court to require the court at the time of sentencing, or at the time of the latest sentencing when a defendant has cases in more than one jurisdiction, to determine which county will be required to supervise the defendant and provides criteria for the court to consider making the determination. The proposed amendments implement Penal Code section 1170.3, subdivision (a)(7), which requires the Judicial Council to adopt rules requiring the	The committee appreciates the comments. The committee declines the suggestion in light of the modifications proposed by the Orange County Public Defender (see below).

			court imposing judgment to determine where a defendant will be supervised. However, the proposed amendment to subdivision [(a)] (4) of rule 4.452 go far beyond the call of Penal Code section 1170.3, subdivision (a)(7), and allow the second sentencing judge to change the discretionary decisions of the first sentencing judge. By way of example, assume a judge sentences a defendant to a 16 month term with an eight month period of custody followed by an eight month period of mandatory supervision. That judge can only arrive at that sentence after considering rule 4.415, and in particular subdivision (c)—"Criteria affecting conditions and length of mandatory supervision." The proposed amendment would allow a second sentencing judge who is imposing an eight month consecutive sentence to re-sentence the defendant to 24 months and reconfigure how that sentence would be split, abrogating the discretion exercised by the first sentencing judge in determining the appropriate period of supervision. Under the proposal, the second sentencing judge could order a 20 month period of incarceration followed by a four month period of supervision, effectively nullifying the first judge's order that an eight month period of supervision is necessary for the defendant's re-entry into the community. [Subdivision (a)] (3) of rule 4.452 recognizes the importance of leaving prior discretionary decisions intact but curiously omits the length of supervision.	

			Accordingly, we recommend the following change to [subdivision (a)] (4): Notwithstanding [subdivision (a)] (3), the second or subsequent judge has the discretion to specify whether a previous sentence is to be served in custody or on mandatory supervision and the terms of such supervision, but may not increase the total length of the sentence imposed *or shorten the period of mandatory supervision ordered* by the previous court.	
3.	Orange County Public Defender By Miles David Jessup Senior Deputy Public Defender	AM	We agree that to the proposed new Rule 4.452, as modified herein. Realignment promoted the concept that counties were to be laboratories of ideas, fostering innovations that can come with diverse approaches under local control of treatment and supervision. Also, each local jurisdiction was expected to take more responsibility for the expenses of its felony criminal justice approach. This rule change should offer guidance on the "where" questions of aggregate sentencing across county lines in context of Penal Code § 1170(h), but it is not supposed to denigrate the discretionary determinations of earlier in time sentencing judges with respect to substantive sentencing terms. Felony sentencing across jurisdictions has proved to be an area that needed some guidance after Realignment: with county jail sentences and county based community treatment imposed by courts of multiple counties, where should such jail custody and/or supervision be	The committee appreciates the comments.

			completed. To that end alone, the Legislature adopted Senate Bill 670 (2017 - Jackson). That bill amended Penal Code sections 1170 (adding subdivision (h)(6)1) and 1170.3 (adding subdivision (a)(7)(2)) mandating new court rules effective January 1, 2018. The rules called for are important but very limited and do not justify the confusing and problematic rule changes proposed here as new [subdivision (a)] (4) to Rule 4.452. The rule change is confusing not by its plain words, but by its seemingly sweeping authorization to disregard [subdivision (a)] (3), a well-reasoned and understandable constraint on resentencing by last-in-time judges who impose aggregate sentences. Furthermore, adoption of the proposed [subdivision (a)] (4) of Rule 4.452 would risk undermining finality of judgments and producing a vast class of defendants entitled to plea withdrawals or enforcement of previously imposed dispositions, worse yet, raising possible resort to litigation back across county lines. The proposed rule change here goes beyond the scope of the legislative authorization relied upon, and does so in a way that risks unauthorized and problematic sentencing practices. The proposed new rule would seem to authorize unilateral deviation from agreed upon dispositions that were the bases of guilty pleas. Moreover, the new rule would expressly disclaim restraint under the current rule ([subdivision (a)] (3) and seems to authorize disregard for important discretionary	The committee agrees with the suggestion and has revised the proposed amendment to subdivision (a)(4) of Rule 4.452 accordingly to incorporate the suggested restrictions.

			judgments of prior sentencing courts, even those going to the core of sentencing to be imposed. In particular, the proposed new [subdivision (a)] (4) of Rule of Court 4.452 purports to create a wholesale exception to existing [subdivision (a)] (3), thereby granting later-sentencing courts free reign to run amok over judicially approved and implemented plea bargains, and more generally to disregard discretionary sentencing decisions of prior judges. The proposed new [subdivision (a)] (4) expressly approves disregard of earlier judicial determinations as to appropriate conditions of community supervision, and indeed as to utility of community supervision at all, subject only to direction to not "increase the total length of the sentence imposed by the previous court." While this entire proposed [subdivision (a)] (4) is outside the legislative authorization invoked by the Judicial Counsel, it could at least avoid serious statutory and Constitutional defect by reformation to reflect appropriate limitations on discretion of last-sentencing judges in this setting. To avoid problems, unless specifically approved by the defendant, the last-in-time judge must NOT impose modifications to earlier sentencing decisions that violate Rule 4.452 [subdivision (a)] (3) and must not otherwise: 1) increase the total sentence on the earlier charges; 2) increase the custodial portion of the sentence on the earlier charges;	

			3) increase the supervisory portion of the sentence on the earlier charges; or 4) impose additional or more restrictive conditions of release (at least for the previously imposed period of supervision). Accordingly, if proposed [subdivision (a)] (4) is to remain in the newly enacted rule we recommend the following changes: Notwithstanding [subdivision (a)] (3), the second or subsequent judge has the discretion to specify whether a previous sentence is to be served in custody or on mandatory supervision and the terms of such supervision, but may not without express consent of the defendant. modify the sentence on the earlier sentenced charges in any manner that will: (i) increase the total length of the sentence imposed, (ii) increase the total length of the actual custody time imposed by the previous court. (iii) increase the total length of mandatory supervision imposed by the previous court or (iv) impose additional, more onerous or more restrictive conditions of release for any previously imposed period of mandatory supervision. A defendant in a criminal case has both a statutory right and Constitutional due process right to enforcement of his plea bargain. (Pen. Code § 1192.5; *People v. Villalobos* (2012) 54 Cal.4th 177, 181-182; *Brown v. Poole* (9th Cir. 2003) 337 F.3d 1155, 1159; People v. Walker (1991) 54 Cal.3d 1013, 1025.) Note that	

			defendants negotiating sentencing under § 11 70(h) may prefer quicker completion (straight jail), or a longer period of less restricted freedom (mandatory supervision), or a combination thereof. In enforcement of the plea bargain contract: "we employ objective standards-it is the parties' or defendant's reasonable beliefs that control.. .. The construction we adopt, however, incorporates the general rule that ambiguities are construed in favor of the defendant. Focusing on the defendant's reasonable understanding also reflects the proper constitutional focus on what induced the defendant to plead guilty." (*Brown v. Poole*, *supra*, 337 F.3d at p. 1160 [emphasis in original].) In the event that a sentencing judge exercises its discretion to refuse to honor a plea agreement as made, and insists upon any significant change to the terms of the plea bargain (including imposition of additional terms of supervision, or revocation of conditional release), this should trigger an immediate duty to advise the defendant of his right to withdraw his plea and admissions. (Pen. Code § 1192.5; *People v. Villalobos* (2012) 54 Cal.4th 177.) Once the plea bargain has been approved or detrimentally relied upon by the defendant, the defendant is generally entitled to specific enforcement of that agreement. (*People v. Cantu* (2010) 183 Cal.App.4th 604, 607.) Plea withdrawal would	

			send the open case back to the earlier sentencing county with new issues. Proposed Rule 4.452 [subdivision (a)] (4) is outside the scope of Senate Bill 670 and runs contrary to the Realignment goals of local experimentation and local responsibility, while likely undermining finality of many criminal convictions by triggering twin rights to plea withdrawals under California law and to actions at specific enforcement of plea agreements under federal constitutional guarantees to due process. [Subdivision (a)] 4 is a mistake and needs to be fixed.	
4.	Superior Court of California, County of San Diego By Michael M. Roddy Executive Officer	A	No specific comment.	No response required.

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Criminal Procedure: Multicounty Incarceration and Supervision (Rule 4.452)

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

	Commenter	Position	Comment	Committee Response
1.	Superior Court of Alameda County Hon. Michael Gaffey,	NI	This letter is in response to the proposed amendment to Rule 4.452 of California Rules of Court of the Court of Alameda County. This Court is specifically responding to the Judicial Council of California's (JCC) has request for comments to the following points. ***Does the proposal appropriately address the stated purpose?*** It does address the state purpose, but the confluence of [subdivisions (a)] 5, 6, and 7 create an invitation to possible appearance of contrived or inadvertent hijinx. First, we recognize that Rule 4.452, [subdivision (a)](6) sets out factors on which a sentencing court is to base its decision. However, Rule 4.452, [subdivision (a)](5) states the second court "shall determine the county of incarceration or supervision, including the order of service." The JCC may wish to consider a rule to encourage courts to have residents of their own counties return there, rather than shift them other counties. A person released can always petition for a change of supervision, under Penal Code §1203.9, but that might result in unnecessary burden and labor for the felon, the courts, and two probation departments.	The committee appreciates the comments. The proposed language of rule 4.452, subdivision (a)(6)(E) directs the court to consider "the nature and extent of the defendant's ties to the community, including employment, duration of residence, family attachments, and property holdings . . ." when determining the county or counties of incarceration or supervision. Additionally, the proposed language of rule 4.452, subdivision (a)(6)(G) directs the court to consider the permanency of the supervised person's residence.

	Commenter	Position	Comment	Committee Response
			Would the proposal provide cost savings? It is hard to identify any foreseeable or quantifiable savings.	No response required.
			What would the implementation requirements be for courts? *Training staff* - the amendment seems to follow along with the current procedure, while perhaps being more complex. This is a specialized task for a small-medium number of the overall court staff, so court staff implementation should not be a problem.	No response required.
			Revising processes and procedures - Currently, sentences are recorded using CR- 290 or CR-290.1, both of which were last revised in 2012. Perhaps the JCC would want to review the two forms to see if they continue to be adequate. CR-290 boxes 4, 12 (supplemented by 13) and 15 (with " box e") seem flexible enough to be satisfactory. CR-290.1 boxes 10 (mandatory supervision), 13 (custody time and location may need clarification), and 15 (who does sheriff deliver defendant to, so as to serve remaining sentence)	The committee will undertake review of forms CR-290 and CR-290.1 in the upcoming invitation-to-comment cycle and determine if changes are necessary.

	Commenter	Position	Comment	Committee Response
			are all similar to current practice, but may be clarified. *Changing docket codes in CMS or modifying CMS* - this is the hardest part for our court. This requires programmers' time to write code, etc. With no excess personnel in our IT, this needs significant lead time. As this relates to the next question, we would suggest 6 months from date of approval. ***Would 1 month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?*** No. Our IT department would need some time for configuration and programming, so implementation no sooner than three (3) months would be preferred, as all our programming staff are currently engaged in projects. ***How well would this proposal work in courts of different sizes?*** In our case, this is not a problem, but the largest and smallest counties may have regional issues to address.	The committee recommends an effective date of July 1, 2019. The committee recommends an effective date of July 1, 2019. No response required.

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

	Commenter	Position	Comment	Committee Response
2.	Michael M. Roddy, Executive Officer Superior Court of San Diego County	AM	A couple comments on the proposed amendments to California Rules of Court, rule 4.452: [Subdivision (a)(4)] was written to "clarify that the second subsequent court has the discretion to specify whether a previous sentence is to be served in custody or mandatory supervision and terms of such supervision." The Orange County Public Defender's Office proposed changes to this paragraph essentially intended to prevent the second judge from imposing conditions that are more onerous than those originally mandated by the first judge. The concerns by the Orange County Public Defender could be rectified by adding the following highlighted language to [subdivision (a)(3)]: "(3) Discretionary decisions of the judges in the previous cases may not be changed by the judge in the current case. Such decisions include, but are not limited to, the decision to impose one of the three authorized terms of imprisonment referred to in section 1170(b), making counts in prior cases concurrent with or consecutive to each other, or the decision that circumstances in mitigation or in the furtherance of justice justified striking the punishment for an enhancement. However, if a previously	The committee appreciates the comments. The committee declines to make the suggested addition. Unlike rule 4.452, subdivision (a)(3), which prohibits the judge in the current case from changing a discretionary decision made by the judge in the previous case, subdivision (a)(4) grants the second or subsequent judge the discretion to specify whether a previous sentence is to be served in custody or on mandatory supervision and the terms of such supervision. Subdivision (a)(4) limits that discretion by requiring the consent of the defendant in specified

	Commenter	Position	Comment	Committee Response
			designated principal term becomes a subordinate term after the resentencing, the subordinate term will be limited to one-third the middle base term as provided in section 1170.1(a)." The changes as proposed to [subdivision (a)(4)] appear to render [subdivision (a)(4)] illusory all together. [Subdivision (a)(4)] purportedly allows the second judge to decide whether to impose the prior sentence as mandatory supervision or actual custody. However, then it states that the judge may not: "Increase the total length of the actual custody time imposed by the previous court" or "Increase the total length of mandatory supervision imposed by the previous court." So, for example, a judge decides that the prior sentence, which was split as part actual custody and part mandatory supervision can now be served as all mandatory supervision…this would be a benefit to the defendant, but it would also be in violation of the [(a)](4)(iii) which does not allow the judge to increase the total length of mandatory supervision. [Subdivision (a)(3)] already forbids the second judge from changing the discretionary decisions of the first judge, so the additions to [subdivision (a)(4)], are unnecessary and overly broad. By simply	situations and thus avoiding any potential violation of a defendant's constitutional rights. In the example given in the comment, a defendant would likely consent to the second or subsequent judge sentencing the defendant to mandatory supervision rather than custody time.

	Commenter	Position	Comment	Committee Response
			adding "but not limited to" to the language of [subdivision (a)(3)], the rule could easily alleviate the Public Defender's concerns. In [subdivision (a)(6)], which lists the factors that the court ***shall*** consider before deciding whether the defendant will complete his sentence in this or another county, its states that a judge must consider "[(a)](6)(C) the nature and quality of treatment program available in each county" and "[(a)](6)(F) the nature and extent of supervision available in each county." A judge in Count A is unlikely to know the nature and quality of treatment programs or nature and extent of supervision available in Count B. Our court would recommend that "if known" be added to [(a)](6)(C) and [(a)](6)(F).	The committee accepts the suggestion and will add the phrase "if known" to subdivisions (a)(6)(C) and (a)(6)(F).
3.	Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC)	A	The following comments are submitted by the TCPJAC/CEAC Joint Rules Subcommittee (JRS), on behalf of the Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC). Recommended JRS Position: Agree with proposed changes. *Request for Specific Comments:*	The committee appreciates the comments.

	Commenter	Position	Comment	Committee Response
			Would the proposal provide cost savings? If so, please quantify. The JRS does not believe that there would be cost savings based on the rule change. The factors in Rule 4.452 [subdivision (a)](6) could potentially require more time of probation offices from the "receiving court" to conduct research (i.e., 4.452[(a)](6)(C)) when there are two or more courts) to assist judicial officers in calculating the remaining custody time. ***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.*** The JRS does not see a significant operational impact from the implementation of the amendment. Some courts may need additional time to meet with probation departments to determine the need to revise local procedures. ***Would 1 month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?***	No response required. No response required.

	Commenter	Position	Comment	Committee Response
			One month should be sufficient for implementation. More time may be needed as courts may need to work with probation offices to revise procedures and assess available resources. ***How well would this proposal work in courts of different sizes?*** The geography of the courts and the types of transfer in cases may impact the courts differently. For example, Rule 4.452[(a)](6)(C) applies when there are two or more counties. For a court located in an area with larger counties, determining the nature and quality of available services in each county may take more time when compared to courts surrounded by smaller counties.	The committee recommends an effective date of July 1, 2019. No response required.
4.	Superior Court of Orange County By: Randy Montejano, Court Operations Supervisor	A	***Does the proposal appropriately address the stated purpose?*** Yes, it appears to appropriately address the purpose of PC 1170.3. ***Would the proposal provide cost savings? If so please quantify.*** It seems it would be difficult to quantify cost savings at this time. It's possible cases could leave Orange County's jurisdiction for purposes of serving a sentence and it's just as possible	The committee appreciates the comments. No response required.

	Commenter	Position	Comment	Committee Response
			that cases from other jurisdictions could be sent to Orange County for purposes of serving sentences. In addition, for those defendants who are serving a sentence per PC 1170(h)(5) have the supervision component of their sentence that will have to be absorbed by the receiving county. ***What would the implementation requirements be for courts? For example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems.*** • Training staff of this change would be critical, as well as judicial officer training. • The staff that would benefit from training are Courtroom Clerks and Clerk's Office staff, especially those who work at the Commitment/Abstract Desk, as well as staff who work at the PC 1203.9 desk (cases where supervision is being transferred to another county). • It doesn't appear that modifying a case management system would be necessary. • A new docket code would need to be created to reflect where the sentence would be served: • Additionally, the issue of where supervision will take place once a sentence	No response required.

	Commenter	Position	Comment	Committee Response
			is served per PC 1170(h)(5), would need to be decided, maybe at the time of sentencing so that there is no question about what county will be in charge of supervision once the custody time itself is served. This would usually happen by way of a PC 1203.9 petition. • Regarding 1170(h) sentences, it will need to be determined where the defendant will be responsible for paying the court fees/fine, and Restitution, if ordered. A docket code(s) may need to be created for this process. ***Would 1 month from Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?*** 4-8 weeks would be more realistic for an implementation date, so long as the staff can be informed of the changes and the necessary docket code can be created or updated in that time frame. ***How well would this proposal work in courts of different sizes?*** Not knowing the processes of other courts, this is a difficult question to answer. The courts themselves will tend to the sentence itself, however, the larger impact appears to be on the county jail system in other counties, as well as	The committee recommends an effective date of July 1, 2018. No response required.

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Criminal Procedure: Multicounty Incarceration and Supervision (Rule 4.452)

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

	Commenter	Position	Comment	Committee Response
			probation/supervision departments in those counties.	